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149	Ishwar Prasad v. Emperor ...	16 A L J 325; 19 Cr L J 485.
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158	Emperor v. Maroti Teli ...	14 N L R 77; 19 Cr L J 494.
159	Niranjan Lal v. Emperor ...	18 P R 1918 Cr; 21 P W R 1918 Cr; 19 Cr L J 495.
160	Rakhal Mandal v. Emperor ...	27 C L J 314; 19 Cr L J 496.
161	Wazira v. Muhammadi ...	37 P R 1918; 66 P W R 1918.
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162	Nand Lal v. Dewan Chand ...	78 P W R 1918.
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184	Bhikamchand Gokulchand v. Harprasad ...	*Nagpur Judicial Commissioner's Court.
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196	Jahurmul Babu v. Keramutullah Molla ...	*Calcutta High Court.
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200	Pramotha Nath Saha v. Sashimukhi Debi ...	*Calcutta High Court.
201	Yeshwantrao v. Dattatraya Krishna ...	*Nagpur Judicial Commissioner's Court.
203	Khoda Bukhsh v. Bahadur Ali ...	(1918, Pat 130; 3 P L J 285; 4 P L W 324.
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509	Abas Mirza v. Emperor ...	20 Bom L R 376; 19 Cr. L J. 605.
511	Ram Sambhari Tewari v. Rajman Naik ...	16 A L J 373; 19 Cr L J 607.
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514	Ambirsaheb Balamiya Patil v. Emperor ...	20 Bom L R 384; 19 Cr L J 610.
515	Magan Lal v. Ganesh Prasad ...	16 A L J 294; 19 Cr L J 611.
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548	Hari Das v. Debendro Ram Banerjee ...	*Calcutta High Court.
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552	Bhausing Ragho v. Chaganiram Harchand ...	20 Bom L R 348.
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651	Mohim Chandra Pal v. Pradyat Kumar Tagore ...	*Calcutta High Court.
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669	Shaligram Sadasheo Pande v. Narain ...	*Nagpur Judicial Commissioner's Court.
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677	Jagan Dubey v. Emperor ...	19 Cr L J 629.
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735	Jamila Khatun v. Mahamud Khatun ...	*Calcutta High Court.
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738	Bengal Stone Company, Ltd. v. Joseph Isaac Joseph Hyam ...	27 C L J 78.
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1918.

VOLUME XLV.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

February 1, 1918.

Present:—Viscount Haldane, Sir John Edge, Mr. Ameer Ali and Sir Walter Phillimore, Bart.

Rai GANGA PERSHAD SINGH BAHADUR AND OTHERS—DEFENDANTS—APPELLANTS

versus

ISHRI PERSHAD SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 59—Mortgage—'Attestation,' meaning of—Evidence—Appeal—Remand, order of, when to be made.

The requirement as to attestation contained in section 59 of the Transfer of Property Act, is not complied with unless the attesting witnesses are able to swear both to the act of execution and the identity of the person performing the act. [p. 3, col. 2.]

Where, therefore, the only evidence was that the attesting witnesses were on one side of a *parda* and the executant of the deed, a *pardanashhin* lady, on the other, that her son took the deed behind the *parda*, returned with it bearing a signature purporting to be hers, and said it had been signed by her, and that the witnesses thereupon attested:

Held, that the terms of the Statute had not been complied with and that the mortgage was void. [p. 4, col. 1.]

Shamu Patter v. *Abdul Kadir Roothen*, 16 Ind. Cas. 250; 39 I. A. 218, 16 C. W. N. 1004; 23 M. L. J. 321; 12 M. L. T. 338; (1912) M. W. N 935; 10 A. L. J. 259; 14 Bom. L. R. 1034; 35 M. 607; 16 C. L. J. 596; (P. C.), followed.

Padarath Halwai v. *Ram Nrain Upadhia*, 30 Ind. Cas. 366; 13 A. L. J. 809; 19 C. W. N 991; 17 Bom. L. R. 617; 18 M L. T. 85; 2 L W. 639; 29 M L. J. 159; 21 C. L. J. 165; 37 A 474; (1915) M. W. N. 709 (P.C.); 42 I. A. 163, distinguished.

It is an unusual course to remand for fresh evidence an appeal which has been argued, and which ought *prima facie* to be decided upon the materials which were before the Courts below. [p. 4, col. 1.]

Appeal from a decree of the Calcutta High Court (Mr. Justice Stephen and Mr. Justice D. Chatterjee), dated August 12, 1909, reported as 3 Ind. Cas. 311, reversing that of the Additional Subordinate Judge, Darbhanga, dated May 31, 1907.

FACTS.—The plaintiffs-respondents sued to recover Rs. 12,575 due on a registered mortgage-bond, dated 1893, executed by *Musammat* Sharbat Koer as certificated guardian of Balmukund Das. The latter, who had since come of age, confessed judgment, but the suit was opposed by the present appellant, who had purchased the mortgaged properties in execution of a money decree and who contended *inter alia* that the suit was time-barred.

The Subordinate Judge found this issue in appellants' favour and dismissed the suit. His finding was based on the ground that the suit was brought more than six years after due date and the bond was not valid as creating a mortgage charge. The material part of his judgment is as follows.—

"The bond in suit is dated 23rd August 1893, and the time of repayment of the debt was stipulated to be within 6 months from the date of the bond. The time of 6 months so fixed ended on the 23rd February 1894, and from this date the period of limitation must have begun to run. To enforce the mortgage-charge created under the bond the limitation was 12 years from the due date, and to obtain a personal decree for a money-debt under the bond the limitation was 6 years from that date, and there can be no dispute about these propositions of law. The suit on the bond

was instituted on the 23rd February 1906, that is to say, after a lapse of 6 years from the due date and within 12 years from it. It is evidently clear, therefore, that if the bond was not valid as creating a mortgage-charge, the entire suit of the plaintiffs would fail as being barred by limitation. The question, therefore, arises whether the bond in suit can operate as a mortgage-bond.

The defendant No. 4 contends, under section 59 of the Transfer of Property Act, that the execution of the bond not having been duly attested as required by that section, it cannot operate as a mortgage bond. The executant of the bond was Sharbat Koer, the certificated guardian-mother of the defendant No. 1. Section 59 of the Transfer of Property Act provides that a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses. Attestation means the attestation by witnesses of the execution of the bond *vide Abdul Karim* v. *Salimun* (1).] The execution of a document means and includes the signing and sealing and delivery of it. The question is, therefore, whether the bond in suit was attested as required by the section 59 of the Transfer of Property Act, as failing which the mortgage purporting to have been created by it could not be effected. The ruling reported as *Tafeluddi Peada* v. *Mohar Ali Shaha* (2) lays down 'that in order that a mortgage deed may be validly attested under section 59 of the Transfer of Property Act, it must be attested by two witnesses each of whom has seen the deed executed, etc.' The plaintiffs have examined in this suit two attesting witnesses of the bond. These witnesses are Ajodhya Pershad and Jharkhandi Pershad, but both of them say in plain terms that they did not see Sharbat Koer sign the bond. Jharkhandi further says that none of the attesting witnesses of the bond saw Sharbat Koer sign the bond. The witness Ajodhya says that he did not see her (Sharbat Koer) sign the bond. From these statements it is transparently clear that the attesting witnesses did not see the bond being executed by Sharbat Koer, and this being so, no mortgage was, in view of the terms of section 59 of the Transfer of Property Act, effected by the bond.

The result is, therefore, that the plaintiffs have failed to prove the execution of the bond as required by section 59 of the Transfer of Property Act, and, consequently, the bond cannot be taken to have effected a mortgage. Now that the bond is not a mortgage-bond and the plaintiffs are not entitled to sue upon it to enforce a mortgage-charge and now that the suit to enforce a money-debt is out of time having been brought after a lapse of 6 years from the due date, the whole suit on the bond is barred by limitation."

On appeal the High Court (Stephen and D. Chatterjee, JJ.*) reversed this decision and decreed the suit. They held that there was due attestation of the bond. "To hold otherwise," they said, "would be to upset what we believe is a frequent practice in cases of the execution of deeds by *pardanashin* ladies, and in many cases to make attestation of their signatures almost impossible."

Hence this appeal.

Mr. *De Gruyther, K. C.*, (with him Mr. *Dube*) for the Appellant.—The bond here was not duly attested: no one saw the *pardanashin* lady Sharbat Koer sign. To have a valid mortgages in India two witnesses at least must see the executant sign: *Shamu Patter* v. *Abdul Kadir Rowthan* (3).

[Mr. *Dunne, K. C.*—The effect of that judgment has been much whittled down in a later case.]

The subsequent case is *Padarath Halwai* v. *Ram Nrain Upadhia* (4).

There it was found that the witnesses had seen the actual hand of the lady signing and recognised her voice. The facts here are widely different. (He was stopped.)

Mr. *Dunne, K. C.* (with him Mr. *H. N. Sen*), for the Respondents.—No issue on

(1) 27 C. 190; 14 Ind. Dec. (N. S.) 125.
(2) 2 C. W. N. ccexix (319).

(3) 16 Ind. Cas. 250; 39 I. A. 218; 16 C. W. N. 1009; 23 M. L. J. 321; 12 M. L. T. 338; (1912) M. W. N. 935; 10 A. L. J. 259; 14 Bom. L. R. 1034; 35 M. 607; 16 C. L. J. 596 (P. C.).
(4) 30 Ind. Cas. 366; 42 I. A. 163; 13 A. L. J. 809; 19 C. W. N. 991; 17 Bom. L. R. 617; 18 M. L. T. 85; 2 L. W. 639; 29 M. L. J. 159; 22 C. L. J. 165; 37 A. 474 (1915) M. W. N. 709 (P. C.).

*See 8 Ind. Cas. 311.—*Ed.*

this precise point was raised; it arose incidentally on a question of limitation; the debt was time barred unless covered by a mortgage. There is evidence that the lady executed and that witnesses were present; only they were on one side of the *parda* and she on the other.

[SIR W. PHILLIMORE:—If the document went in blank and came out signed, and no one else was there but the lady, and the son said he did not sign, it might be sufficient.]

I submit I am entitled to a remand on account of the change in the authorities.

[VISCOUNT HALDANE.—The second case may be supported by saying the witnesses who attested *did* see they saw the hand and heard the voice.]

I submit *Shamu Patter* v. *Abdul Kadir Rowthen* (3) only lays down that an attesting witness must be present at the execution itself, as distinguished from one who receives an acknowledgment afterwards. *Sight* only comes in from English cases, where there are no *pardanashins*.

[VISCOUNT HALDANE.—Isn't the point narrower? Has this document been attested by two witnesses?]

[SIR W. PHILLIMORE.—Haven't you got an affidavit?]

No.

[VISCOUNT HALDANE.—And we must take the facts as you have them. It is your own witness: he says what the son told him.]

[SIR JOHN EDGE.—On the evidence the case only be decided as it was decided by the Subordinate Judge.]

[SIR W. PHILLIMORE.—Your application is in the air.]

When the appeal was heard by the High Court in 1909 there had been a case which held it was not necessary you should see a *pardanashin* woman sign.

[SIR W. PHILLIMORE.—In the former case the point had not been discussed in the Court below.]

JUDGMENT.

VISCOUNT HALDANE.—This appeal arises out of a suit which was brought by one Ishri Pershad and others to enforce an instrument of mortgage, dated in 1893, against the present appellants and others. The whole question before their Lordships turns, in the first instance, upon the validity of the instrument of mortgage which is sought to be enforced. It is argued on behalf of the appellants that the mortgage was invalid because it was not executed in the manner rendered necessary by section 59 of the Transfer of Property Act, 1882. Section 59 enacts that: "Where the principal money sum secured is Rs. 100 or upwards, a mortgage can be effected only by a registered instrument signed by the mortgagor, and attested by at least two witnesses." Now the question is: What is meant by the word "attested"? In the present case, all that is proved is that the mortgage was executed under circumstances which their Lordships will state very shortly. It was granted by a lady called *Musammat* Sharbat Koer, who was the guardian of her son Balmukund Das, and she executed the mortgage on his behalf. She was a *pardanashin* lady, and the account given by the respondents' own witnesses of what happened was this: She was behind the *parda* when the document was taken to her for signature; none of the witnesses saw her sign it; her son came from behind the *parda* and said that it had been signed by her. That was all. The question is whether the witnesses who appended their names under these circumstances attested the document in accordance with the provisions of section 59. Now at one time there seems to have been a good deal of difference of opinion as to what "attested" meant. It will be observed that the words are not "attested and acknowledged," as is the case in some Statutes, but "attested" only. At the time this appeal was decided by the High Court, this Board had not decided the case of *Shamu Patter* v. *Abdul Kadir Rowthan* (3). In that case it was held, settling the law as to the interpretation of the words to which their Lordships have referred in section 59, that the section is not complied with if the witnesses have not been present at the execution of the instrument and have only attested on the subsequent acknowledgment of the signature. After that there was another case brought before this Board, which was relied on by the respondents as bringing the point in the present case, at any rate, much nearer. It was a case of *Padarath Halwai* v. *Ram Narain Upadhia* (4). The head-note is as follows:—

"A mortgage deed purported to be executed by two *pardanishin* ladies. It appeared from the evidence of the attesting witnesses that they saw the hand of each executant when she signed the deed, and that, although they could not see the faces of the executants, they heard them speak and recognised their voices."

That is a very different case from a case of attesting on mere subsequent acknowledgment. It is a case in which the witnesses actually saw the hand of each lady, and in which they recognised her voice, and it is plain that, in the case of witnesses who were acquainted with the individuality of the lady concerned, they might very well recognise the hand which guided the pen and the voice sufficiently to be able to swear to the identity of the person who was performing the act. But that is a very different case from the one before their Lordships upon the present occasion, where, not only was the actual attestation not witnessed by a hand put out from behind the curtain, but the voice was not heard, and what the witnesses went on was, in the main, the fact that the son came to them and said: "Here is the deed which my mother has executed." That, in their Lordships' opinion, is not enough to satisfy the terms of the Statute. The mortgage is, therefore, void, and the appeal must succeed.

It has been suggested that the appeal should be referred back to the Court below, on the view which their Lordships take of the law (and it is a view which may be said to have been a somewhat novel one at the time of the decision of the High Court in Calcutta, given in 1909, three years before the first decision of the Judicial Committee to which their Lordships have referred), for the purpose of framing an issue to see whether it could be brought within the later decision about *pardanashin* ladies. But it is obvious that the facts, as proved here, fall far short and very remote from what was under consideration in the case to which reference has been made, and their Lordships see no justification for taking the unusual course of referring back an appeal which has been argued, and which ought *prima facie* to be decided upon the materials which were before the Courts below.

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be allowed, and that the respondents should pay to the appellants their costs here and in the Courts below.

Appeal allowed.

Solicitors for the Appellants: Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondents: Messrs. *Ranken, Ford and Chester.*

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 281 OF 1916.

February 4, 1918.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

GANESHI LAL—PLAINTIFF—APPELLANT

versus

BABU LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Partition—Property included by mistake—Discovery of mistake—Loss, apportionment of—Partition, whether can be re-opened.

Where parties arrive at a partition either by agreement, or by a decree, which is only a more solemn and binding form of agreement, there is an implied and mutual right of indemnity or contribution in respect of any paramount claim by a third person which throws the burden of a loss not contemplated in the partition proceedings unfairly upon one of the parties. If the original decision has been arrived at by a common mistake, which in the case of a decree has been adopted by the Court making the decree, the mistake can be set right *pro tanto*, *i.e.*, the partition can be opened up in so far as is necessary to apportion the loss which arises out of the discovery of the mistake. [p. 7, col. 1.]

First appeal from a decree of the Subordinate Judge, Dehra Dun.

Mr. *Gulzari Lal*, for the Appellant.

Dr. *Surendra Nath Sen*, for the Respondents.

JUDGMENT.

PIGGOTT, J.—This is an appeal by a plaintiff whose suit for partition has been dismissed by the Court of the Subordinate Judge of Dehra Dun and Mussoorie. One of the pleas taken in the written statement was that that Court had no jurisdiction to try the suit at all. So far as we can gather from the judgment of the learned Subordinate Judge, he seems to have found that he had no jurisdiction

to try the whole suit but had jurisdiction to try part of it, and he has, therefore, proceeded to try what he regards as a preliminary question sufficient to determine that portion of the suit which he conceived himself to have jurisdiction to try. The conclusion we have come to is that the Court below either had jurisdiction to try the entire suit, or had no jurisdiction to try any part of it. Further, we are of opinion that the decision pronounced with regard to a portion of the plaintiff's claim proceeds upon erroneous principles of law and is calculated to make it impossible for the plaintiff in any event to litigate a possibly just claim any further. We must, therefore, set aside the decree of the Court below and remand the case to that Court under the provisions of Order XLI, rule 23 of the Code of Civil Procedure. In so doing, however, we must make it quite clear that we do not feel able on the materials before us finally to determine the question of jurisdiction. We leave that question still open and the Court below, after receiving this order of remand, should again take that point into consideration at once and pass appropriate orders, according as to whether it finds that it has or that it has not jurisdiction to try the suit.

The said suit arises out of the following state of facts. Ganeshi Lal the plaintiff and Babu Lal the principal defendant are brothers. They were admittedly up to the year 1910 members of a joint undivided Hindu family. In the year 1910 Babu Lal brought a suit for partition against Ganeshi Lal. The specification of the property sought to be partitioned given at the foot of the plaint sets forth a number of houses situated in the town of Pilkhna in the Meerut district, and the suit was accordingly filed in the Court of the Munsif of Ghaziabad, within whose territorial jurisdiction the said property was situated. In his defence Ganeshi Lal raised a question as to whether the plaint contained a complete specification of the property which ought to be brought under partition. He pleaded that Babu Lal and himself were the joint owners of a shop at Landhour, the Cantonment of Mussoorie, that this shop was an ancestral business carried on for the benefit of both parties, that it had not been doing well and that there were heavy liabilities attaching to the business. His written statement implies, if it does not actually state, that this shop or business at Landhour was in the possession and under the management of Ganeshi Lal, and it is suggested that Babu Lal's object in suing for the partition of the joint family property at Pilkhna, while omitting all mention of the Landhour business, was to saddle his brother Ganeshi Lal with all the liabilities of that business while taking for himself his full half share in the joint property, some of which it was contended had been purchased out of the profits of that business at a time when such profits were available. This pleading obviously raises questions of fact and of law which the Court conducting the partition would have had to determine before any decree could be passed; but as a matter of fact the case was settled by a compromise between the two brothers. The precise effect of that compromise as regards the business at Landhour is a matter of controversy in the present suit; but it is sufficient to note that its result was to partition the immoveable property at Pilkhna in a particular manner. One large house was divided between the brothers in equal shares, the eastern portion being assigned to Babu Lal and the western portion to Ganeshi Lal. Certain other houses were assigned, some to one brother and some to the other, and in respect of one house it was provided that it should continue in the joint possession of both parties. A decree was passed on the 21st of December 1910 in the terms of the compromise. In the year 1914, one Khairati Lal, a cousin of the parties, instituted a suit in which he claimed to recover possession of one-half share of the whole of the property which had been dealt with in the partition of December the 21st, 1910, alleging himself to be the owner of the same and asking that his moiety might be divided by metes and bounds from the rest and he be put into possession. This suit was contested by both the brothers, who denied that Khairati Lal had any right or title in respect of any share whatever in this property; but the suit was decreed in Khairati Lal's favour on the 3rd of February 1915. The result of this decree was that the western portion of the largest of the houses in question,

that is to say, the portion which had been assigned to Ganeshi Lal at the partition of 1910, was awarded to Khairati Lal; and along with this one smaller building, described as a shop with a *kuchcha* house appertaining thereto, and another *kuchcha* built house were awarded to Khairati Lal out of the property allotted to Babu Lal in 1910. The plaintiff claims that, in consequence of the success of Khairati Lal's suit, he is entitled to re-open the question of the distribution of the joint family property, and more particularly of the immoveable property, effected at the partition of 1910.

We must take it that at that time Ganeshi Lal and Babu Lal honestly believed themselves to be the sole owners of the property in their possession which they then partitioned amongst themselves. There was, therefore, a *bona fide* mistake on the part of both parties to the partition, and that mistake has now become apparent and has produced inequitable results because of the success of Khairati Lal's suit. There is good authority for the proposition that under such circumstances the party to the partition who finds himself prejudiced as a consequence of the common mistake is entitled to have the question of the partition re-opened. A very clear case on this point is that of *Maruti* v. *Rama* (1). We agree with the principles laid down by the learned Judge who decided that case and we think that they apply to the case now before us. Ganeshi Lal, however, has chosen to complicate the question in two ways. He wishes to re-open, not merely the question of the division effected of the house property at Pilkhna by the partition of 1910, but also the question then raised by him as to the respective rights and liabilities of himself and his brother in connection with the business at Landhour. Believing apparently that he could do this more effectually by means of a suit instituted in the Court within whose territorial jurisdiction this Cantonment is situated, he has brought the present suit, not in the Court of the Munsif of Ghaziabad, but in that of the Subordinate Judge of Dehra Dun and Mussoorie. The question whether that Court has any jurisdiction to entertain this plaint depends simply on whether or not any immoveable property sought to be partitioned is situated within the territorial jurisdiction of that Court. The provisions of section 16, clause (*b*), of the Code of Civil Procedure are quite clear in their application to the present case and, inasmuch as the defendant Babu Lal does not live or carry on business within the jurisdiction of the Subordinate Judge of Dehra Dun and Mussoorie, no possible question arises as to the effect of any subsequent section of the same Code. Either the Court below had jurisdiction to entertain the whole of this suit or it had no jurisdiction to entertain it at all, and this depends on what the parties meant in that Court when they spoke of the "shop" situated at Landhour. The wording of the plaint suggests that they were speaking only of a "business," possibly carried on in a hired shop; but it has been pressed upon us on behalf of the plaintiff that this point is not made clear beyond dispute by the record as it now stands before us and that there is room for further enquiry in the Court below. The only other substantial point in the case turns on the wording of the compromise of 1910 and the decree passed in accordance therewith. We are not sure that we have all the materials before us for pronouncing a final opinion on this point and it is not advisable that we should endeavour to try this question on the merits before the question of jurisdiction has been finally determined. According to the defendant the effect of the compromise decree of 1910 was not merely to assign the business at Landhour with its assets and its liabilities, whatever these might be, entirely to the share of Ganeshi Lal; but it did this independently altogether of the partition of the joint property effected by the other portion of the compromise. Virtually the contention for the defendants is that the decision arrived at between the parties on their own compromise in December 1910 amounted to a decision that this Landhour business did not form part of the assets of the joint family but was entirely a matter for which Ganeshi Lal alone was responsible. This is a question which may yet have to be determined between the parties and it is possible that further evidence may be required before a decision can be pronounced. The

(1) 21 B. 333; 11 Ind. Dec. (N. S.) 225.

point seems worth mentioning in order to make it clear that, in saying that Ganeshi Lal is, in our opinion, entitled to have a re-partition of the joint family property made in consequence of the success of Khairati Lal's suit, we are not pronouncing any opinion one way or the other as to whether the assets or the liabilities of the Landhour business should or should not be taken into account in connection with such re-partition. Our order, therefore, is that we remand this case to the Court below under Order XLI, rule 23, for re-trial subject to the remarks we have made. We leave all costs of this appeal to be costs in the cause.

WALSH, J.—I entirely agree. I only wish to add one word on the point arising on the merits, which was substantially argued before us. I agree with the decision in *Maruti* v. *Rama* (1), but I think that there is danger in stating as a general principle that proof of such matter entitles the party to re-partition. I do not think that it entitles him to open up the previous decision except in so far as is necessary to apportion the loss which arises out of the new fact. The right is based simply upon this principle, that where parties arrive at a partition either by agreement or by a decree (which after all is only a more solemn and binding form of agreement), there is an implied and mutual right of indemnity or contribution in respect of any paramount claim by a third person which throws the burden of a loss not contemplated in the partition proceedings unfairly upon one of the parties. If the original decision has been arrived at by a common mistake, which, of course, in the case of a decree is adopted by the Court making the decree, the mistake can be set right *pro tanto*.

Case remanded.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 248 OF 1917.

January 28, 1918.

Present:—Mr. Justice Richardson and Mr. Justice Beachcroft.

KHETRA MOHAN KUNDU AND OTHERS—JUDGMENT-DEBTORS—APPELLANTS

versus

JOGENDRA CHANDRA KUNDU—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 35 (1)—Execution—Application for actual possession, maintainability of, after dismissal of execution case granting formal possession—Partition suit.

A decree-holder in a partition suit, who has been given formal possession of the portion of the properties allotted to him in an execution case which was dismissed after the delivery of the formal possession, can maintain a fresh application in execution for actual possession of the property under sub-rule 1 of rule 35 of Order XXI, Civil Procedure Code. [p. 9, col. 2.]

Appeal against the order of the Additional District Judge of Hoogly, dated the 22nd June 1917, confirming that of the Subordinate Judge, 3rd Court, Hoogly, dated the 17th April 1916.

FACTS material to the report will appear from the following judgments of the Subordinate Judge and the Additional District Judge respectively:—

"In Partition Suit No. 109 of 1911 the decree-holder got a decree for possession of certain properties, which were allotted to his share. On 15th December 1914, the decree-holder applied for execution of the decree, and on 21st March 1915 he received formal possession of the properties and gave the usual acknowledgment. After that the execution case was dismissed on part satisfaction on 14th April 1915. After the disposal of the execution case the decree-holder made an application in that case to be put into actual possession of the properties. On that application the following order was passed by my predecessor-in-office on 20th April 1915:—

'As the execution case has been disposed of after delivery of possession no steps can be taken on decree-holder's application for delivery of possession in the manner as prayed for. Hence decree-holder's application is rejected.' The decree-holder has now made a fresh application to be put into actual possession of the properties under sub-rule 1 of rule 35 or Order XXI of the Civil

Procedure Code, and his application has been registered as Execution Case No. 95 of 1915. On behalf of the judgment-debtors an application has been made under section 47 of the Civil Procedure Code objecting to the decree-holder's application to be put into actual possession of the properties. It is contended on behalf of the judgment debtors that the decree holder, having obtained delivery of possession in the previous execution proceedings and given an acknowledgment to that effect, is precluded from making a fresh application for delivery of possession. It is also contended that the Court has no power to order delivery of actual possession to the decree-holder, that the present application is barred by reason of the decree-holder's previous application to be put into actual possession of the properties having been rejected on 20th April 1915, and that the decree-holder's only remedy is to bring a suit for recovery of *khas* possession of the properties. It is not denied that under the decree in the partition suit the decree holder is entitled to obtain actual possession of the properties under sub-rule 1 of rule 35 of Order XXI of the Civil Procedure Code. Instead of actual possession formal possession was delivered to the decree-holder in the previous execution proceedings. The previous execution proceedings were, therefore, incomplete. The decree-holder is entitled to realise the full benefit of his decree, and there is nothing, in my opinion, to preclude him from obtaining actual possession under sub-rule 1 of rule 35 of Order XXI, to which he is entitled under the decree. The order of 20th April 1915 cannot be a bar to present application, as by that order it was only decided that after the disposal of the previous execution case no action could be taken in that case on the decree-holder's application to be put into actual possession of the properties. The judgment-debtor's objections are disallowed, and it is ordered that possession be delivered to the decree-holder under sub-rule 1 of rule 35 of Order XXI of the Civil Procedure Code by removing the judgment-debtors if they refuse to vacate the properties. In Miscellaneous Case No. 74 of 1915 the decree-holder shall get his costs and Rs. 8 as Pleader's fee."

"This is an appeal arising out of certain execution proceedings. There was a partition suit. The property was partitioned. The appellant applied for execution of the decree and was given formal possession of his portion and gave a receipt stating that he had been given possession by the affixing of a bamboo. The execution case was then dismissed on 14th April 1915. A few days later on 19th April 1915 the appellant applied to be put into actual possession of his portion. The Sub-Judge rejected the application on the ground that the execution case had been disposed of after delivery of possession and that accordingly no further steps would be taken. Later a fresh application was made for actual possession of the property under sub-rule 1 of rule 35 of Order XXI, Civil Procedure Code.

The Sub-Judge (the successor of the Sub-Judge who had passed the former order) granted the order prayed for. It is now argued on appeal that after the delivery of formal possession no further execution proceedings could be taken; that the only course then open to appellant was to bring a regular suit for possession. The Court having once delivered possession, it is said, exhausted its powers. So far as the Code goes, this would clearly appear not to be the case. It had only given possession by affixing a bamboo. Rule 35 confers the further power of ousting people. It is, however, argued that it has been established by judicial decisions that after formal possession has been delivered nothing more can be done in execution of a decree. *Mohamed Elahee Buksh* v. *Kally Mohun Mookhopadhya* (1), *Lokessur Koer* v. *Purgun Roy* (2), *Shama Charan Chatterji* v. *Madhub Chandra Mookerji* (3), *Coventry* v. *Tulshi Prasad* (4) and *Hari Mohan Shaha* v. *Baburali* (5) are cited. In none of these cases were the circumstances identical with those obtaining here. Again these are all decisions of the time before the present Code of Civil Procedure came into existence. Under the circumstances of this case it seems to me it would be a distinct hardship for the appellant to have to bring a separate suit to get separate possession of the portion of the property allotted to him by the partition decree.

(1) 5 C. 589; 5 C L. R. 519; 2 Ind Dec. (N. S.) 982
(2) 7 C. 4 8; 8 Ind. Dec. (N S.) 819.
(3) 11 C 93; 5 Ind. Dec N. S.) 820.
(4) 8 C. W. N. 672; 31 C. 822.
(5) 24 C. 715; 12 Ind. Dec. (N. S.) 1146

The learned Pleader for the respondent refers to the new section 151 of the present Civil Procedure Code, and I think it is a case when that section may well be invoked should it indeed be necessary, which I doubt.

It is argued again on behalf of the appellant that the principle of *res judicata* applies in execution proceedings. *Mungul Pershad Dichit* v. *Grija Kant Lahiri*(6)and *Murlidhar Supal* v. *Nursingh Das* (7) are referred to. These cases relate to entirely different circumstances. I do not think the Sub-Judge's order of 20th April 1915 raises the bar of *res judicata* here.

On the whole I see no adequate reason to disagree with the order of the learned Subordinate Judge which is appealed against.

The appeal is dismissed. Costs Pleader's fee Rs. 8."

Babu *Bijan Kumar Mukherjee*, for the Appellants.—As the execution case was dismissed after delivery of formal possession no fresh application for execution could be maintained. The decree-holder's remedy was to bring a regular suit for getting actual possession of the portion of the properties allotted to him. The execution proceedings were completed by the delivery of formal possession on a previous application for execution so that nothing remained for the execution Court to execute after the grant of delivery of formal possession. As between parties to the suit, formal or symbolical possession is equivalent to actual possession. Hence what the decree-holder got on his formal application for execution was actual possession, though that might be symbolical possession as against persons who are not parties to the suit. [See *Mohamad Elahee Buksh* v. *Kally Mohun Mookhopadhya* (1), *Lo'essur Koer* v. *Purgun Roy* (2), *Shama Charan Chatterji* v. *Madhub Chandra Mookerji* (3), *Coventry* v. *Tulshi Prasad* (4) and *Hari Mohan Shaha* v. *Baburali* 5).

[RICHARDSON, J.—The Calcutta case decided the question of limitation.]

Moreover, as the previous application for execution asked for actual possession, but the execution case was dismissed after delivery of formal possession the decision, of the Court in that execution case cannot be re-opened between the same parties in a subsequent stage of the same execution proceedings. That decision would operate as *res judicata* under the ruling of the Privy Council in *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (6). See also *Murlidhar Supal* v *Nursingh Das*(7), *Raja Thakur Barham* v. *Ananta Ram Marwari* (8), *Ballabh Shankar* v. *Narain Singh* (9), *Nityananda Gantayet* v. *Gajapati Vasudeva Deru* (10) and *Lakhshmanan Chetti* v. *Kuttayan Chetti* (11).

Babus *Manmatha Nath Mukerjee* and *Satindra Nath Mukerjee*, for the Respondent, were not called upon.

JUDGMENT.—This appeal must be dismissed. We are satisfied that the judgment of the Court below is correct. The respondent is entitled to the costs of this appeal. We assess the hearing fee at one gold *mohur*.

Appeal dismissed.

(6) 8 C. 51 (P. C.); 11 C. L. R. 113; 8 I. A. 123; 4 Sar. P. C. J. 249; 4 Ind. Dec. (N. S.) 32.
(7) 10 Ind Cas. 359; 17 C. W. N. 113; 15 C. L. J. 153.
(8) 2 C. L. J. 584.
(9) 3 A. 173; 2 Ind. Dec. (N. S.) 90.
(10) 24 M. 681; 11 M. L. J. 313.
(11) 24 M. 669.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1713 OF 1914.

January 14, 1918.

Present:—Mr. Justice Scott-Smith and Mr. Justice Shadi Lal.

ABDULLA—DEFENDANT—APPELLANT

versus

NABIA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Custom—Adoption—Gorsewaha Rajputs of Mauza

ABDULLA v. NABIA.

Dodhala, Tahsil Nawanshehr, Jullundur District—Adoption of sister's son, validity of—Special custom—Burden of proof—Acquiescence, what amounts to.

Among Gorewaha Rajputs of Mauza Dodhala in the Nawanshehr Tahsil of Jullundur District, adoption of a sister's son is not allowed by custom. [p. 10, col. 2.]

If a party pleads a custom opposed to the generally established custom prevailing in the community to which he belongs, the onus lies on him to prove that special custom and a solitary instance is insufficient to discharge that onus. [p. 10, col. 2.]

One *M.* adopted his sister's son some 16 years before his death. His entire property was mutated in the adoptee's name in 1886, who managed it, mortgaged a part of it and gifted away a plot. In 1885 a collateral of *M.* and the plaintiffs died and his estate was mutated not only in the names of the plaintiffs but in the name of the adoptee also. *M.* died in 1896 leaving the adoptee and a widow. The widow died in 1913 a few months after which the plaintiffs brought a suit for possession:

Held, that although it was true that the collaterals could have instituted a suit for declaration that the alleged adoption should not affect their reversionary rights, they were not bound to do so, as the succession did not open to them until the death of the widow and that, therefore, their allowing the adoptee to remain in possession of the property and to deal with part of it did not prejudice their right of succession and their acts did not amount to acquiescence in the adoption. [p. 10, col. 2.]

Second appeal from the decree of the Divisional Judge, Jullundur, dated the 23rd May 1914, reversing that of the Subordinate, Judge, 1st Class, Jullundur, dated the 17th November 1913, dismissing the claim.

The Hon'ble Pandit *Sheo Narain*, for the Appellant.

Mr. *Bihari Lal* and Sheikh *Umar Bakhsh*, for the Respondents.

JUDGMENT.—The dispute in this appeal relates to the ancestral estate of one Mude Khan, a Gorewaha Rajput of Mauza Dodhala, in the Nawanshehr Tahsil, of the Jullundur District, who died on 19th January 1896. His widow *Musammat* Bholi survived him for many years and died in January 1913. Upon her death the plaintiffs, who are the collaterals of Mude Khan, brought the suit, out of which this appeal arises, for possession of the estate; and the questions for determination are whether the defendant Rahmat Khan, Mude Khan's sister's son, was validly adopted, and whether the collaterals have acquiesced in his adoption.

The factum of the adoption has been found in favour of the defendant, but on the question of validity the learned Divisional Judge has held that the defendant, on whom the onus rested, has failed to establish a custom authorizing a Ghorewaha Rajput to adopt his sister's son. This finding has not been seriously contested by the learned Advocate for the appellant. It is beyond dispute that the general presumption is against the adoption of a sister's son, and this presumption has not been rebutted by the evidence upon the record. Only one instance, *viz.*, of the adoption of one Ghulam Nabi by Sube Khan, has been cited in this connection, but it is clear that a solitary instance is insufficient to discharge the onus. We accordingly concur with the learned Divisional Judge in holding that the defendant has failed to prove the validity of his adoption. As regards the plea of acquiescence, the facts relied upon by the defendant are set out *in extenso* in the judgment of the learned Divisional Judge (*vide* page 8 of the printed paper-book); and after hearing the learned Counsel on both sides, we are not prepared to dissent from the conclusion reached by the learned Judge. The adoption took place about 15 or 16 years before the death of Mude Khan, and it appears that his entire estate was mutated in favour of Rahmat Khan in April 1886. The latter consequently managed the property, mortgaged part of it, and gifted a small plot to one Sardar Ali. The mortgage was subsequently redeemed by him, and the gift is still open to objection by the plaintiffs. It is true that the collaterals could have instituted a suit for a declaration that the alleged adoption should not affect their reversionary rights, but it is clear that they were not bound to do so. The succession did not open out to them until the death of *Musammat* Bholi in 1913, and within a few months of that event they instituted the present suit for possession. In these circumstances we do not think that the fact that they allowed Rahmat Khan to remain in possession of the property and to deal with part of the estate can prejudice their right of succession. It appears that in 1885 one Badhe Khan, a collateral of Mude Khan and the plaintiffs, died, and that

the deceased's estate was mutated not only in favour of the plaintiffs, but also in favour of Rahmat Khan. Now, it is manifest that the plaintiffs had no right to possess the share of the estate belonging to Mude Khan, and could not, therefore, prevent the latter from having the mutation with respect to that share effected in favour of Rahmat Khan. Rahmat Khan having once been recorded as a co-sharer with the plaintiffs of Budhe Khan's estate, the joint mortgage by all the co sharers can be easily explained, and the same remark applies to the sale transaction effected by them subsequent to the mortgage. It is also contended that the plaintiffs joined Rahmat Khan in sinking a well; but that act may be attributable to the fact that Rahmat Khan was in possession of Mude Khan's land, and it is not an unreasonable explanation that his assistance was sought for in his capacity as the agent of *Musammat* Bholi. The question of acquiescence is not free from doubt, but considering that the learned Divisional Judge has duly examined all the relevant facts, we do not think that there is any adequate reason for holding that his conclusion is incorrect.

Accordingly we confirm the decree of the lower Appellate Court, and dismiss the appeal with costs.

Appeal dismissed.

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(1) MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1811 of 1916.

December 11, 1917.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

SUBRAMANIA AIYAR—PLAINTIFF—APPELLANT

versus

NAMASIVAYA ASARI—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 102—'Cognizable,' meaning of—Provincial Small Causes Courts Act (IX of 1887), Sch. II, Art. 35, effect of amendment of 1914 upon—Suit for value of trees, carried away—Trial as regular suit—Appeal, second, maintainability of—Amendment of Art. 35, before filing of second appeal, effect of—Interpretation of Statutes, principles of—Retrospective effect.

A suit to recover the value of trees cut and carried away was filed in the Small Cause Court and was afterwards transferred to the regular file as a question of title was involved in the suit. Against the decree of the trial Court there was an appeal to the District Court, and from the decree of the latter Court a second appeal was filed in the High Court. It was objected that, under section 102, Civil Procedure Code, no second appeal lay. It was contended in answer that as the second appeal was filed after the amendment of Article 35 of Schedule II of the Provincial Small Causes Courts Act in 1914, the second appeal was maintainable:

Held, that, as the appeal was against a decree in a suit of the nature cognizable by Small Cause Courts, no second appeal lay. [p. 12, col. 1.]

The word 'cognizable' in section 102, Civil Procedure Code, is restricted to the nature of the proceeding prior to decree and not to its character at the time of the second appeal. [p. 12, col. 1.]

The principle of law that a right to prefer an appeal, being a vested right cannot be affected by legislation, is equally applicable to parties who have acquired a right to a judgment being regarded as final and conclusive. [p. 12, cols. 1 & 2.]

Colonial Sugar Refining Co., v. Irving, (1905) A. C. 369; 92 L. T. 738; 21 T. L. R. 512; 74 L. J. P. C. 77, explained.

An enactment, which deliberately withdraws certain classes of cases from the jurisdiction of Small Cause Courts, cannot be said to declare the law and does not have a retrospective effect. [p. 12, col. 1.]

Second appeal against the decree of the District Court, Tanjore, in Appeal Suit No. 189 of 1914, preferred against that of the Court of the District Munsif, Pattukottai, in Original Suit No. 713 of 1912.

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

Mr. *V. Purushottama Aiyar*, for Mr. *T. R. Venkatarama Sastri*, for the Respondent.

JUDGMENT.—A preliminary objection has been taken by Mr. Purushottama Aiyar to the maintainability of the second appeal, and we are of opinion that the objection should prevail.

The suit was for Rs. 50 and odd for cutting and carrying away trees. It was originally instituted in the Small Cause Side of the Tanjore Subordinate Judge's Court. As a question of title was involved in the determination of the claim, the plaint was returned for presentation to the District Munsif's Court at Pattukottai. The suit was tried by that Court and an appeal was heard therefrom by the District Judge. This second appeal is against the decree of the District Judge.

The suit as originally filed was not exempted from the jurisdiction of the Small Cause Court. An amending Act was passed in 1914, by which a new clause (11) was added to Article 35 of the II Schedule of the Provincial Small Causes Courts Act. Under this new clause, if the suit were to be filed now, there can be no question that the Small Cause Court will have no jurisdiction to try it. The point for determination is whether this amendment affects the operation of section 102 of the Code of Civil Procedure. Under that section no second appeal lies *in any suit of the nature cognisable* by Small Cause Courts, if the value of the subject-matter does not exceed Rs. 500. In the present case all the disqualifying conditions are present. Mr. Rajah Aiyar contended that the nature of the suit must be considered with reference to the date on which the second appeal is presented and not with reference to the date on which the suit was filed; and as the amending Act was passed in 1914, before the second appeal was filed, the character of the suit has changed so as to admit of a second appeal being presented. This ingenious argument ignores the consideration that the appeal is against the decree which has been passed in the suit of the nature cognisable by Small Cause Courts. The word 'cognisable' must be restricted to the nature of the proceeding prior to decree and not to its character at the time of the second appeal.

The next contention of the learned Vakil was that the right of preventing an appeal being filed is not a vested right. It was held in *Colonial Sugar Refining Co.* v. *Irving* (1) that the right to prefer an appeal being a vested right, it will not be affected by a new legislation. We think that the principles of that decision applies to the present case. The right claimed by one party to take up a matter to an appellate tribunal is no more sacred, than the right given to the other party to prevent the right of finality attaching to the decree obtained by him not being disturbed. We think that the statement of law by the Judicial Committee is equally applicable to parties who have acquired a right to a judgment being regarded as final and conclusive.

The next contention was that the matter is one of procedure. Reliance was placed upon the decision in *Attorney General* v. *Theobald* (2). That was a case in which a declaratory enactment was construed. It was held that, where the Legislature declares the meaning of a particular expression, that must be deemed to have been the meaning from the outset. In the present case, the Legislature has deliberately withdrawn certain cases from the jurisdiction of the Small Cause Court. This is not a case of declaring the law but of the making of a new law. To such an enactment the statement of law contained in the judgment of Lopes, L. J., in *Pulborough School Board Election, In re* (3) is peculiarly applicable: "It is a well recognised principle in the construction of Statutes that they operate only on cases and facts which come into existence after the Statutes were passed unless a retrospective effect is clearly intended.

"This principle of construction is especially applicable when the enactment to which a retrospective effect is sought to be given would prejudicially affect vested rights or the legal character of past transactions."

Mr. Rajah Aiyar next referred to cases which have held that there is no vested right in having a case tried by a tribunal which has been deprived of jurisdiction by a subsequent enactment. Such a right has been held by Lord Monaughten in *Colonial Sugar Refining Co.* v. *Irving* (1) as pertaining to the province of processual law, and not to vested right, because so long as there has been no trial, no party has any right to say that the mode of trial or the procedure for trying it shall not be changed. These observations apply to *Vajechand* v. *Nandram* (4) as well.

For these reasons we are of opinion that no second appeal lies in this case and we reject it with costs.

Appeal dismissed.

M. C. P.

(1) (1905) A. C. 369; 92 L. T. 738; 21 T. L. R. 513; 74 L. J. P. C. 77.

(2) (1890) 24 Q. B. D. 557; 62 L. T. 768; 38 W. R. 527.

(3) (1894) 1 Q. B. 725 at p. 737; 63 L. J. Q. B. 497; 9 R. 395; 70 L. T. 639; 42 W. R. 385; 1 Manson 172 58 J. P. 572.

(4) 9 Bom. L. R. 1028; 31 B. 545.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 1913 AND 1957 OF 1913.

January 25, 1918.

Present:—Mr. Justice Teunon and Mr. Justice Newbould.

IN No. 1913 OF 1913

Srimati SUKUMARI DEBI—PLAINTIFF —APPELLANT

versus

KALIPADA MUKHERJEE AND OTHERS —RESPONDENTS

IN No. 1957 OF 1913

KALIPADA MUKHERJEE AND ANOTHER—DEFENDANTS NOS. 2 AND 3—APPELLANTS

versus

Srimati SUKUMARI DEBI AND OTHERS —RESPONDENTS.

Evidence Act (I of 1872), s. 92, applicability of, to document to which one of the parties to suit was not party.

The provisions of section 92 of the Evidence Act, excluding oral evidence in regard to the question whether a certain plot of land was or was not covered by a sale-deed executed by one of the parties to a suit, do not apply when the other party to the suit was not a party to the document.

Appeals against the decrees of the Third Additional District Judge, 24-Perganas, dated the 26th of February 1913, modifying those of the Subordinate Judge, 2nd Court of that District, dated the 2nd of July 1912.

Babu *Siba Prasanna Bhattacharjee*, for the Appellant in No. 1913 and for the Respondent in No. 1957.

Babus *Surendra Chandra Sen* and *Trailokhya Nath Ghose*, for the Respondents in No. 1913 and for the Appellant in No. 1957.

Babu *Amulya Chandra Chatterjee*, for the Defendants-Respondents in No. 1957.

JUDGMENT.

TEUNON, J.—These two appeals arise out of a partition suit, No. 1913 being preferred by the plaintiff and No. 1957 by defendants Nos. 2 and 3. The question in the former is whether the appellant is entitled to her share ($\frac{1}{4}$th) in plot No. 1 of the schedule to the plaint, being a plot of Bhadrason or homestead measuring some $1\frac{1}{2}$ *bighas* in area, and the question in the latter appeal is whether she is entitled to the same share in the ancestral house of 3 rooms standing on the said plot.

The plot appertains to Taluk No. 2510 and the contention of defendants Nos. 2 and 3 is that by a *kobala*, dated 7th *Asar* 1315, the plaintiff sold to one Satish Chandra Bhattacharjee (the son of plaintiff's father-in-law's sister) her interest in this Taluk and, therefore, in the plot now in question. The plaintiff on the other hand says that the Bhadrason and the Bhadrason Bati were excluded from the sale which covered only the agricultural lands.

In the Court of first appeal the case proceeded on the assumption that the provisions of section 92 excluding oral evidence applied to the case. But that is not so; defendants Nos. 2 and 3 are no parties to the deed. Satish Chandra Bhattacharjee the vendee has in this Court been made a party to the suit and he has filed a written statement supporting the plaintiff and disclaiming all interest in the Bhadrason and the house thereon. Defendants Nos. 2 and 3 are admittedly not entitled to the plaintiff's share in the property now in question and Satish being now a party it would be possible in the case to direct that the 1/4th share in question should be allotted to the plaintiff and Satish jointly. But this, in our opinion, is unnecessary; Satish's written statement, the improbability of a sale by the plaintiff of her house, and the documents, and other matters relied on by the Subordinate Judge justify us in holding that the property in question, being regarded as a separate parcel, was excluded from the sale to Satish.

In this view No. 1957 is dismissed with costs. The decree of the first Appellate Court in respect of the Bhadrason is reversed and the decree of the Subordinate Judge restored. Appeal No. 1913, is, therefore, decreed with costs.

NEWBOULD, J.—I agree.

Appeal No. 1913 *decreed*;
Appeal No. 1957 *dismissed.*

MADRAS HIGH COURT.

CIVIL REVISION PETITION NO. 1189 OF 1916.

December 18, 1917.

Present:—Mr. Justice Seshagiri Aiyar.

VAITHILINGAM CHETTY—PLAINTIFF—PETITIONER

versus

KALIAPERUMAL MUDALI AND ANOTHER —DEFENDANTS—RESPONDENTS

Civil Procedure Code (Act V of 1908), s. 24, cl. (1) (b) (ii), O. XLVII, r. 2—'Competent to try and dispose of the same,' meaning of—Jurisdiction of Courts, territorial changes in—New Courts, establishment of, with jurisdiction over cases from specified

VAITHILINGAM CHETTY v. KALIAPERUMAL MUDALI.

date—Review, petition for, to Court exercising jurisdiction before establishment of new Court—Transfer to new Court, power of District Judge to—New Court, whether 'successor' of Court which entertained petition—Transfer, whether ultra vires.

The Court of a District Judge has no power to transfer suits or petitions filed in a Court subordinate to it to another subordinate Court newly established thereafter, which is only empowered to hear cases presented to it from a specified date after its establishment. [p. 15, col. 1.]

The latter Court is not a Court 'competent to try and dispose of the same' within the meaning of clause (1) (*b*) (*ii*) of section 24, Civil Procedure Code, nor can it be regarded as 'successor' to the Court which originally entertained the suit or petition within the meaning of Order XLVII, rule 2, Civil Procedure Code. [p. 14, col. 2; p. 15, col. 1.]

The Subordinate Judge of Kumbakonam issued notice, on a review petition presented to him, on 19th November 1915, to the opposite party to appear on 27th November 1915. The petition not having been disposed of on the latter date, the District Judge transferred the petition to a new Small Cause Court established at Kumbakonam on 1st January 1916 with jurisdiction to try all Small Cause suits *from that date*:

Held, that the order of transfer was *ultra vires*. [p. 15, col. 1.]

Petition, under section 25 of Act IX of 1897, praying the High Court to revise the order of the Court of Small Causes, Kumbakonam, in Original Petition No. 24 of 1916 (Original Petition No. 2121 of 1915, in Small Cause Suit No. 1373 of 1915, on the file of the Court of the Subordinate Judge, Kumbakonam).

Mr. *K. Aravamuda Ayyangar*, for the Petitioner.

Mr. *C. Madhavan Nair*, for the Respondents.

JUDGMENT.—The suit was originally instituted on the Small Cause Side of the Subordinate Judge's Court at Kumbakonam. He pronounced judgment on the 27th October 1915. A petition for review was presented to him on the 19th November 1915. He directed the issue of notice to the opposite party on the 27th November. On the 1st January 1916 a Special Small Cause Court was established at Kumbakonam which was invested with jurisdiction to try all small cause suits within a specified area. The High Court issued a circular, R.O.C. No. 3656 of 1916, dated 31st October 1916, in which it was stated that the Special Small Cause Judge alone shall have jurisdiction to hear all small cause suits instituted after the 1st January 1916. Apparently on this circular the District Judge transferred the review petition from the Kumbakonam Subordinate Court to the new Small Cause Court. The question for consideration is whether this transfer was right.

This petition was presented by the plaintiff and as I found that the opposite side was not represented before me, I requested Mr. Madhavan Nair to help me, as a question of considerable importance regarding the procedure was raised by the point taken before me. I am very much indebted to Mr. Madhavan Nair for his assistance.

Mr. Madhavan Nair supports the order of the District Judge by a reference to section 24, clause (1) (*b*) (*ii*). He concedes that the High Court circular can only affect cases which were instituted after the 1st January 1916. But he argues that the District Judge had power to withdraw the case from the file of the Subordinate Judge and to direct its disposal by any Court subordinate to the District Court which was competent to try and dispose of small cause suits. The difficulty arises in construing the words 'competent to try and dispose of the same' in clause (1) (*b*) (*ii*) of section 24. There can be no doubt that the Special Small Cause Judge, according to the circular of the High Court, was only competent to hear cases which were filed after the new Court was established. Order XLVII, rule 2, of the Civil Procedure Code provides that after notice has been issued by the Judge on an application for review, the successor of that Judge is competent to dispose of it. Mr. Madhavan Nair's contention is this—that the Special Small Cause Judge is the successor of all those Judges who exercised Small Cause Court's jurisdiction within the limit which was subsequently assigned to him and, therefore, he became the successor of the Subordinate Judge of Kumbakonam and as notice was directed to be issued by the Subordinate Judge in respect of this matter, the new Small Cause Court Judge must be taken to be a successor competent to dispose of the review petition, within the meaning of section 24 (*b*) (*ii*). As pointed out by the learned Vakil for the petitioner, it seems to me that the new Small Cause Court Judge should be regarded as the successor of the existing Small Cause Court Judges, onl in respect of cases filed after the 1st January 1916. Having regard to the express

wording of the High Court circular he cannot be regarded as the successor of the Small Cause Court Judges in respect of matters which were pending on their file at the time when the new Court was established. There can be no doubt on the question of convenience and justice that the Subordinate Judge of Kumbakonam would be the proper person to dispose of this review petition. He is cognisant of all the facts which transpired before him, and it would be very inconvenient that a new Judge who had nothing to do with the original trial should be asked to hear the review petition. The observations of the Judicial Committee in *Ram Nath* v. *Gowhur* (1) support this view. I have, therefore, come to the conclusion that the order of the District Judge transferring the case from the file of the Kumbakonam Subordinate Court to the new Small Cause Judge is *ultra vires*. On this ground, I must reverse the order in this case and direct the Subordinate Judge of Kumbakonam to dispose of the petition on the merits. Costs to abide the result.

Order reversed.

M.C.P.

(1) 2 N. W. P. H. C. R. 230.

CALCUTTA HIGH COURT.

CIVIL RULE No. 882 OF 1917.

February 11, 1918.

Present:—Mr. Justice Teunon and Mr. Justice Newbould.

LALU SARDAR AND OTHERS—DEFENDANTS—PETITIONERS

versus

OHEDALI MRIOHA—PLAINTIFF—OPPOSITE PARTY.

Provincial Small Causes Courts Act (IX of 1887) as amended by Act VI of 1914, Sch. II, Art. 35, cl. (ii)—Suit for value of paddy wrongfully and forcibly taken away whether cognisable by Small Cause Court.

A suit to recover the value of paddy alleged to have been forcibly, wrongfully and maliciously cut and taken away by the defendant from the possession of the plaintiff is not cognisable by a Court of Small Causes. [p. 16, col. 1.]

Rule against the order of the Small Cause Court Judge, Barisal.

FACTS appear from the judgment.

Babu *Abinash Chandra Ghosh*, for the Petitioner.—The defendant is the petitioner and the suit is for the recovery of the price of paddy alleged to have been wrongfully and forcibly cut and taken away by the defendant from the land in possession of the plaintiff. So, under clause (*ii*), Article 35, of the Second Schedule of the Provincial Small Causes Courts Act, as amended by Act VI of 1914, the suit is not maintainable in a Court of Small Causes. See *Helaluddi Molla* v. *Abdul Gafur Molla* (1), *Ram Prasad Pramanik* v. *Sricharan Mandal* (2), *Adu Malo* v. *Nagar Bashi Malo* (3).

[TEUNON, J.—Was the objection as to jurisdiction of the Court taken in the lower Court ?]

Yes. In the written statement it is stated that the suit is not maintainable in the Court of Small Causes. Even if the objection as to jurisdiction was not specifically taken, that would not give jurisdiction to the Court to try the suit when the law expressly takes away such suits from the cognizance of the Court of Small Causes. It has been held in many cases that where there is a total want of jurisdiction, omission or failure to take that objection would not vest the Court with jurisdiction.

Babu *Suresh Chandra Talukdar*, for the Opposite Party.—The objection as to the jurisdiction of the Court not having been specifically taken in the Court below, the decision of the Court below should not be interfered with in revision.

[TEUNON, J.—Under the Amending Act VI of 1914 the suit is not triable by a Court of Small Causes.]

Then the plaint may be returned to the plaintiff for presentation to the proper Court. But the petitioner shall not be entitled to costs, as the objection now raised was not taken in the lower Court.

JUDGMENT.—This Rule is directed against a decree made by the Small Cause Court of Barisal. The plaintiff brought his suit to recover the value of paddy and his claim has been decreed to the extent of Rs. 15. His allegations in the plaint were that this paddy being in his possession the de-

(1) 41 Ind. Cas. 936; 21 C. W. N. cxlvii (147).
(2) 41 Ind. Cas. 276; 21 C. W. N. 1109.
(3) 33 Ind. Cas. 728.

fendant had forcibly, wrongfully and maliciously cut and taken it away. On these allegations it is clear that under the Small Causes Courts Act, Second Schedule, Article 35, clause (*ii*), introduced into the Act by the Amending Act VI of 1914, the plaintiff's suit was one not triable by a Court of Small Causes. We, therefore, set aside the decree against which this Rule is directed and return the case to the Small Cause Court Judge in order that he may return the plaint to the plaintiff for presentation in the proper Court.

Under all the circumstances we make no order as to costs.

Decree set aside; Case returned.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 403 OF 1917.

January 17, 1918.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Napier.

SISTU SEETARAMAYYA—PLAINTIFF—APPELLANT

versus

TADAPALLI SODEMMA—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 2—Civil Procedure Code (Act XIV of 1882), s. 257A—Agreement by decree-holder to give time for discharge of decree not certified to Court—Breach of contract—Execution of decree in violation of agreement—Damages, suit for, maintainability of.

No suit lies for damages for breach of an agreement by a decree-holder to give time to the judgment debtor for satisfaction of the decree where the agreement has not been certified to Court under Order XXI, rule 2, Civil Procedure Code, and there is no consideration to support it. [p. 17, col. 1.]

Venkata Subramania Ayyar v. *Koran Kannan Ahmod*, 26 M. 19; 12 M. L. J. 113, followed.

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Cocanada, in Appeal Suit No. 59 of 1916, preferred against that of the Court of the District Munsif, Peddapur, in Original Suit No. 648 of 1914.

FACTS appear from the judgment.

Mr. *D. Appa Row*, for the Appellant, argued that failure to obtain the Court's sanction for the adjustment out of Court only rendered the judgment-debtor liable in execution proceedings The reporting of the agreement would bar execution, but there was an independent cause of action on the agreement between the parties and a breach of the covenant by the decree-holder rendered him liable in an action for damages. The consequence of the failure to certify in time under the provisions of Order XXI, rule 2, Civil Procedure Code, was that the matter could not be pleaded in bar of execution, but the common law right to seek reparation for breach of the covenant by a suit is preserved. As the judgment-debtor paid an instalment the agreement had consideration to support it.

Mr. *V. Ramesam*, for the Respondent, urged that the agreement itself was void as it was not made for consideration or with the sanction of the Court, and no right could be rested on it. *Venkata Subramania Ayyar* v. *Koran Kannan Ahmod* (1).

Mr. *Appa Rao* was heard in reply.

JUDGMENT.—The plaintiff sues to recover damages from the defendant in somewhat curious circumstances. The defendant had a decree for money against the plaintiff and there was an agreement arrived at between the parties by which the decree-holder consented to receive an amount less than the decree amount in several instalments, covering a period of two years, the first instalment being payable on the date of the agreement. It would seem that two instalments were paid to the decree-holder. In the payment of the 2nd instalment there was a delay of a few days, but the defendant waived the delay and accepted payment, but would not receive the 3rd instalment sent to him and then took steps to enforce the decree and realise the amount due upon the decree apart from the agreement. The agreement was never brought to the notice of the Court or sanctioned by it. The plaintiff says that he is entitled to recover damages from the defendant for violation of the agreement even though he could not set up the agreement as a bar to execution. But the agreement comes within the purview of section 257 A of the old Civil Procedure Code, Act XIV of 1882, which lays down that "every agreement to give time for the satisfaction of a judgment debt shall be void unless it is made

(1) 26 M. 19; 12 M. L. J. 113.

for consideration and with the sanction of the Court which passed the decree and such Court deems the consideration to be under the circumstances reasonable " It would be void on two grounds:—*first* of all, it was not sanctioned by the Court, and *secondly*, there was no consideration for it. We cannot accept the contention that because the 1st instalment was paid at the date of the agreement, there was valid consideration for it. The case referred to by the District Munsif, *Venkata Subramania Ayyar* v. *Koran Kannan Ahmad* (1), clearly shows that an agreement of this nature is an agreement to give time within the meaning of section 257A and does not put an end to the relationship of judgment-debtor and creditor by extending the time. It relieves the defendant from the obligation of satisfying the decree at any time he is called upon to do so by the decree holder. The agreement being void as not being sanctioned by the Court as required by law, no rights can arise to the plaintiff under such an agreement and the suit was rightly dismissed by both the Courts.

The appeal fails and is dismissed with costs.

Appeal dismissed.

M. C. P.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 951 OF 1916.

February 11, 1918.

Present:—Mr. Justice Scott-Smith and Mr. Justice Shadi Lal.

FIRM OF GOPI MAL-DURGA DAS —DEFENDANT—PETITIONER

versus

THE JAIN BANK OF INDIA, LIMITED, LAHORE —PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), ss 184, 248—Principal and agent Minor, whether can act as agent—Firm, liability of, for acts done by managing minor member—Minor, liability of, on attaining majority.

Where on the application of an active minor member of a firm who did most of the business of the firm, shares in a Limited Liability Company were allotted to the firm:

Held, (1) that as a minor can act as an agent under section 184 of the Contract Act, the fact that at the time of the application the member was not *sui juris* did not vitiate the contract between the Company and the firm and that the firm was, therefore, liable on the shares;

(2) that as the minor did not give notice within reasonable time after attaining majority of his repudiation, he was also equally liable.

Petition, under section 25 of Act IX of 1887, for revision of the decree of the Judge, Small Cause Court, Lahore, dated the 19th August 1916, decreeing the claim.

Lalas *Tirath Ram* and *Kahan Chand*, for the Petitioner.

Dr. *Nand Lal*, for the Respondent.

JUDGMENT.—After hearing arguments on both sides and considering the findings arrived at by the Judge, Small Cause Court, we are of opinion that no adequate ground for revision has been made out. There can be no doubt whatsoever that Durga Das, purporting to act on behalf of the firm Gopi Mal Durga Das, consisting of himself and his father, Gopi Mal, applied in July 1913 for 20 shares in the Jain Bank of India, Limited, and paid Rs. 40 with the application. The shares were duly allotted to the firm, and the letter of allotment was posted and presumably reached its destination. It is, therefore, clear that the firm became a share-holder in respect of 20 shares, if Durga Das had the authority to act on its behalf. Now the Judge, Small Cause Court, finds that " Durga Das is an active member of the firm and he does most of the work of the shop," and this finding receives support not only from the evidence of Gopi Mal but also from the general circumstances of the case.

Now, section 184 of the Indian Contract Act shows that a minor can act as an agent. The fact that Durga Das was at the time of the application not *sui juris* does not, therefore, vitiate the contract between the Bank on one side and the firm on the other. The firm is liable on the shares, and Durga Das having attained majority in 1915 is equally liable, *vide* section 248, Indian Contract Act.

We are accordingly of opinion that the defendant firm has been rightly held liable for the payment of the call money, and this application for revision is hereby dismissed with costs.

Revision dismissed.

PANDIRI VEERANNA v. GRANDHI VEERABHADRASWAMI.

MADRAS HIGH COURT.
FULL BENCH.
CIVIL APPEAL No. 343 OF 1916.
February 20, 1918.

Present:— Justice Sir William Ayling, KT.,
Mr. Justice Coutts Trotter and
Mr. Justice Seshagiri Aiyar.

PANDIRI VEERANNA—PLAINTIFF—APPELLANT

versus

GRANDHI VEERABHADRASWAMI *alias* VEERABHADRUDU—DEFENDANT No. 2—RESPONDENT.

Limitation Act (IX of 1908), s. 21—Acknowledgment by partner, whether binding on co-partner—Implied authority to acknowledge, proof of, admissibility of.

In the absence of direct evidence that a co-contractor or partner has authorised his co-contractor or partner to make acknowledgments or payments saving limitation on his behalf, such authority can be inferred from other circumstances, such as the position of the other co-contractors or partners in the business. [p. 21, col. 1.]

K. R. V. Firm v. *Sathayavada Sitharama Swami*, 21 Ind. Cas. 634; 25 M. L. J. 501; 37 M. 146, followed.

Valasubramania Pillai v. *Ramanathan Chettiar*, 2 Ind. Cas. 309; 5 M. L. T. 102; 32 M. 421 and *Sheik Mohideen Sahib* v. *Official Assignee*, 11 Ind. Cas. 332; 35 M. 142; (1911) 1 M. W. N. 347; 9 M. L. T. 473, overruled.

Appeal against the decree of the Court of the Additional Temporary Subordinate Judge, Rajahmundry, in Original Suit No. 3 of 1916.

This appeal coming on for hearing on the 28th September 1917 and on the 1st October 1917, upon perusing the grounds of appeal, the judgment and decree of the lower Court and the material papers in the suit, and upon hearing the arguments of Mr. *V. Ramadoss*, for the Appellant, and of Mr. *T. Ramachandra Rao*, for the Respondent, and the case having stood over for consideration till the 30th day of October 1917, the Court (Chief Justice and Kumaraswami Sastri, J.) made the following

ORDER OF REFERENCE TO A FULL BENCH.

WALLIS, C. J.—It is quite clear in this case that the 1st defendant and his adult son the 2nd defendant, carried on business as timber merchants with the joint family property. It is also clear that the advances made by the plaintiff were made to them both and that the 2nd defendant was personally liable on them as well as the 1st defendant. This is abundantly proved by the fact that the 2rd defendant has signed the settlements in the plaintiff's books Exhibit A, dated the 27th April 1907, and A1, dated the 12th September 1909, and the promissory notes D, dated the 1st May 1907, and E, dated the 13th September 1909. He did not sign the settlement A2, the promissory note F, dated the 26th September 1910, or the letter J, dated the 1st October 1910, as he was absent, but on the 7th February 1911 he signed the letter Exhibit G, set out in the judgment of the Subordinate Judge, in which he stated that he and his father had been borrowing from the plaintiff, that his father had settled accounts on the 26th September 1910 and signed in the plaintiff's book, that he had not signed as he was not present and that subsequently they had received further advances to the extent of Rs. 4,000. In this letter he undertook to discharge both these amounts on his personal liability and added: "There subsists also my personal liability for the whole of the amount payable according to your accounts. As I did not sign in your accounts, this letter was written and given." He did not, however, sign the subsequent settlement A3, dated the 7th September 1913, or the promissory note Exhibit H, dated the 7th September 1913, or the letter Exhibit K, dated the 9th September 1913, by which the 1st defendant acknowledged the joint indebtedness to amount to Rs. 9,855 and arranged for a further advance of Rs. 1,200 for which they were to give a fresh mortgage. The plaintiff has given evidence in support of his case, and neither the first nor the 2nd defendant has ventured to go into the box and the witnesses called for the 2nd defendant to prove that he had no connection with his father's business are contradicted by the documents under his own signature already mentioned. There is evidence, and it is the 2nd defendant's case, that for the last few years he has been looking after a cloth business, and according to the plaintiff's evidence the 1st defendant was the manager and always wrote the letters and invoices relating to the timber business.

In these circumstances, the only question is whether the suit is barred against the 2nd defendant personally, and this depends on whether the 1st defendant can be assumed to have had implied authority to sign the

settlement in Exhibit A 4, and the letter Exhibit K on behalf of the 2nd defendant as well as himself. The last acknowledgments were made by the 1st defendant when he was managing the joint timber business, which was being carried on with joint family funds by the 1st and 2nd defendants as co-contractors or partners and while the 2nd defendant was looking after another business. According to the decisions of this Court in *Valasubramania Pillai* v. *Ramanathan Chettiar* (1) and in *Sheik Mohideen Sahib* v. *Official Assignee* (2), these facts are not sufficient to raise a presumption that the 1st defendant had authority to make an acknowledgment on behalf of the 2nd defendant. In the latter case it was expressly decided that the fact of a partner being left in management of the business did not give rise to a presumption that he was authorized to sign acknowledgments. I have pointed out in *K. R. V. Firm* v. *Sathayavada Sitharama Swami* (3) that a different view has been taken by other Courts in India in the cases cited, to which may be added *Lalta Parshad* v. *Babu Parshad* (4) and, also apparently in England, where the statutory provisions are substantially the same as in India. The point is fully discussed in *K. R. V. Firm* v. *Sathayavada Sitharama Swami* (3) and, as it is one of great importance to the commercial community, we have decided to refer to a Full Bench the question whether, in the absence of direct evidence that a co-contractor or partner has authorized his co-contractor or partner to make acknowledgments or payments saving limitation on his behalf, such authority can be inferred from other circumstances such as the position of the other co-contractors or partners in the business?

KUMARASWAMI SASTRI, J.—I agree to the reference proposed by my Lord, as I am of opinion that the decisions in *Valasubramania Pillai* v. *Ramanathan Chettiar* (1) and in *Sheik Mohideen Sahib* v. *Official Assignee* (2) require re-consideration in the light of the decision in *K. R. V. Firm* v. *Sathayavada Sitharama Swami* (3), which, if, I may say so with respect, gives cogent reasons for placing on section 21 of the Limitation Act a more liberal construction in conformity with the decisions of the other High Courts. There is no essential difference between the position of partners in England and India and if under section 251 of the Contract Act the act of one partner which is necessary for or is usually done in the course of the business binds the other partners, there is no reason why acknowledgments of liability or payments made by one partner should not bind the others. I have rarely come across any instance where partners, while providing for authority to borrow on behalf of the firm, make any express provision for acknowledgments or payments with reference to limitation. Very often the partnership agreement restricts the powers of certain of the partners to borrow, but when there is no restriction, business is conducted on the footing that one who has the power to borrow has also power to settle accounts, make payments and in general to do all things necessary to ensure the credit of the firm. It is well known that Marvadis and Nattukottai Chettys who open account with persons insist on periodical settlements and would make no further advances unless accounts are settled when required. The object of the settlement is to prevent disputes as to its correctness and pleas of limitation from being raised. It is difficult to see why partners who allow business to be conducted on lines which are well known to everybody should not be presumed to have given authority, in the absence of evidence that the authority to borrow was limited and excluded the doing of things which are ordinarily done where accounts are opened with money-lenders.

I do not think that the wording of section 21 concludes the matter or makes any difference in the general law applicable to partners. The use of the words "by reason only of" in the Acts of 1877 and 1908, instead of the words 'by reason of,' suggests that the Legislature did not intend to affect the powers of one partner to bind another by acts falling under section 251 of the Contract Act. If it is shown that one partner has been borrowing money, making payments and settling accounts without objection by the other partners, it may well be presumed that he was authorized to do so. There is

(1) 2 Ind. Cas. 309; 5 M. L. T. 102; 32 M. 421.
(2) 11 Ind. Cas. 332; 35 M. 142; (1911) 1 M. W. N. 347; 9 M. L. T. 473.
(3) 21 Ind. Cas. 634; 25 M. L. J. 501; 37 M. 146.
(4) 4 Ind. Cas. 708; 32 A. 51; 6 A. L. J. 953.

no reason why we should go further and require an express authority treating the implied authority as useless for the purpose of section 21.

Section 21 is similar in language to section 14 of the Mercantile Law Amendment Act of 1856, which has received judicial interpretation in England so far as partners are concerned. The following passage from Lightwood (time limit to action) correctly summarises the law in England on the subject. "Though the doctrine of implied agency as between co-debtors is abolished, one may still be the actual agent of the other so as to bind him by payment. In the absence of evidence to the contrary, one partner is presumed to be the agent of the other to make payments in respect of partnership debts [*Goodwin* v. *Parton* (5)] and though the agency is in general terminated by a dissolution of partnership [*Watson* v. *Woodman* (6)] it may under special circumstances be treated as continuing where for instance the retirement of a partner is kept secret and payments of interest are made in the name of the firm, *In re Tucker* (7).

I agree with the judgment in *K. R.* v, *Firm* v *Sathayavada Sitharama Swami* (3), which deals fully with the English and Indian Statutes and decisions and which is entirely in accordance with my experience of the consciousness of the mercantile community and the course of business usually followed. The same view has subsequently been taken in *Lalta Prashad* v. *Babu Parshad* (4) and in *Abdulalli Badrudin* v. *Ranchodlal Trikamlal* (8) and in *Karmali Abdulla Allarkhia* v. *Bora Karimji* (9).

The question referred came on for hearing before the Full Bench on the 20th February 1918.

Mr. *V. Ramadoss*, for the Appellant.—Section 21 of the Limitation Act is general. To make an acknowledgment by a partner or contractor binding on his co-partner or co contractor, the section does not, in express terms, say that there should be direct evidence of the latter's authority. Such an insistence would work great hardship in commercial dealings. Applying the principles of section 251 of the Contract Act by which the acts of one partner generally bind his co-partners, it follows that acknowledgments by one partner bind the other partners in the absence of any specific understanding between them to the contrary. The wording of section 21 of the Limitation Act literally follows the corresponding provision in section 14 of the Mercantile Law Amendment Act of 1856, which has received a liberal judicial interpretation intending the requisites of proof to direct evidence of authority as well as to circumstances from which the authority may be inferred.

The cases in *Valasubramania Pillai* v. *Ramanat Lan Chettiar* (1) and *Sheik Mohideen Sahib* v *Official Assignee* (2) have been wrongly decided.

Mr. *T. Ramachandra Rao*, for the Respondent, argued *contra*.

OPINION.—In this case the two defendants carried on the business of timber merchants as a family business, they being father and son in an undivided Hindu family. They are sued on a debt which would be statute-barred in the absence of an acknowledgment, sufficient, within section 19 of the Limitation Act, to take it out of the Statute. There is such an acknowledgment, but it is only signed by the 1st defendant, the father, and the question is whether it can operate as against the son, the co-defendant, also.

The learned Judges who referred the case have propounded a question about the answer to which we feel no hesitation, but it is obviously referred to us because they felt a doubt as to whether the decisions in *Valasubramania Pillai* v. *Ramanathan Chettiar* (1) and *Sheik Mohideen Sahib* v. *Official Assignee* (2) did not preclude them from arriving at the conclusion which they clearly thought to be the right one.

(5) (1879) 41 L. T. 91.

(6) (1875) 20 Eq. 721; 45 L. J. Ch. 57; 24 W. R. 47.

(7) (1894) 3 Ch. 429; 63 L. J. Ch. 737; 12 R. 141; 71 L. T. 453.

(8) 38 Ind. Cas. 873; 19 Bom. L. R. 86 at p. 95.

(9) 26 Ind. Cas. 915; 17 M. L. T. 35; 2 L. W. 133; 17 Bom. L. R. 103; 19 C. W. N. 337; 13 A. L. J. 121; 21 C. L. J. 122; 28 M. L. J. 515; 39 B. 261; (1915) M. W. N. 606; 42 I. A. 48.

SRIPAT NARAIN RAI v. TIRBENI MISRA.

The exact question propounded is "whether in the absence of direct evidence that a co-contractor or partner has authorised his co-contractor or partner to make acknowledgments or payments saving limitation on his behalf, such authority can be inferred from other circumstances such as the position of the other co-contractors or partners in the business." Our answer is in the affirmative. We think that direct evidence of a specific authority to give acknowledgments is quite unnecessary, and that authority may be inferred from circumstances, though it is, of course, quite beyond our province to indicate what circumstances should, in our opinion, be deemed sufficient to warrant the inference. It is important to notice the exact wording of section 21 (2) of the Limitation Act. The section does not say that a person shall not be liable on acknowledgment signed by the partner by reason only of his being a partner but by reason only of a written acknowledgment signed by his partner; and it amounts to saying that if you have no more than a written acknowledgment signed by one defendant the fact that the other defendant is his partner cannot affect the latter's liability. You could obviously have a case where one partner signed an acknowledgment in respect of a gambling debt of his own; but for the sub-section proof of the acknowledgment would be sufficient to fix the other partner with liability, a conclusion manifestly repugnant both to sense and justice. We see nothing in the sub-section to make it necessary to suppose that it is intended to apply to transactions conducted in the ordinary Courts of partnership business. We need only refer to the general principle of law embodied in section 251 of the Contract Act that partners are the agents of one another and that their acts done in the ordinary course of the partnership business bind the partnership.

As regards the two decisions referred to, it is not quite easy to say whether they should properly be regarded as laying down as a condition of liability that there should be direct evidence of express authority to give acknowledgments. But at least one sentence in *Sheik Mohideen Sahib* v. *Official Assignee* (2) lends colour to that view. White, C. J., referring to the former decision in *Valasubramania Pillai* v. *Ramanathan Chettiar* (1), says: "Following the principle we here [*i. e.*, *Valasubramania Pillai* v. *Ramanathan Chettiar* (1)] lay down, we have to see in this case if there is evidence that the person who made the acknowledgment had authority to do so on behalf of his firm." Those words are capable of the construction that what is meant is direct evidence of specific authority, and they were obviously so regarded by the learned Judges who referred this question to us. If that be so, we have no hesitation in saying that they were wrongly decided and should no longer be regarded as law. Such a view is completely at variance with that taken by the other Courts of India and by the English Courts in their construction of the corresponding sections of the English Acts and would obviously put a premium on commercial dishonesty.

Answered in the affirmative.

M.C.P.

ALLAHABAD HIGH COURT.

EXECUTION SECOND APPEAL No. 686 OF 1917.

March 2, 1918.

Present:—Sir Henry Richards, Kt., Chief Justice, and Justice Sir P. C. Banerji, Kt.

SRIPAT NARAIN RAI—OPPOSITE PARTY—APPELLANT

versus

TIRBENI MISRA—PETITIONER—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 7, O. XXII, r. 6—Execution—Decree passed against deceased defendant, validity of—Decree, whether can be executed.

No Court can make a decree against a dead man, and a decree so made is a nullity. No question of the jurisdiction of the Court to make the decree arises in such a case. [p. 22, col. 1.]

It is a good answer to an application for execution against the alleged representatives of a judgment-debtor to show that the judgment-debtor was dead at the time the decree was made, and that such a decree is void and incapable of execution as against the deceased. [p. 22, col. 1.]

Execution second appeal from a decree

of the District Judge, Gorakhpur, reversing that of the Munsif, Bansgaon.

Mr. *Haribans Sahai*, for the Appellant.

Mr. *Iswar Saran*, for the Respondent.

JUDGMENT.—This appeal arises out of execution proceedings. It appears that a decree for pre-emption was obtained against three persons, one of whom was Bindeshri. It is alleged, and it is possibly correct, that all the three persons constituted a joint Hindu family. The question of jointness is not now before us. Bindeshri died and the present application was for execution against the surviving defendants and also against the sons of Bindeshri as his legal representatives. It was objected that Bindeshri had died before the decree was made. Having regard to the order of the Court below and to what happened when this case was before us on a previous occasion, we intend to deal with the case on the assumption that Bindeshri was dead at the time the decree was made against him. The lower Appellate Court has dismissed the application for execution as against the sons of Bindeshri as his legal representatives. This Court has held in the case of *Imdad Ali* v. *Jagan Lal* (1) that it is a good answer to an application for execution against the alleged representatives of a judgment-debtor to show that the judgment-debtor was dead at the time the decree was made, and that such a decree is void and incapable of execution as against the person so dead. This is an authority which we think we ought to follow, unless it can be shown that it is no longer law. It is contended that there has been a change in the new Code of Civil Procedure by the omission from Order XXI, rule 7, of the word "jurisdiction." We think that this alteration in no way modifies the authority of the case to which we have referred. No question of "jurisdiction" of the Court to make the decree arises because no Court can make a decree against a dead man; and a decree so made is a nullity. In this view we think the decision of the Court below was correct. It is suggested that as the family is joint it was sufficiently represented by the members of the family who were alive when the decree was made, and that it is unnecessary that the sons of Bindeshri should be named as judgment-debtors. A good deal might be said for this contention particularly if the pre-emption money is accepted by the joint family, but we have not to decide this matter in the present appeal. We express no opinion as to what the effect of the execution of the decree against the surviving defendants will be. But we think the Court below was justified in dismissing the application for the execution against the sons of Bindeshri *as his legal representatives*. The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 17 A. 478; A. W. N. (1895) 103; 8 Ind. Dec. (N. S.) 632.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1170 OF 1916.

November 14, 1917.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

TITTU GOPALACHARIAR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MAIYAPPA CHETTY AND OTHERS—DEFENDANTS—APPELLANTS.

Paper Currency Act (II of 1910), s. 26, scope of—Negotiable Instruments Act (XXVI of 1881), s. 19—Note or bill payable to bearer on endorsement of payee, whether payable 'on demand'—Evidence, admissibility in.

A bill or note which is payable to the bearer who brings it to the place of payment on the order of the payee, does not offend against section 26 of the Paper Currency Act and is an on demand note. The note is receivable in evidence and is one made in accordance with law. [p. 23, cols. 1 & 2; p. 24, col. 1.]

Chidambaram Chettiar v. *Ayyasami Thevan*, 36 Ind. Cas. 741; 40 M. 585; 31 M. L. J. 401; (1916) 2 M. W. N. 210; 4 L. W. 266; 20 M. L. T. 350 and *Nachimuthu Chetty* v. *Andiappa Pillai*, 42 Ind. Cas. 706, (1917) M. W. N. 778; 6 L. W. 630, explained.

A note which does not fix any date for payment is an 'on demand' note. Also a note will be construed as an 'on demand' note if it is so expressed. [p. 23, col. 2]

Per *Seshagiri Aiyar, J.*—The principle underlying section 26 of the Paper Currency Act is that private persons should not be permitted to usurp the privileges of the Government, for the latter alone have the right to get a note negotiated by bare presentation. The language of an ordinary

TITTU GOPALACHARIAR v. MAIYAPPA CHETTY.

currency note is what the Legislature intended should not be copied by private parties. [p. 23, cols. 1 & 2.]

Per *Napier, J.*—A bill of exchange is nonetheless payable on demand for the fact that the demand cannot be made on the day when the bill is drawn. [p. 24, col. 1.]

Second appeal against the decree of the District Court, Madura, in Appeal Suit No. 258 of 1914, preferred against the decree of the Court of the Additional District Munsif, Madura, in Original Suit No. 154 of 1913.

Mr. *K. V. Krishnasamy Ayyar*, for the Appellants.

Messrs. *K. R. Gurusamy Ayyar* and *A. Subbarama Ayyar*, for the Respondents.

JUDGMENT.

SESHAGIRI AIYAR, J.—The suit has been disposed of by the lower Courts on the pleadings and on the construction of the note annexed to the plaint. The learned District Judge says that as "it is a physical impossibility for it (the note) to have been paid on the day it was drawn," it was not a promissory note. The learned Vakil for the respondents said that he would not rest his case on this view of the District Judge. If I understand the learned Judge rightly, unless the payee and the drawer are face to face with each other, no promissory note can be made payable on demand. Whether it takes seven days to go to Penang or 24 hours from the place of execution to the place of payment, cannot matter if the view of the District Judge is correct that an 'on demand' is payable *eo instanti* and should be paid the moment payment is claimed. No authority is cited by the learned Judge for this proposition and neither I nor the learned Vakils are able to find any.

The real question is, what is the nature of the document. The translation made by the interpreter shows that the note is payable to the bearer who brings it to the place of payment on the order of the payee. It is clear, therefore, that there must be an endorsement by the payee. If this is the correct view of the document, it does not offend against section 26 of the Paper Currency Act. The principle underlying that section is that private persons should not be permitted to usurp the privileges of the Government. For they alone have the right to get a note negotiated by bare presentation. The language of an ordinary currency note is what the Legislature intended should not be copied by private parties. In *Chidambaram Chettiar* v. *Ayyasami Thevan* (1) and in *Nachimuthu Chetty* v. *Andiappa Pillai* (2) the language of the note was such that there was no necessity for an endorsement before payment can be demanded by the bearer of it, who is not the payee under it.

Mr. Gurusamy Ayyar then argued that the note postpones the payment of the amount due thereunder and is, therefore, obnoxious to section 19 of the Negotiable Instruments Act. In the first place, I am unable to accept this construction of the note. What it provides for is, for postponing the date on which interest shall accrue due on the note. I am not prepared to say that even the payment of interest is put off. A comparison of the English Bill of Exchange Act, section 10, with section 19 of the Indian Act shows that a note which does not fix any date for payment is an 'on demand' note. Also a note will be construed as an 'on demand' note, if it is so expressed. This is the clear meaning of section 10 of the English Act. Mr. Gurusamy Ayyar contended that even though a note may be made expressly payable on demand, if the time for the payment of interest or principal or both is put off, then the document is not a promissory note. The omission in the Indian Act to provide for cases of notes expressed to be payable on demand must be attributed not to any intention to depart from the English rule of law but to the view that if the expression is there, the Legislature need not provide for it specially.

Looking at the document from any point of view, the conclusion of the Courts below is wrong and we must reverse the decree of both the Courts below and remand the suit for disposal on the merits. Costs will abide the result.

NAPIER, J.—The objection raised by the District Judge is absolutely without any

(1) 36 Ind. Cas. 741; 40 M. 585; 31 M. L. J. 401; (1916) 2 M. W. N. 210; 4 L. W. 261; 20 M. L. T. 350.

(2) 42 Ind. Cas. 706; (1917) M. W. N. 778; 6 L. W. 630.

foundation. A bill of exchange is nonetheless payable on demand for the fact that the demand cannot be made on the day when the bill is drawn. There has been some discussion on the meaning of the document. The District Munsif and the translation department translated it in a way which appellant's Vakil contended was not correct. It has now been translated by the principal interpreter and my learned brother is satisfied that the translation is accurate. On the words as we have them now, it is clear that the payment of the bill is not postponed to a future date and that it is not payable to any holder without endorsement. It, therefore, does not require an *ad valorem* stamp and does not offend against section 26 of the Paper Currency Act, the effect of which is explained in *Chidambaram Chettiar* v. *Ayyasami Thevan* (1). The document is, therefore, both receivable in evidence and one made in accordance with law. The case will be remitted to the Court of the District Munsif for disposal. Costs will abide the result.

Case remanded.

M. C. P.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1737 OF 1916.

November 30, 1917.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

YAMAJALA SANJEVUDU—PLAINTIFF—APPELLANT

versus

NAKKA VENKADU AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), s. 335—Court sale—Resistance to possession by third party—Delivery, order for, to purchaser, without enquiry into merits, effect of—Non-enforcement of order within statutory period, effect of Suit for possession—Title based on sale certificate, whether liable to question—Estoppel—Civil Procedure Code (Act V of 1908), ss. 97, 99, 101—Evidence Act (I of 1872), s. 114.

An order under section 335, Civil Procedure Code of 1882, is final, if no suit is instituted questioning its correctness within a year, in the sense that it cannot be re-opened after a year, that is, in cases where the order upholds the auction-purchaser's right to possession, if there is an application for delivery within the time allowed by law, the party against whom the order is passed cannot be heard to say that he will not deliver possession as he has a better title. But where the order is unexecuted and the resister remains in possession, he is not estopped from pleading, in defence to a suit for possession, that the plaintiff has no title to recover. [p. 25, cols. 1 & 2.]

Fidaye Shikdar v. *Ozeeooddeen*, 7 W. R. 87, followed.

Achuta v. *Mammaru*, 10 M. 357; 3 Ind. Dec. (N. S.) 1002, *Mahamad* v. *Ayyapan*, 9 M. L. J. 131, distinguished.

The Civil Procedure Code of 1908 does not provide for the investigation of the claim of an objector who does not derive title under the judgment-debtor. The provision to that effect in section 335 of Act XIV of 1882 has not been reproduced in the new Code [p. 25, col. 1.]

Second appeal against the decree of the Temporary Subordinate Judge, Ellore, in Appeal Suit No. 113 of 1915, preferred against that of the Court of the District Munsif, Tanuku, in Original Suit No. 37 of 1912.

Mr. *P. Narayanmurthi*, for the Appellant.

Mr. *B. Narasimha Row*, for the Respondents.

JUDGMENT.—This is a suit by an auction-purchaser to recover possession. He applied in execution for possession, but was obstructed by defendants. The District Munsif passed the following order upon the application: "the counter-petitioner has no witnesses. It is not necessary to take evidence in this case. It is ordered that the property be delivered over to the petitioner at once. In case the counter-petitioners raise any further obstruction, they will be committed to jail". No attempt was made to obtain possession and we accept the finding of the Courts below that possession remained all along with the defendants. As more than 3 years had elapsed from the date of the order above referred to, the plaintiff brought this suit for possession basing his title on the sale certificate. The District Munsif held that the order for possession precluded the defendants from disputing plaintiff's title. On appeal, the Subordinate Judge held that the order for possession was not passed on investigation and that the defendants were not, therefore, estopped from showing that plaintiff acquired no title to the property. On the merits he found that the judgment-debtor, as whose property the suit site was sold, had no title to it at the time

of the auction sale and dismissed the suit.

We agree with his conclusion. Under section 335 of the old Code of Civil Procedure, the law provided for the investigation of the claim of an objector who did not derive title under the judgment-debtor. The present Code has abolished this provision. It was anomalous that the rights of a person who was no party to the suit should be concluded by summary proceedings in execution: and the Legislature has removed this anomaly in the present Code. But as the present case is governed by the old Code, we have to see whether the order passed against the defendants has the effect of preventing them from showing that their title is superior to that of the plaintiff. Section 335 by its last clause provides that "the party against whom such order is passed may institute a suit to establish the right which he claims to the present possession of the property; but, subject to the result of such suit, if any, the order shall be final" This can only mean that the particular order, if given effect to, should not be allowed to be re-opened after a year; that is to say, if there was any application for delivery of possession within the time allowed by law, the defendant could not be heard to say that he would not deliver possession as he had a better title than the plaintiff. But where the order remained unexecuted, and the defendant continued to be in possession, he is not estopped from pleading, in defence to a suit for possession, that the plaintiff has no title to recover. He is not disputing the order passed in execution which section 335 said was conclusive on him. He is contesting the plaintiff's right by proving that he has got a superior title. The decision in *Fidayi Shikdar* v. *Ozeecoddeen* (1) is on all fours with the present case and we think that it was rightly decided. Mr. Justice Sadasiva Aiyar expresses concurrence with the view taken in that case in *Ayyakutti Mankondan* v. *Periasami Koundan* (2). It is not necessary to consider the arguments addressed to us that the learned Judge is wrong in his view that where possession of a share is given by the order of the Court, that is not actual possession, we agree with him when he says that where the obstructor has not been dispossessed, the order does not conclude him in a subsequent suit from proving that the plaintiff has no title to sue.

As regards *Achuta* v. *Mammavu* (3) there was a finding that the objector had no title; consequently it was incumbent on him to sue to establish his title. In *Muhamod* v. *Ayyappan* (4) possession was given to the auction-purchaser which was not contested within a year. A subsequent suit by the objector based on title was disallowed apparently on the ground that the order as to possession which was carried into effect had to be vacated if the suit is to be decreed.

We think these authorities do not affect the present question. In our opinion the defendants whose possession was not disturbed by the order are entitled to sustain their right to continue in possession by proving that plaintiff's title is defective.

The decree of the lower Appellate Court is right and we dismiss the second appeal with costs.

Appeal dismissed.

M.C.P.

(1) 7 W. R. 87.
(2) 31 Ind. Cas. 615; 30 M. L. J. 404 at p. 411; 2 L. W. 1184.

(3) 10 M. 357; 3 Ind. Dec. (N. S.) 1002.
(4) 9 M. L. J. 131.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1115 OF 1915.

February 15, 1917.

Present:—Mr. Justice Fletcher and Mr. Justice Richardson.

LAKHI CHARAN SAHA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MOKAR ALI—DEFENDANT—RESPONDENT.

Bengal Revenue Sales Act (XI B. C. of 1859), s. 37—"Protected interests"—Bengal Tenancy Act (VIII B. C. of 1885), s. 21—Settled raiyat holding land at fixed ra

of rent under permanent lease, whether can acquire right of occupancy.

Contract or no contract, every *raiyat* who is a settled *raiyat* of a village and obtains a *raiyati* interest in other lands in that village acquires a right of occupancy in those other lands. Consequently, a settled *raiyat* of a village holding land within the village under the terms of a permanent lease at a fixed rate of rent has a right of occupancy in the land which is not annulled by a sale for arrears of revenue of the estate comprising the village.

Appeal against the decree of the Officiating Additional Subordinate Judge, Chittagong, dated the 10th February 1915, affirming that of the Munsif, Hathazari, dated the 23rd August 1913.

Bâbus *Dhirendra Lal Kastgir* and *Khitis Chandra Sen*, for the Appellants.

Moulvi *Abdul Jawwad*, for the Respondent.

JUDGMENT.

FLETCHER, J.—This is an appeal from a decision of the learned Officiating Additional Subordinate Judge of Chittagong, dated the 10th February 1915, affirming the decision of the Munsif of Hathazari. The suit was brought by the plaintiffs to recover *khas* possession of the land in dispute. The plaintiffs purchased a revenue paying estate which was sold for arrears of revenue under the provisions of Act XI of 1859. The question in this case is "has the contesting defendant a protected interest within the meaning of the proviso to section 37 of the Act"? The facts found are these :—*First* of all, it has been found that the contesting defendant is a settled *raiyat* of the village within the meaning of the Bengal Tenancy Act. *Secondly*, it has been found that he holds the land in suit which is in the same village as the village of which he is a settled *raiyat* under the terms of a permanent lease at a fixed rate of rent. Whatever may be the law as regards other classes of *raiyats*, it is quite clear on the terms of section 21 of the Bengal Tenancy Act that, contract or no contract, every *raiyat* who is a settled *raiyat* of a village and obtains a *raiyati* interest in other lands in that village acquires a right of occupancy in those other lands; and, if that is so, the present defendant seems to me clearly to have a right of occupancy in the land in dispute. If he has a right of occupancy, he comes clearly within the proviso to section 37 of Act XI of 1859, and has an interest which has not been annulled by the sale for arrears of revenue. In that view, I agree in the decision arrived at by the learned Judge of the lower Appellate Court. The present appeal, therefore, fails and must be dismissed with costs.

RICHARDSON, J.—I agree.

Appeal dismissed.

MADRAS HIGH COURT.

FULL BENCH.

SECOND CIVIL APPEAL No. 1177 OF 1916.

March 4, 1918.

Present:—Sir John Wallis, KT., Chief Justice, Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

PAZHAVATHIL MAVILAPUTHIA VEETIL CHINDAN NAMBIAR—DEFENDANT No. 1—APPELLANT

versus

KUNHI RAMAN NAMBIAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Malabar Law and usage—Karnavan, *appointment of senior* Anandravan *as, by family* Karar—*Removal of* karnavan, *suit for, maintainability of.*

Where the senior Anandravan in a Malabar Tarwad is appointed to the office of Karnavan by a family Karar whereunder the existing Karnavan renounces or is deprived of his office, a suit will lie to remove the Karnavan so appointed for misconduct. [p. 28, col. 2.]

Cheria Pangi Achan v. *Unnalachan*, 38 Ind. Cas. 513; (1917) M. W. N. 185; 5 L. W. 392; 32 M. L. J. 323; 21 M. L. T. 329, explained.

A family Karar to which all the adult members of a Tarwad are parties and by which a person is deprived of his status as Karnavan is not the same thing in the eye of the law as a unilateral act of relinquishment of his office by the Karnavan, though the result on his status as Karnavan may be the same. [p. 28, col. 2.]

PAZHAVATHIL MARILAPUTTIAH VEETIL CHINDAN NAMBIAR v. KUNHI RAMAN NAMBIAR.

Second appeal against the decree of the court of the Temporary Subordinate Judge, Tellicherry, in Appeal Suit No. 535 of 1913, preferred against the decree of the Court of the District Munsif, Taliparamba, in Original Suit No. 39 of 1910.

This second appeal coming on for hearing on the 3rd December 1917, upon perusing the grounds of appeal, the judgments and decrees of the lower Appellate Court and the Court of first instance and the material papers in the suit and upon hearing the arguments of Counsel on both sides, the Court (Seshagiri Aiyar and Napier, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH.—This is a suit to remove a Karnavan. The Courts below directed his removal. Mr. Anantakrishna Aiyar for the appellant contested the findings regarding the charges framed against the Karnavan. There is evidence to support the findings and we are not prepared to differ from the Courts below on these points. The next contention was that, even if the charges are proved, they are not serious enough to entail the removal of the Karnavan. One of them which relates to the assignment of a satisfied decree to the 16th defendant, the son of the Karnavan, to enable the said defendant to bring Tarwad properties to sale is a very serious one. Both the Courts below have found that the conduct of the Karnavan in this respect was fraudulent. Other charges also have been proved against him. They are all detailed in the judgments of the Courts below. We think that taking them all together, there is enough justification for the decree passed in the case.

Mr. Anantakrishna Aiyar relied on *Cheria Pangi Achan* v. *Unnalachan* (1) and contended that the suit was not maintainable, as the 1st defendant was not the *de jure* Karnavan, but was appointed to his position by a family Karar. The facts necessary to understand this contention are these:—The 3rd defendant (who has since died) was the senior in age and was the *de jure* Karnavan. He was removed by a Karar. Then the 2nd defendant, who is also now dead and who was next in age, was in management. During this period, the members of the Tarwad were dissatisfied with the way the affairs were being conducted. Therefore there was a family council and Exhibit B, dated the 17th May 1892, came into existence. All the members of the Tarwad were parties to that document. By its terms, the 2nd defendant was removed from the general management and the 1st defendant who was admittedly the senior Anandravan was constituted the Karnavan. The 2nd defendant was allowed to manage a family temple and to utilise the surplus income for his maintenance. The result of the Karar was that the 2nd defendant, the Karnavan, was substantially removed from his office and his duties were entrusted to the 1st defendant. As both the defendants were parties to this Karar, it was argued that the 2nd defendant must be deemed to have renounced his rights by his assenting to it. The decision in *Kenath Puthen Vettil Tavazhi* v. *Narayanan* (2), on which Mr. Ramachandra Aiyar relied, seems to enunciate the following propositions:—(*a*) the renunciation by a Karnavan is binding on the Tarwad and is irrevocable by him, (*b*) this renunciation may be by a unilateral act or by being a party to the contract by which his rights are superseded, and (*c*) by such renunciation, the next in age becomes the Karnavan *de jure*. Applying these conclusions to the present case, it may be said that the 1st defendant, who was the senior in age after the 2nd defendant, became the *de jure* Karnavan by virtue of the renunciation implied by the Karar. It is true that some powers which ought ordinarily to have been exercised by the Karnavan were entrusted to the 2nd defendant. This may be taken to have entailed some restrictions on the full powers of the 1st defendant. In other respects his rights as Karnavan were recognised and confirmed by the Karar. If this is the correct view of Exhibit B we think that a suit will lie to remove the 1st defendant. This conclusion is, in our opinion, not inconsistent with the decision in *Cheria Pangi Achan* v. *Unnalachan* (1). But Mr. Anantakrishna Aiyar argued that this decision is authority for the larger pro-

(1) 38 Ind. Cas. 513; (1917) M. W. N. 185; 5 L. W. 392; 32 M. L. J. 323; 21 M. L. T. 329.

(2) 28 M. 182; 14 M. L. J. 415 (F. B.)

position' that whenever a Karnavan is designated by a Karar, he is not liable to be removed by a suit. We express no opinion on the question whether, even though the Karar Karnavan is not the senior in age, a suit may not lie at the instance of some of the parties to the Karar to remove him. But we think that when a *de jure* Karnavan is recognised by the Karar, he does not acquire a higher status than that which he originally possessed. However the question raised is a very important one, affecting as it does the rights of management in numerous families in Malabar. We have, therefore, resolved to refer the following questions for the decision of the Full Bench:—

(*a*) Where a *de jure* Karnavan is a party to a family Karar by which his general rights as Karnavan, subject to some minor exceptions, are taken away, can he be said to have renounced his rights as Karnavan?

(*b*) When, under the above circumstances, the next in age to the Karnavan is recognised as the Karnavan by the Karar, whether a suit will not lie to remove him from the Karnavanship?

This second appeal came on for hearing in pursuance of the above Order of Reference before a Full Bench.

Mr. *C. V. Anantakrishna Aiyar*, for the Appellant, contended that the 1st defendant was not the *de jure* Karnavan as he was appointed to the office by the family Karar Exhibit B and as the 2nd defendant, the Karnavan, had not renounnced all his rights under the document, having been allowed by the Tarwad to manage a family temple, the 1st defendant could not be said to have all the unrestricted powers of a Karnavan. *Cheria Pangi Achan* v. *Unnalachan* (1) was authority for the proposition that no Karnavan appointed by a family Karar could be removed by suit.

Mr. *T. R. Ramachandra Aiyar*, for the Respondent, argued that as the 2nd defendant had substantially renounced all his rights under the Karar, the 1st defendant, who was the senior Anandravan and who was appointed to the office of Karnavan, became the *de jure* Karnavan and was, therefore, liable to be removed for misconduct. It was also urged that no distinction could be drawn in principle between a renunciation made by the unilateral act of a Karnavan and a renunciation under a contract to which he and the other members of the Tarwad were parties.

Mr. *Ananta Krishna Aiyar* replied.

OPINION.

SADASIVA AIYAR, J.—It is clear to my mind that the Karar Exhibit B dated in 1892 deprived the 2nd defendant of his Karnavastanam though with his consent and vested the office in the 1st defendant. The fact that the Tarwad (including the new Karnavan) gave the management of a temple and its income to the removed Karnavan did not affect the other results of the Karar, namely, the putting an end to the tenure of the second defendant's office as Karnavan and the appointment of the first defendant to the said office. The supersession of second defendant's rights by the family Karar cannot, of course, be affected by any subsequent unilateral act or expression of intention on his part.

The 1st defendant became not only the *de facto* Karnavan but also the *de jure* Karnavan under the Karar and he can, therefore, be removed by suit for gross misconduct.

As soon as a Karnavan ceases to be such by death or removal, the next in order of seniority becomes the Karnavan, and any family Karar binding on the person who has ceased to be the Karnavan ceases to have any effect on the new Karnavan, "except perhaps where he has himself agreed in that Karar to be bound by those restrictions whenever he succeeded to the Stanom." There is no scope for the framing of a scheme of management by a Court under those circumstances. This was all that I intended to express in *Cheria Pangi Achan* v. *Unnalachan* (1).

A family Karar to which all the adult members of a Tarwad are parties and by which a person is deprived of his status as Karnavan is not the same thing in the eye of the law as an unilateral act of relinquishment of his office by the Karnavan, though the result on his status as Karnavan may be the same.

I think that the question (*a*) referred to us does not arise for decision on the above view of the legal nature and effect of the family Karar Exhibit B and I would answer as regards question (*b*) that a suit will lie

to remove the Karnavan recognized as such by a family Karar.

WALLIS, C. J.—I agree.

SPENCER, J.—I agree.

Question (b) answered in the affirmative.

M.C.P.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 129 OF 1917.

February 5, 1918.

Present:—Mr. Justice Tudball and Mr. Justice Rafique.

MUHAMMAD FARZAND ALI—PLAINTIFF—APPLICANT

versus

RAHAT ALI AND OTHERS—DEFENDANTS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XLIV, r. 1—Appeal in forma pauperis—Application rejected—Applicant, whether entitled to pay Court-fee on appeal.

An application under Order XLIV, rule 1 of the Civil Procedure Code asking for leave to appeal *in forma pauperis* was rejected under the proviso to the rule. The applicant then filed a petition praying that he might be permitted to pay Court-fees on his memorandum of appeal. The petition was rejected on the ground that the appeal had already been dismissed:

Held, (1) that what was rejected under the proviso to Order XLIV, rule 1, was the application for permission to appeal *in forma pauperis*, and that the memorandum of appeal was still before the Court:

(2) that the Court refused to exercise its jurisdiction in not allowing the Court-fees to be paid on the memorandum of appeal.

Civil revision from an order of the District Judge, Meerut.

Mr. *Iqbal Ahmad*, for the Applicant.

Mr. *Uma Shankar Bajpai*, for Mr. *S. M. Sulaiman*, for the Opposite-Party.

JUDGMENT.—The present applicant brought a suit *in forma pauperis* for possession of certain property which had been mortgaged. He sought to recover possession without payment of any sum of money. On the 15th of July 1916 the Court gave a decree for redemption of the mortgage on payment of Rs. 4,301-3-2. On the 19th of August he filed an application under Order XLIV, rule 1, together with a memorandum of appeal as directed therein asking for permission to be allowed to appeal *in forma pauperis*. The Appellate Court directed further enquiry by the Court of first instance into the alleged pauperism and on the 15th of February, that Court reported that the applicant was a pauper. On the 17th of February 1917, the Court then took action under the proviso to rule 1 of Order XLIV. It examined the judgment and the decree and rejected the application under that proviso. Information of this was sent to the applicant by post and he received it on the 17th of March 1917. On the 20th of March 1917 the applicant filed a petition stating that he had received a post-card from the Court intimating that his application for permission had been rejected. He, therefore, prayed that he might be permitted to pay the Court-fee on his memorandum of appeal. On this the lower Court passed the following order:—"Yesterday the applicant filed a petition requesting to be allowed to deposit fees and to prosecute his appeal. His appeal was dismissed on the 17th of February last. I reject his petition." The Court, therefore, refused to exercise its jurisdiction in not allowing the Court-fees to be paid, under the impression that the appeal had been dismissed on the 17th of February. This is clearly wrong. The appeal had never been dismissed. The memorandum of appeal is still before the Court. On the 17th February what was rejected was the application for permission to appeal *in forma pauperis*. We think that in the circumstances the applicant should have been allowed to pay the Court-fees if he so wished, and we allow this application and direct the lower Court to allow this to be done. Any question of limitation that may arise will be decided by the Court in the usual way according to law. The Court below will fix a time within which the applicant will pay the Court-fees. In regard to the costs of this application, they will be costs in the cause and will abide the result.

Application allowed.

LAKSHMANAN CHETTY v. PALANIAPPA CHETTY.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION No. 245 OF 1918.

March 18, 1918.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Napier.

LAKSHMANAN CHETTY AND OTHERS—APPELLANTS—PETITIONERS

versus

P. P. V. PALANIAPPA CHETTY AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, rr. 5, 6—Appeal—Stay of execution, application for, pending disposal of appeal—Stay of sale—Powers of Appellate Court—Jurisdiction.

An Appellate Court has power, on an original petition presented to it, to direct stay of sale of immoveable property in execution of the decree under appeal before it. The inherent powers of the Appellate Court recognised by Order XLI, rule 5, Civil Procedure Code, are not cut down or limited by the special and exceptional power conferred on the executing Court by Order XLI, rule 6. *Kanniappan Chetti* v. *Manikavasagam Chetti*, 17 Ind. Cas. 763; 23 M. L. J. 677, dissented from.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue an order directing stay of further proceedings in execution of the decree by way of confirmation of sale in Original Suit No. 75 of 1914, on the file of the Court of the Temporary Subordinate Judge of Ramnad at Madura, pending the disposal of Appeal Suit No. 350 of 1917, preferred to the High Court against the decree of the Court of the Temporary Subordinate Judge, Ramnad at Madura, in Original Suit No. 102 of 1916.

Mr. *K. V. Krishnasami Ayyar*, for the Petitioners.

Mr. *K. Bashyam Ayyangar*, for the Respondents.

ORDER—As regards the preliminary objection that no petition under Order XLI, rule 5, of the Code of Civil Procedure lies in this Court in respect of a stay of sale of immoveable property, Wallis, C. J., and Hannay, J., doubted in Civil Miscellaneous Petition No. 1595 of 1914 (in Appeal against Order No. 175 of 1914) the soundness of the decision in *Kanniappan Chetti* v. *Manikavasagam Chetti* (1), which was quoted in support of the objection. We are inclined to go further and dissent (with great respect) from the decision in *Kanniappan Chetti* v. *Manikavasagam Chetti* (1). The inherent powers of the Appellate Court clearly recognised by Order XLI, rule 5, cannot be held to have been cut down or limited by the special and exceptional power conferred on the executing Court by Order XLI, rule 6, which rule seems to have been clearly intended in order that the executing Court might be compelled to exercise it in emergent cases for the benefit of the judgment-debtor [see also the pertinent observations of Mookerjee, J., in *Tribeni Sahu* v. *Bhagwat Bux* (2) and *Rama Prasad Ray* v. *Anukul Chandra* (3)]. We overrule the preliminary objection.

On the merits it is not the decree under appeal that is sought to be executed by the sale of immoveable property but another decree against the execution of which the decree under appeal refused to grant an injunction. The present petition is not for a temporary injunction but it is for stay of execution of the decree under appeal. The decree appealed against not being under execution Order XLI, rule 5, does not apply, and this petition is misconceived. It is, therefore, dismissed with costs.

Memorandum of costs will follow.

Appeal dismissed.

M. C. P.

(1) 17 Ind. Cas. 763; 23 M. L. J. 677.

(2) 34 C. 1037; 11 C. W. N. 1030; 6 C. L. J. 298 (F.B.).

(3) 27 Ind. Cas. 444; 20 C. L. J. 512.

ALAUDIN SAHEB v. SECRETARY OF STATE.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 390 OF 1911.

March 19, 1913.

Present:—Justice Sir Ralph Benson, KT., and Mr. Justice Sundara Aiyar.

ALAUDIN SAHEB AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, BY N. S. BRODIE, COLLECTOR OF NORTH ARCOT, AND OTHERS—DEFENDANTS—RESPONDENTS.

Madras Land Encroachment Act (III Mad. of 1905), s. 3

SHANKAR LAL *v.* RAM BABU.

—Pathway on private land, obstruction of, by owner—Penal assessment, levy of, legality of.

Government have no right under Madras Act III of 1905 to levy penal assessment where an owner of land obstructs a pathway over the land to which the public have acquired a right of user.

Second appeal against the decree of the District Court of North Arcot, in Appeal Suit No. 107 of 1909, preferred against the decree of the Court of the District Munsif, Vellore, in Original Suit No. 123 of 1907.

Mr. *G. C. Adam*, for the Appellant.

Mr. *C. F. Napier*, Government Pleader, for the Crown.

JUDGMENT.—The suit was for a declaration of the plaintiffs' absolute right to the sight of a pathway, free from any public right of way, to recover the penal assessment levied by Government on the footing that the pathway belonged to it and not to the plaintiff, and for an injunction to restrain Government from interfering with the plaintiffs' enjoyment of the pathway as their absolute property. Both the lower Courts have found that the public have been walking along the way as a matter of right and not with the plaintiffs' license as urged by them, and that the public have a right of way. The plaintiffs did not contend that the right of way was abandoned by the public and we cannot, therefore, allow the contention to be raised at this stage. It is then argued that the ownership of the pathway is in the plaintiffs, though the public may have a right of way, and that, therefore, Government had no right to levy penal assessment under Madras Act III of 1905. The District Judge's view that even in such a case penal assessment could be lawfully levied is not sound, as Act III of 1905 allows penal assessment only where Government property is encroached on. But the plaintiffs did not contend in the first Court that they were the owners of the pathway even if the public had a right of way. The question presented to the Munsif by the parties was whether the pathway belonged to the plaintiffs and the public walked along it only with their license, or whether the public did so because the pathway belonged to Government. A right of way in the public was taken to carry with it the right of ownership in the pathway on the part of Government. The point that the public might have a right of way as an easement should have been raised in the first Court, as it was one on which the parties would be entitled to adduce evidence. The Munsif, moreover, found that the plaintiffs failed to establish their ownership. The fact that the site is not marked in the survey plan as Poramboke he regarded as not conclusive. On the other hand, the Union metalled the pathway and built culverts so early as 1894 without any assertion of their ownership by the plaintiffs. We see no reason for not accepting the Munsif's finding that the plaintiffs' ownership of the site was not proved. We dismiss the second appeal with the costs of the first respondent.

Appeal dismissed.

M C.P.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 770 OF 1916.

March 7, 1918.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

SHANKAR LAL—PLAINTIFF—APPELLANT

versus

RAM BABU—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XX, r. 15—Partnership—Death of partner—Accounts, suit for, by surviving partner against representative of deceased partner, maintainability of.

The personal representative of a deceased partner is bound to give an account of what has been received on behalf of the partnership, but he will only be liable for the person he represents to the extent of the assets he receives. The mere fact that a minor representative is personally unable to give the accounts will not absolve him from the obligation of getting the accounts prepared by the persons who were conversant with what took place and what money was received and spent and who were acting either for the deceased partner during his life or for the minor and the estate of the partner after his death. [p. 32, col. 2.]

Where a surviving partner sued the representative of a deceased partner for accounts, alleging that a much larger sum in connection with the partnership business was received by the deceased partner's estate than the plaintiff had received and that there would be a balance payable to him upon taking accounts:

Held, (1) that the suit was maintainable; [p. 32, col. 2.]

(2) that the proper procedure for the Court was to pass a preliminary decree directing that

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each party should furnish an account of what had been received and what had been spent. [p. 32, col. 2.]

Second appeal from a decree of the District Judge, Agra, confirming a decree of Munsif of Agra.

Mr. *Kailas Nath Katju*, (with him Mr. *Shiam Krishna Dar*), for the Appellant.

Mr. *Mangal Prasad Bhargava*, for the Respondent.

JUDGMENT.—We think that both the Courts below have taken an extremely narrow and technical view of this case. It appears that one Puran Chand had a lease of the grass farm at Agra. He took into partnership the plaintiff. They were to provide the capital between them and to share in the profits. Puran Chand died. The plaintiff then instituted the present suit, alleging that he had received certain monies and that Puran Chand and after his death his minor son received further money in connection with the joint enterprise. He alleged that there was a much larger sum received by Puran Chand's estate than he had received and that there would be a balance payable to him upon taking accounts. He accordingly asked that the accounts should be taken. The Courts below have dismissed the suit, holding that it was not maintainable and that the minor could not be liable to render accounts. It seems to us (assuming the plaintiff's allegation to be true) that it would have been a very right and proper thing that the minor should have been ordered to render an account of the monies received by Puran Chand or after his death by his estate in respect of the enterprise. It is said that he (the plaintiff) ought to have claimed a definite sum. It is only after he knew what had been received by the other side and what expenses had been incurred that he would be in a position to name the sum that ought to be paid to him. The learned District Judge says that it will be most unfair that the plaintiff should escape rendering an account whilst the other side was ordered to render accounts. We cannot understand what there was to prevent the Courts below, if it was objected on behalf of the minor defendant that it was not admitted that the plaintiff had only received the sum he alleged, to have directed that he also should furnish an account of what he had received and what he had expended. We think that the personal representative of a deceased partner is bound to give an account of what has been received on behalf of the partnership. Of course the personal representative will only be liable for the person he represents, to the extent of the assets he receives. What we think the Court below ought to have done was to have passed the preliminary decree directing that each party should furnish an account of what has been received and what has been spent. These accounts after they have been filed can be accepted or objected to in the ordinary way and dealt with by the Court. It may be objected that the minor is unable to give the accounts. The mere fact that he is personally unable to give the accounts will not absolve him from the obligation of getting the accounts prepared by the persons who were conversant with what took place and what money was received and spent and who were acting either for Puran Chand during his life or for the minor and the estate of Puran Chand after his death. We allow the appeal, set aside the decree of both the Courts below and remand the case to the Court of first instance, through the lower Appellate Court, with directions to re-admit the suit in its original number and to proceed to deal with the same having regard to what we have said above. The Court can deal with the case as near as possible on the lines of the provisions of Order XX, rule 15, of the Code of Civil Procedure making a preliminary decree for an account. Costs here and heretofore will be costs in the cause.

Appeal allowed; Case remanded.

ABDUL KARIM *v.* MEHERUNESSA.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 68 OF 1917.

January 7, 1918.

Present:—Mr. Justice Richardson and Mr. Justice Beachcroft.

ABDUL KARIM—APPELLANT

versus

MEHERUNESSA DAUGHTER OF BAKTER BHUYA AND OTHERS—RESPONDENTS.

Compromise, whether binding on person not party to it Execution Sale set aside on compromise between auction-purchaser and mortgagee Surplus sale-proceeds taken away by judgment-debtor, whether liable to be refunded by order of Court on compromise — Appeal —Revision.

No one can be bound by a compromise to which he is not a party. [p. 33, col 2.]

After the sale of a *raiyati* holding in execution of a rent-decree, the mortgagee of the holding, who in execution of his mortgage-decree had purchased the holding, applied to have the sale set aside under the provisions of Order XXI, rule 90 of the Civil Procedure Code. A compromise was effected between him and the auction-purchaser of the holding and was given effect to by an order of the Court which was as follows :—

"The application for setting aside the sale is granted in terms of the *solenamah* and the sale is set aside. The judgment-debtors will deposit the surplus sale-proceeds taken by them at once for payment to the petitioner":

Held, that the order relating to the refund of the surplus sale-proceeds was not binding on the judgment-debtors who were no party to the compromise and was not capable of execution as against them, that there was no jurisdiction to make the order in the first instance and there was no jurisdiction to enforce it. [p. 34, col 1.]

Held, also, that no appeal lay to the High Court on behalf of the judgment-debtors but the matter was one for revision by the High Court. [p. 33, col 2.]

Appeal against the order of the District Judge, Noakhali, dated the 1st of December 1916, reversing that of the Munsif, 3rd Court at Sudharam, dated the 24th of July 1916.

FACTS of the case appear from the judgment.

Babu *Bhagirath Chandra Das*, for the Appellant.—The judgment-debtor not having been a party to the compromise effected between the mortgagee and the auction-purchaser, whatever order might have been made by the Court on that compromise would not be binding on him.

The application was merely for setting aside the sale under Order XXI, rule 90, Civil Procedure Code. On such application any order passed by the Court for paying back the money taken out from the Court by the judgment-debtor as surplus sale-proceeds was without jurisdiction and hence invalid and not binding upon the judgment debtor. There is, therefore, no jurisdiction to enforce the order which was passed without jurisdiction and was, therefore, inoperative.

Babu *Jatindra Kumar Sen Gupta*, for the Respondents.—By the compromise the sale was set aside and the order passed by the Court on such compromise directing the re-payment of the sum received by the judgment debtor from the Court as surplus sale proceeds is within jurisdiction.

Even assuming that the order for the refund of the surplus sale-proceeds was without jurisdiction, the order cannot be challenged in execution proceedings, because the executing Court cannot go behind that order as it stands. See *Kalipada Sirkar* v. *Harimohan Dalal* (1). When that order stands and is not set aside by suit, appeal or review as being null and void, the Court which is asked to execute that order cannot refuse execution on the ground that the order was made without jurisdiction.

Babu *Bhagirath Chandra Das*, in reply.

JUDGMENT.—The appeal and the Rule before us relate to the same matter. In my opinion no appeal lies in the present case and the matter must be dealt with under the Rule.

The whole question is covered by the simple proposition that no one can be bound by a compromise to which he was not a party. The compromise in the present case related to an execution sale which had taken place in the course of executing a decree for rent obtained by the landlord of a *raiyati* holding against his tenant. The holding was sold and was purchased by the auction-purchaser for Rs. 400. The landlord satisfied himself out of the money and the balance Rs. 353 and odd was taken by one of the judgment-debtors as the representative of the rest. Then the mortgagee, to whom the holding had previously been mortgaged and who had obtained a decree on the mortgage and had in execution of that decree purchased the holding, though he had never

(1) 35 Ind. Cas 856; 21 C. W. N. 1104; 24 C. L. J. 375; 44 C. 627.

received recognition from the landlord, came in and applied to have the sale set aside under the provisions of rule 90 of Order XXI. It was in connection with that application that the compromise in question was arrived at. The mortgagee came to an agreement with the auction-purchaser by which the sale was to be set aside on condition that the mortgagee paid to the auction purchaser the sum of Rs. 500 and the mortgagee was to be at liberty to recover the balance of the sale proceeds previously taken out by the representative of the judgment-debtors. Now, as between the mortgagee and the auction-purchaser that may be, and no doubt was, an entirely valid and binding agreement, but in the nature of things the compromise can have no binding effect upon the judgment-debtors who were no party to it. No doubt the order made upon the compromise was in the following form: "The application for setting aside the sale is granted in terms of the *solenamah* and the sale is set aside. The judgment-debtors will deposit the surplus sale-proceeds taken by them at once for payment to the petitioners." Some attempt has been made to argue as to the latter part of this order that it is in some way independent of the compromise. But obviously the order arose out of the compromise and depends upon the setting aside of the sale. What the mortgagee is attempting to do now is to execute that order against the judgment-debtors, that is to say, to execute as against the judgment-debtors an order founded upon and dependent upon a compromise to which they were not parties. The application was dismissed by the Munsif in the first Court, but on appeal the learned District Judge for reasons which I am unable to appreciate has made an order in favour of the mortgagee. In my opinion, whatever rights the mortgagee may have to the surplus sale-proceeds taken out of Court by the judgment-debtors or their representative, as to which we say nothing, he had no right to treat this order made on the compromise as an order binding on the judgment-debtors and capable of execution as against them. There was no jurisdiction to make the order in the first instance and there is now no jurisdiction to enforce it. In my opinion, therefore, the order of the learned District Judge on appeal must be set aside and that of the Munsif rejecting the application of the mortgagee must be restored. The petitioner will be entitled to his costs (of this Rule) and in the Court below. We assess the hearing fee in this Court at two gold *mohurs*.

The appeal is, therefore, dismissed and the Rule made absolute as above.

BEACHCROFT, J.—I agree.

Appeal dismissed; Rule made absolute.

ALLAHABAD HIGH COURT

CIVIL REVISION No. 183 OF 1917.

March 19, 1918.

Present:—Mr. Justice Tudball and Mr. Justice Abdul Raoof.

KALI CHARAN PANDE AND OTHERS—PLAINTIFFS—APPLICANTS

versus

GUPT NATH MISRA AND OTHERS—DEFENDANTS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), Sch. II, paras. 14, 15—Arbitration—Award by some out of several arbitrators, validity of.

The parties to a dispute referred it to six arbitrators agreeing that the verdict should be, if necessary, the verdict of the majority. The arbitrators recorded the evidence of the parties, but no decision was arrived at. Thereupon two of the arbitrators withdrew, and the remaining arbitrators, after notice to the defendants but in their absence, recorded afresh the evidence offered by the plaintiffs and gave an award:

Held, that the award, being based upon fresh proceedings and fresh evidence taken by four out of six arbitrators, was invalid and illegal. [p. 35, col. 1.]

Civil revision from an order of the District Judge, Allahabad.

Mr. *Uma Shankar Bajpai*, for the Applicants.

Mr. *Kailas Nath Katju*, for the Opposite Party.

JUDGMENT.—This is an application in revision arising out of arbitration proceedings. The facts briefly are as follows:—The parties to the dispute agreed to settle it by arbitration (out of Court). There was no suit pending. They referred their dispute to six arbitrators agreeing that the verdict should be, if necessary, the verdict of the majority. The arbitrators met on

the 10th of February 1915. The parties produced evidence which was recorded. The arbitrators again met on the 19th or 20th of February. They discussed the matter and apparently were soon divided into two groups in the opinions they expressed. No decision was arrived at, no award was drawn up. Two of the arbitrators withdrew from the arbitration and sent in notice to that effect. Thereupon the remaining four arbitrators again met on the 21st of March. Prior to that date notice was issued to the parties for that and was also sent to the defendants and their arbitrators. On that date the four arbitrators proceeded to take all the evidence afresh that the plaintiffs offered. The defendants were not present nor were their witnesses. One fact has to be noted, and that is that after the meeting of the 19th or 20th of February, one of the two arbitrators who withdrew, took away with him the record of the evidence which had been taken on the 10th of February. On the 21st of March, the four arbitrators after recording the evidence of the plaintiffs' witnesses on that date drew up an award and signed it. It was this award which the plaintiffs put forward in Court that it should be filed and a decree passed upon it. The Court of first instance granted the application. The lower Appellate Court held that this award, on the face of it and upon the facts stated, was an illegal award and set aside the order of the first Court. It seems to us in the first place that the order of the Court below was correct. The award of the 21st of March was not an award within the intention of the parties. It was based upon fresh proceedings and fresh evidence taken by four out of six arbitrators and it was not an award based upon the proceedings of the 10th of February and 19th or 20th of February. We can find no ground whatsoever for revision. The Court below was entitled to go into the matter and to see whether any of the grounds mentioned in paragraphs 14 and 15 of the Second Schedule of the Civil Procedure Code were proved. It went into the facts and held, as we have mentioned above, that the award was invalid and set aside the order of the first Court. We cannot find that the Court below acted illegally or with material irregularity in the circumstances of this case. There is, therefore, no force in the application. It is dismissed with costs.

Application dismissed.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 47 OF 1917.

September 12, 1917.

Present:—Sir John Wallis, Kt., Chief Justice, Mr. Justice Bakewell and Mr. Justice Kumaraswami Sastri.

ASHA BEEVI AND OTHERS—DEFENDANTS NOS. 5 TO 7—APPELLANTS

versus

S. K. M. KARUPPAN CHETTY—PLAINTIFF—RESPONDENT.

Muhammadan Law—Right of inheritance, renunciation or transfer of, before vesting, validity of.

A transfer or renunciation of the rights of inheritance by a Muhammadan before that right has vested in him is prohibited under the Muhammadan Law. [p. 36, col. 2.]

Musammat Khanum Jan v. *Musammat Jan Beebee*, 4 S. D. A. 210, followed.

Musammat Hurmut-ool-nissa Begum v. *Allahdia Khan*, 17 W. R. 108 (P. C.), explained.

Kunhi Mamod v. *Kunhi Moidin*, 19 M. 176; 6 M. L. J. 62; 6 Ind. Dec. (N. S.) 828 and *Mohammad Hashmat Ali* v. *Kaniz Fatima*, 27 Ind. Cas. 701; 13 A. L. J. 110, not approved.

Appeal, under clause 15 of the Letters Patent, against the judgment of Mr. Justice Sadasiva Aiyar, dated the 7th February 1917, in Second Appeal No. 1471 of 1915, reported as 41 Ind. Cas. 361, preferred against the decree of the Court of the Additional District Munsif, Sivaganga, in Original Suit No. 96 of 1913.

Messrs. *A. Krishnaswami Aiyar* and *E. Duraiswami Aiyar*, for the Appellants.

Mr. *C. V. Anantakrishna Aiyar*, for the Respondent.

JUDGMENT.—We agree with the conclusion arrived at by Mr. Justice Sadasiva Aiyar in this case on the ground that a transfer of an expectancy of this kind is not permitted by the Muhammadan Law. That was decided in accordance with the opinion of the numerous law officers consulted in *Musammat Khanum*

Jan v. *Musammat Jan Beebee* (1). Case No. 11 cited at page 89 of Macnaughten's Principles and Precedents of Muhammadan Law is to the same effect. This view has also been taken by the text-writers on Muhammadan Law (Sir Roland Wilson's Digest of Anglo-Muhammadan Law, page 268, and more particularly Volume II, pages 50 and 51 of the 3rd edition of Mr. Amir Ali's Muhammadan Law where the subject is more fully dealt with). Mr. Justice Tyabji's Principles of Muhammadan Law is to the same effect.

On the other hand reliance has been mainly placed on the decision of the Privy Council in *Musammat Hurmut oolnissa Begum* v. *Allahdia Khan* (2), by which Mr. Justice Spencer appears to have been mainly influenced in dissenting from the conclusion come to by Mr. Justice Sadasiva Aiyar. On examining that case we do not think that their Lordships intended to lay down that a Muhammadan could renounce his right of inheritance before that right had become vested on the death of the person to whom he was entitled to succeed. In that case there had been a very great delay in putting forward the plaintiff's claim to succeed as heir of the deceased and their Lordships observed at page 112: "They may further remark that according to the Muhammadan Law, there may be a renunciation of the right to inherit and that such a renunciation need not be expressed but may be implied from the ceasing or desisting from prosecuting a claim maintainable against another." Having regard to the words "right to inherit" and the words "prosecuting a claim", which claim would only arise after the succession had opened, we think that these observations of their Lordships may be taken as dealing with a renunciation after the right of inheritance has vested and are not authority for the proposition that a prior renunciation is authorised by the Muhammadan Law. Mr. Amir Ali in the passage referred to deals with renunciation after the inheritance has vested.

Reliance has also been placed on a decision of this Court reported in *Kunhi Mamod* v. *Kunhi Moidin* (3). That decision has been questioned by all the text-book writers who have since dealt with the subject. As pointed out in Wilson's book, the recital that all the law officers were not agreed in the case in *Musammat Khanum Jan* v. *Musammat Jan Beebee* (1) is not accurate. Further the respondent was not represented and, therefore, the case was not so fully argued. The learned Judges also proceeded upon the footing that the right of inheritance had vested. We are not prepared to accept this case as an authority for the proposition that under Muhammadan Law a right of inheritance can be renounced before it vests. The decision in *Musammat Khanum Jan* v. *Musammat Jan Beebee* (1) has since been referred to with approval by this Court in the judgment of Benson and Sundara Aiyar, JJ., reported as *Meerangani Rowther* v. *Karupathi Nagur Meera Lubbai* (4) and the same view appears to have been expressed by Sir Lawrence Jenkins, C. J., in *Sumsuddin* v. *Abdul Husein* (5), though the judgment in that case proceeded upon the construction of the provisions of the Transfer of Property Act. Reliance has also been placed upon the decision in *Mohammad Hashmat Ali* v. *Kaniz Fatima* (6), but there is no discussion of the authorities in that case.

On the whole, we think that there is a large preponderance of authority in favour of the view that a transfer or a renunciation of the right of inheritance before that right vests is prohibited under the Muhammadan Law. The rules of Muhammadan Law are not affected by the Transfer of Property Act and it is, therefore, unnecessary to consider whether this transfer or renunciation would not also be invalid under the provisions of section 6 of the Transfer of Property Act itself.

For these reasons the Letters Patent Appeal fails and is dismissed with costs.

Appeal dismissed.

M. C. P.

(1) 4 S. D. A. 210.
(2) 17 W. R. 108 P. C.).
(3) 19 M. 176; 6 M. L. J. 62; 6 Ind. Dec. (N. S.) 228.
(4) 18 Ind. Cas. 185; 24 M. L. J. 258; (1913) M. W. N. 371.
(5) 31 B. 165; 8 Bom. L. R. 781.
(6) 27 Ind. Cas. 701; 13 A. L. J. 110.

COLLECTOR OF MORADABAD *v.* MAQBUL-UL-RAHMAN.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No 138 OF 1916.

March 7, 1918.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

THE COLLECTOR OF MORADABAD AS MANAGER—PLAINTIFF—APPELLANT

versus

M. MAQBUL-UL-RAHMAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Registration Act (XVI of 1908), ss. 32, 33, 71, 73, 75, 87—Mortgage deed—Registration—Presentation by duly authorised agent—Refusal to register—Registrar's order to register—Presentation on behalf of Collector as Manager of Court of Wards, validity of.

A mortgage-deed was executed in favour of one *S* but before it could be registered *S* fell ill. Subsequently *S* executed a special power-of-attorney as required by section 33 of the Registration Act authorising one *N* to present the deed for registration on his behalf. Accordingly, within the period prescribed by law *N* presented the deed for registration and the Sub-Registrar made an endorsement on the deed certifying its presentation by *N* under a special power-of-attorney authenticated in his office. The mortgagor, however, failed to appear and the Sub-Registrar, therefore, refused to register the deed In the meantime *S* had died and his widow on behalf of his minor sons applied to the Registrar, who made an order under section 75 (1) of the Registration Act that the document should be registered. Within thirty days of this order the Collector in his official capacity as Manager of the Court of Wards, by whom the estate of the sons of *S* had been taken over for management, sent the deed to the Sub-Registrar with an official letter, enclosing also a certified copy of the order of the District Registrar. The Sub-Registrar on receipt of this communication took cognisance of the same as a presentation of the document, within the meaning of section 75, clause (2) of the Registration Act, and proceeded to register the document accordingly:

Held, (1) per *Piggott, J.*, that the endorsement on the deed by the Sub-Registrar that it was presented by *N* under a special power-of-attorney registered and duly authenticated in his office entitled the Court to assume that the Sub-Registrar acted in the proper and lawful exercise of his powers under the proviso to section 33 of the Registration Act, and that, therefore, the original presentation of the deed for registration by *N.* was a proper and valid presentation under section 32 of the Registration Act; [p. 38, cols. 1 & 2.]

(2) (*per Curiam*) that the procedure adopted by the Collector after the order of Registrar directing registration of the deed was a sufficient compliance with the requirements of section 75 (2) of the Registration Act; [p. 40, col. 1.]

(3) that even if the procedure was irregular, the irregularity was covered by section 87 of the Registration Act [p 40, col. 1.]

Per *Walsh, J.*—What happens after the Registrar's order under section 75 (1) of the Registration Act directing registration of a document is pure machinery. Any form of presentation, if it is supported by an application, which takes place on behalf of the presenter and is noted on the order in his favour, is sufficient for the purposes of clause (2) of section 75. [p. 42, col. 2.]

First appeal from the decree of the Additional Subordinate Judge, Moradabad, dated the 29th January 1916.

Mr. *A. E. Ryves*, for the Appellant.

Dr. *S. M. Sulaiman*, Dr. *Surendra Nath Sen* and Mr. *Gulzari Lal*, for the Respondents.

JUDGMENT.

PIGGOTT, J.—This was a suit on a mortgage, dated the 20th of November 1911. The persons impleaded are the mortgagor and certain subsequent transferees. The mortgage was in favour of one Sahu Parshadi Lal. The evidence shows that before registration of the document had been effected the mortgagee fell ill. It seems a fair matter of inference that the mortgagor endeavoured to take advantage of this fact to defeat the registration of the document. On the 3rd of February 1912 a special power-of-attorney of the kind spoken of in section 33 of the Registration Act (No. XVI of 1908) was registered at the office of the Sub Registrar of Moradabad, whereby the mortgagee Sahu Parshadi Lal purported to authorise a Pleader, named Pandit Nanak Chand, to present the mortgage of November the 20th, 1911, for registration on his behalf. Accordingly, on the 5th of February 1912, within the period prescribed by law, the mortgage deed in suit was presented for registration by the said Pandit Nanak Chand, purporting to act under the authority of the special power-of-attorney of the 3rd of February 1912. A question has been raised as to the validity of this presentation, and it is just as well to dispose of it at once. The learned Subordinate Judge who tried this suit seems to have thought that, whatever the facts may have been, the plaintiff had been remiss in the matter of producing satisfactory evidence and that the Court had before it no evidence from which it was entitled to infer that Pandit Nanak Chand did hold a valid power-of-attorney under the provisions of section 33 aforesaid, authorising him to present this document for registration. I think the decision of the Court below on this point is clearly wrong. The document in suit was presented for registration at the office of the Sub-Registrar of Moradabad, the very

same office in which the special power-of-attorney had been registered two days previously. In his endorsement on the deed in suit the Sub-Registrar certifies its presentation by Pandit Nanak Chand under a special power-of-attorney duly authenticated in his office. That certificate is evidence under the Registration Act of the truth of the facts therein stated. There is no reason whatever for presuming that it is in any way an incorrect statement of the facts. What has been contended before us is that the special power-of-attorney referred to in section 33 of the Registration Act requires, not merely to be authenticated by the Sub-Registrar, but to be executed before him. The argument is that the certificate above referred to does not specify that the document in question had been executed before the Sub-Registrar. Moreover it is suggested that, on the evidence as to the illness of Sahu Prashadi Lal, it is fairly certain that he did not appear personally before the Sub-Registrar on the 3rd of February 1912. Had he been able to appear in person at the Sub-Registrar's Office on that date, he would presumably have presented the mortgage of the 20th November 1911 himself. This argument, however, overlooks the proviso to section 33 of Act XVI of 1908. We may take it from the evidence that Sahu Parshadi Lal was suffering from bodily infirmity at the time. Indeed the argument addressed to us on behalf of the respondents on this point assumes that Sahu Parshadi Lal was in fact unable by reason of bodily infirmity to attend in person at the Sub-Registrar's Office. It was, therefore, open to the Sub-Registrar to attest the special power-of-attorney without requiring the personal attendance of the executant at his office, provided only that he satisfied himself that it had been voluntarily executed by the person purporting to be the principal. We have it from his certificate that the special power-of-attorney was not merely registered in his office but was duly authenticated by him. In this state of the evidence we are entitled to assume that the Sub-Registrar acted in the proper and lawful exercise of his powers under the proviso to section 33 aforesaid. I think, therefore, there can be no doubt that the original presentation of the document in suit for registration on the 5th of February 1912 was a proper and valid presentation under section 32 of Act XVI of 1908. The mortgagee Sahu Parshadi Lal died on the 8th of February 1912, a few days after the presentation of the document before the Sub-Registrar. The mortgagor, the executant of the said document, failed to appear before the Sub-Registrar to admit execution of the same. As I have already suggested, I see no reason to doubt that he was purposely keeping out of the way. The Sub-Registrar had no option but to treat the non-appearance of the executant as a denial of execution and to refuse registration on that ground. We know that he did so. This refusal gave rise to a right on the part of any person claiming under such document, or the representative of any such person, to apply to the Registrar to establish his right to have the document registered. We know that such an application was in fact made to the Registrar of Moradabad. It has been made a grievance on the part of the respondents in this Court that the evidence on the record does not show with certainty by whom this application was made. We have been informed that the application was made on behalf of the mother of the two minor sons of Sahu Parshadi Lal, acting as their natural guardian. It does not seem, however, in any way incumbent upon us to call for specific evidence on this point. We know that the Registrar had before him an application on which he proceeded to take action under the appropriate section of the Registration Act. He was satisfied that he had before him a valid application by, or on behalf of, a person entitled to make the same. I do not see that we are called upon to enquire into the precise nature of that application, especially in the absence of any specific plea that it was made by the particular person not authorised to make it. The proceedings before the Registrar resulted in an order by him, under the first clause of section 75 of Act XVI of 1908, whereby he ordered the document to be registered. In the meantime the estate of the minor sons of Sahu Parshadi Lal had been taken under the management of the Court of

Wards, and the Collector of Moradabad, in his official capacity as manager of the Court of Wards, became charged with looking after the interests of the minors in this matter. The Registrar's order for the registration of the document was dated June the 28th, 1912. Within the prescribed period of 30 days, that is to say, on the 23rd of July 1912, the Collector sent the document in suit to the Sub-Registrar with an official letter, enclosing also a certified copy of the order of the District Registrar. The Sub-Registrar on receipt of this communication took cognisance of the same as a presentation of the document, within the meaning of section 75, clause (2) of the Registration Act, and proceeded to register the document accordingly. The present suit was instituted on the 23rd of November 1914, the plaintiff being the Collector of Moradabad as Manager of the Court of Wards in charge of the estate of the two minor sons of Sahu Parshadi Lal. The defendants were the original mortgagor, who did not contest the suit, and a number of subsequent transferees. In the written statements filed by some of these men the plea was taken that the document sued upon had not been duly presented for registration within the requirements of the law, that its registration was consequently invalid and that it could not affect the property hypothecated. The Court below fixed a number of issues, but as between the plaintiff and the subsequent transferees it has tried out only the one issue as to the validity of the registration. Having come to a finding that the registration was invalid the learned Subordinate Judge has dismissed the plaintiff's claim altogether holding that, as a claim for a simple money debt against the original mortgagor, the suit would be barred by limitation.

The appeal before us raises simply the question of the validity of the registration. In the earlier portion of this order I have taken occasion to dispose of two points which were incidentally argued. There remains the main substantial point in the appeal, namely, whether the Sub-Registrar of Moradabad was right in treating this document as having been duly presented to him on the 23rd of July 1912, when he received it under cover of an official letter from the Collector of Moradabad. In dealing with this point I do not propose to refer to the numerous authorities which have been cited before us. The present case is clearly distinguishable on the facts from any of those authorities, in that it turns upon section 75, and not exclusively upon section 32, of the Registration Act. This was not a case in which the registration officers had never been lawfully seized of the document at all. There had been, as I have held, a valid presentation of the document in the first instance on the 5th of February 1912. Moreover, there was in existence a positive order by the District Registrar that the document be registered. The only question, therefore, is whether the procedure adopted in carrying out that order was such as wholly to invalidate the registration which followed, or was at most an irregularity of procedure on the part of the Sub-Registrar of Moradabad covered by section 87 of the Registration Act. The provisions of section 75, clause (2), of the Act are somewhat curiously worded. There is no such categorical imperative as is to be found in section 32, where it is laid down that, subject to certain exceptions, every document to be registered shall be presented by one or other of the persons described in the categories which follow. All that section 75, clause (2), does is to empower the registering officer to register the document, without such complete compliance as would otherwise be required with the provisions of sections 58, 59 and 60 of the Act, provided only it be duly presented to him within 30 days of the making of the Registrar's order. The controversy before us has turned on the expression "duly presented". The Sub-Registrar's duty, when he received this document on the 23rd of July 1912, was no doubt to satisfy himself that it was being presented to him by a person claiming under the document. If the Collector of Moradabad had presented himself in person at the office, the Sub-Registrar would presumably have taken the Collector's word for it that the estate of the minor sons of the deceased mortgagee was now in his charge as Manager of the Court of Wards and that he was entitled to prefer a claim under

the document on behalf of the said minors, or he might have satisfied himself on this point by a reference to the notification in the official Gazette. What he had before him was an official letter on the authority of the Collector of Moradabad, claiming to be in charge of the estate of the minors and to be entitled to present the document for registration. The argument that the Collector's failure to present this application in person is a fatal defect in the registration of the document seems to me open to a *reductio ad absurdum*. Whoever the messenger may have been who carried the document in question along with the Collector's letter to the office of the Sub Registrar of Moradabad, the Collector could have given him formal authority to present the document by the execution of a special power-of-attorney; that special power-of-attorney, being an instrument executed by the Collector in his official capacity, could have been registered on the strength of an official letter from the Collector without his personal attendance at the office under the provisions of section 88 of the Registration Act. On the principle that the greater includes the less it seems to be asking far less of the Sub-Registrar that he should take cognisance of the Collector's official signature and designation to a letter informing him of the Collector's interest in the document in suit and presenting it for registration, than to ask him to accept a similar letter as proof of the fact that a particular document, as for instance a power-of-attorney, had been executed by the Collector. Under the circumstances of the case I think we are not straining the law in holding that the presentation of this document made on the 23rd of July 1912 was a sufficient compliance with the requirements of section 75, clause (2), of the Act. Even if I do not think so, I should feel justified in regarding the action of the Sub-Registrar in taking cognisance of certain facts on the strength of an official letter received from the Collector of the District, without requiring the personal attendance of that officer before him, as at most a defect of procedure, curable by the provisions of section 87 of the Act. I hold, therefore, that the finding of the Court below that the document in suit is invalid as a mortgage for want of due registration is incorrect and must be reversed. Although certain other issues have been disposed of in the judgment under appeal, this was the main issue decided as between the plaintiff and the subsequent transferees and it was certainly a preliminary issue. As we have reversed the finding of the Court below on this point, I think the proper order to pass is that the decree of the Court below be set aside and the case returned to that Court for re-trial and disposal on the merits. We leave the costs of this appeal, which will include fees on the higher scale, to be costs in the cause.

WALSH, J.—I agree. I think the case of the respondents is an attempt to apply the *dicta* of the Privy Council to a situation in respect of which they were certainly not uttered and to which, I think, they are not applicable. I propose to cite authorities only for the purpose of showing the principles which have to be borne in mind and then to attempt to construe the somewhat complicated provisions in order to make them work, if possible, naturally and easily.

Now first with regard to the presentation by the Pleader on the 5th of February. By the endorsement that presentation purports to have been made under the authority of a special power-of-attorney duly authenticated in the registration office two days before. I feel a difficulty in applying the terms of section 60, sub-section (2), to that endorsement. The endorsement, it seems to me, is only evidence of the facts mentioned by it after the provisions of the section have been complied with and a certificate has been issued for registration. And, inasmuch as the very question which we have to decide is whether those provisions have been complied with as provided by section 60, it looks to me somewhat like begging the question to apply section 60, sub-section (2), to this endorsement. There is a further difficulty strongly relied upon in argument by Dr. Sulaiman that it is only evidence of the facts mentioned in the endorsement and the endorsement does not, it so happens in this case, mention the fact of the execution of the power-of-attorney. And, therefore, although I agree in the conclusion at which

my brother has arrived to be drawn from that endorsement, I do so for somewhat different reasons. I think it is in any case, apart from the provisions of the act, an instance of the sort of case to which the old maxim of *omnia præsumuntur rite et solemniter esse acta* ought to be applied, and that view seems to me to be supported by a passage in a case under this Act of a similar nature decided in the Privy Council as long ago as 1877. In that case * Sir Montague E. Smith delivering the judgment of their Lordships said: "If the High Court is to be understood to mean that in all cases where a registered deed is produced, it is open to the party objecting to the deed to contend that there was an improper registration, that the terms of the Registration Act in some substantial respects have not been complied with, their Lordships think this is too broadly stated. Undoubtedly, it would be a most inconvenient rule if it were to be laid down generally, that all Courts, upon the production of a deed which has the Registrar's endorsement of due registration, should be called on to inquire, before receiving it in evidence, whether the Registrar had properly performed his duty. Their Lordships think that this rule ought not to be thus broadly laid down. The registration is mainly required for the purpose of giving notoriety to the deed. . . If the registration could at any time, at whatever distance of time, be opened, parties would never know what to rely upon, or when they would be safe. If the Registrar refuses to register, there is at once a remedy by an appeal." Applying that general statement of principle to the endorsement on a deed of the alleged authentication before the Registrar of a power-of-attorney under which a person presenting the deed for registration purported to act, I think, in the absence of either a finding or of evidence to the contrary, and there is a total absence of either in this case, we are entitled to assume that when the Registrar endorsed on the deed the due authentication in his office of the power-of-attorney he meant that it was a power-of-attorney which had been properly executed and authenticated before him in accordance with law. And I, therefore, agree with my brother that the case of the respondents with regard to the presentation of the 5th of February breaks down. We, therefore, start with this, that the document in question was presented at the Sub Registrar's Office for registration in accordance with the requirements of the law which, the Privy Council in a passage which I propose to cite has said, "it is the duty of Courts of India to see carried out." The guiding principle recognised more than once by the Privy Council and reiterated by decisions in this Court is to be found in the headnote to the decision in *Mujib-un-nisa* v. *Abdur Rahim* (1): "The power and jurisdiction of the Registrar only arises when he is invoked by a person in direct relation to the document." And the necessity of guarding against opening the door even to trivial breaches of these requirements has been recently enforced by the judgment of their Lordships delivered by Sir John Edge in *Jambu Parshad* v. *Muhammad Nawab Aftab Ali* (2): "It is the duty of Courts of India not to allow the imperative provisions of the Act to be defeated when, as in this case, it is proved that an agent who presented a document for registration had not been duly authorised in the manner prescribed by the Act to present it." I would only add that a perusal of the judgment of the High Court in that case delivered by Griffin, J., shows that there was positive evidence and a finding of fact negativing the strict compliance with the requirements of the Act.

These cases are decisions, as my brother has pointed out, under sections 32, 33 and 34 of the Act. And, as my brother has already pointed out, there is in the provision about presentation in section 75, to which I propose to refer in a moment, an absence of that imperative language which Sir John Edge refers to in the passage I have quoted. This brings me to the question of the second presentation, namely, of the 23rd of July by the Collector through a letter after various incidents including the death of the mortgagee had occurred and a proceeding

* See *Muhammad Ewaz* v. *Birj Lal*, 1 A. 465; 4 I. A. 166—*Ed.*

(1) 23 A. 233; 5 C. W. N. 177; 28 I. A. 15; 11 M L. J. 58; 3 Bom. L. R. 114; 7 Sar. P. C. J. 829 (P. C.).

(2) 28 Ind Cas. 422; 37 A. 49 at p 56; 19 C. W. N. 282; 13 A. L. J 129; 17 M. L. T. 148; 21 C. L. J. 218; 2 L. W. 277; 28 M. L J. 577; 17 Bom. L. R. 413 (1915) M. W. N. 593; 42 I. A. 22 (P. C.)

had taken place before the Registrar. The receipt of that letter was carefully endorsed by the Sub-Registrar on the deed on the same day, and the second point which we have to decide—and it is really the great difficulty in the case—is whether there was a due presentation of that deed in accordance with section 75. I have come to the conclusion that there was, very largely for this reason. I think Part VI and Part XII of the Act deal with totally different circumstances and contemplate a totally different situation, and that the fallacy underlying the respondent's argument is an attempt to introduce into Part XII considerations bearing upon interpretation which are really only applicable to Part VI. The contrast between the two parts is really significant. Part VI is a collection of sections, and they are those on which the decisions of High Courts and Privy Council have been mainly given, dealing solely with "of presenting documents for registration." Part XII is also self-contained and deals with a situation created by what is called "of refusal to register", we have to deal with a case of refusal to register and of another kind of presentation in consequence of the proceedings rendered necessary by such refusal. Section 71 (2) says that "no Registering Officer shall accept for registration a document endorsed with a refusal unless and until, under the provisions hereinafter contained, the document is directed to be registered." Section 72, so far as there is anything before us in the case at present, does not apply but I refer to it for one rather important fact. The word "presented" occurs in it, namely, that an appeal may be heard from the order of the Sub-Registrar if presented to the Registrar within 30 days. It could hardly be contended that that presentation must be of the strict personal character which is obviously intended by Part VI of the Act and, therefore, we find in the part of the Act which we have to construe that the word "presented" is used in what I may call a more elastic sense. Section 73 deals with the right of the party who desires to secure registration where the Sub-Registrar refuses on the ground of the denial of execution. That right is to apply to the Registrar to establish his right to have the document registered. Section 74 provides for an enquiry before the Registrar as the result of such application into (*a*) the execution, (*b*) the compliance with the requirements of the law. As regards "presenting" it clearly refers to such presentation as is dealt with by Part VI "so as to entitle the document to registration." And in connection with such enquiry section 75 (4) enables the Registrar to summon and enforce the attendance of witnesses to compel them to give evidence as if he were a Civil Court and to deal with costs which are made recoverable as if they had been awarded in a suit under the Code of Civil Procedure. In my view that proceeding is a judicial proceeding and was intended by the Legislature to be a judicial proceeding, the ordinary penalty for failure in which was visited on the unsuccessful party in the way such penalties are. And to my mind, therefore, the questions of the due execution, the due authorisation of the person presenting, and the due presentation, when such an enquiry has taken place, are decided, and disposed of for the purpose of the immediate question of registration or non-registration in a final order. The result of the Registrar's order, if in the affirmative, is to establish the right of the person to have the document registered and to entitle the document to registration, and the form of his order is an order that it shall be registered. To my mind, though I feel difficulty and hesitation about it, it would be to attribute totally superfluous particularity to the Legislature if one were to hold that these provisions in section 75 superimpose upon that solemn proceeding and final decision a duty, upon the person who desires merely to carry out the order of the Registrar, of performing the strict formalities which are necessary and repeatedly held by the Privy Council to be necessary before the registration by the Registrar has taken place. To my mind what happens after the Registrar's order as provided by section 75 is pure machinery. Any form of presentation, if it is backed up by an application which takes place on the part of the presenter and is noted on the order in his favour, is sufficient. And even if it were not, I agree with my brother that section 87

covers the case. And if some other form of presentation is intended the mistake is merely a defect in procedure. I, therefore, agree that this decision cannot stand and that the case is not covered by any of the authorities cited to us.

I want to add one word with regard to the way in which the case has been dealt with. As I have often said, it is in the interests of the Courts themselves, and what is far more important, in the interests of the litigants, that in a case of this description, where the evidence has in fact been taken and both sides have done all that they are able or likely to be able to do before the trial Court, and the Court, when it sits down to review the whole case and write its judgment, finds that there is some point which in its opinion enables it to dismiss the case, it should go on to dispose of all of the issues which have been dealt with in evidence and argued at the Bar before it. It is just as easy and there is no better time than when the hearing of the case is fresh in the recollection of the Court. Nobody is infallible and in a difficult case of this kind it is not unlikely that the Appellate Court may take a different view of the law and, therefore, it is of the highest importance that the Courts with these points before them should go on to complete the whole case and come to a conclusion upon the merits.

The real question in this case is whether there is anything to show that these two infant children, whom the Court of Wards represents as plaintiffs, are to be deprived of the fruits of the contract entered into by their father. And here are we sitting in this Court with all the evidence material to that point already given on both sides in the Court below, and if findings had been arrived at by the Court below, fully equipped for disposing of the case upon the merits, compelled to send the case back practically for a re-hearing, probably before another Judge, two years at least after the original hearing of the suit. It is suggested that even after that has taken place and it has come to this Court again, there might still be an appeal to the Privy Council on the main question of registration. All these proceedings have a tendency to prolong to an unspeakable extent the decision of a comparatively trivial dispute and to accumulate the expenditure of costs out of all proportion to the issues involved. Of course where there is a preliminary point, it is a totally different matter, *viz.*, as to whether a heavy appeal has been presented out of time. No doubt it is necessary to decide as a preliminary matter whether the Court is competent to hear it at all. When everything has been done to enable the trial Court to dispose of a case, I think it is a great misfortune, and it happens a great deal too often, that the Judge gets rid of it by disposing of some legal technicalities raised by one of the parties and leaving the merits wholly untouched. I agree with my brother that this is a preliminary point and that the proper order is the one that has been passed.

BY THE COURT.—We set aside the decree of the Court below and remand the case to that Court under Order XLI, rule 23, of the Code of Civil Procedure for re-trial and disposal on the merits. We leave the costs of this appeal, which will include fees on the higher scale, to be costs in the cause.

Decree set aside;
Case remanded.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 252 OF 1913.

August 22, 1917.

Present.—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Walmsley.

SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—APPELLANT

versus

DIGAMBAR NANDA—PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII B. C. of 1885), *ss. 5,* 104H *—Landlord and tenant—Tenant, status of—Tenure or raiyati interest - S.* 104H, *scope of suit under.*

The mere fact that a tenant has sub-let his land is not decisive of the question whether he is a tenure-holder or a *raiyat.* [p. 44, col. 2; p. 45, col. 1.]

The test to be applied to determine the status of a tenant is the purpose for which the right of tenancy was originally acquired. [p. 45, col. 1.]

SECRETARY OF STATE FOR INDIA *v.* DIGAMBAR NANDA.

The statutory presumption under sub-section 5 of section 5 of the Bengal Tenancy Act has no application when the terms of the original grant of a tenancy are known. [p. 45, col. 1.]

In cases where the origin of the tenancy is unknown or where the terms of the grant are ambiguous, the mode of user of the land and the evidence of the subsequent conduct of the parties may furnish a valuable clue to determine the original purpose of the tenancy. [p. 45, cols. 1 & 2.]

In a suit under section 104H, Bengal Tenancy Act it is not sufficient for the Court to hold that the entry in the settlement rent roll as to the status or the rent is erroneous. The Court must affirmatively determine the exact conditions and incidents of the tenancy as also the rent to be settled on such basis. [p. 46, col. 1.]

Where an *amalnamah*, which sanctioned the entry of the tenant on the land demised, recited that the *mauzas* as mentioned therein were settled with the tenant for bringing them under cultivation and directed him to extirpate wild beasts and by clearing out jungles and raising embankments at his own expense to carry on cultivation and tillage and enjoy the crops thereof, and the regular lease which followed did not indicate any intention to alter the nature of the tenancy, but authorised the grantee to continue to enjoy the profits of the land by bringing it under cultivation either by himself or by making settlement with tenants for a term of nineteen years at a progressive rate of rent:

Held, that notwithstanding the land settled exceeded 2,000 *bighas* in area the settlement was of a *raiyati* holding and not of a tenure. [p. 44, col. 2.]

Appeal against the decree of the Subordinate Judge, Midnapur, dated the 27th March 1913.

Babu *Ram Charan Mitra*, for the Appellant.

Mr. *B. Chakrabarty*, and Babus *Shib Chunder Palit*, *Khirod Narayan Bhuiya* and *Dhirendra Krishna Roy*, for the Respondent.

JUDGMENT.—This is an appeal by the Secretary of State for India in Council in a suit instituted by the respondent under section 104H of the Bengal Tenancy Act for declaration that he is an occupancy *raiyat* in respect of the subject-matter of the litigation and for incidental reliefs. The Subordinate Judge has decreed the suit and has held that the plaintiff is not a tenure-holder but an occupancy *raiyat* and that the existing rent which the plaintiff was liable to pay before the last survey and settlement proceedings was fair and equitable. The substantial question in controversy, consequently, is whether the plaintiff is an occupancy *raiyat* as he alleges, or whether he is a tenure-holder as recorded by the Revenue Authorities. The root of the title of the plaintiff is an *amalnamah* granted on the 19th June 1868 to his father by Lal Chand Bhuia, the then settlement-holder under the Government. This document recites that the *mauzas* mentioned were settled with the grantee for bringing them under cultivation, and it specially directs the grantee to extirpate wild beasts and by clearing out jungle and raising embankments at his own expense to carry on cultivation and tillage and enjoy the crops thereof. The express purpose of the grant consequently was reclamation and cultivation of the leasehold lands by the grantee. No rent was settled at the time but the *amalnamah* recites that a *pattah* would be granted at the proper rent in the following year. On the 14th June 1869, the grantor executed a *pattah* in favour of the grantee. This instrument recites that, on the strength of the *amalnamah*, Bholanath Narda had taken possession of land exceeding two thousand *bighas* in area and that he had at his own expense commenced to reclaim jungles, to raise embankments and to cultivate the lands. The settlement was made for a term of 19 years for carrying on cultivation at a progressive rate of rent. The document further authorised the grantee to continue to enjoy the profits of the lands by bringing them under cultivation either by himself or by making settlement with tenants, and a covenant was inserted to the effect that if the grantee did not cultivate the lands fit for cultivation within the term of the lease, he would be liable to compensation for loss that might be sustained by the grantor. In our opinion, this document leaves no room for doubt that the settlement was of a *raiyati* holding and not of a tenure. The *amalnamah* was expressly granted for the purpose of reclamation and cultivation by the grantee, and the regular lease which followed did not indicate any intention to alter the nature of the tenancy. Stress has been laid, however, on the circumstance that under the lease the grantee was authorised to cultivate the land, either by himself or by making settlement with tenants. This clause obviously does not show conclusively that the tenant was a tenure-holder and not a *raiyat*. A tenure-holder may settle a *raiyat* on the land of his tenancy, and, a *raiyat* also may, in his turn, sub-let the land of his holding to an under-*raiyat*. Consequently, the mere fact that a tenant

has sub-let his land does not by itself establish conclusively that his status is that of a tenure-holder, and not that of a *raiyat*. The test to be applied to determine the status of a tenant is the intention of the contracting parties. Section 5, sub-section (1), of the Bengal Tenancy Act defines a "tenure-holder" to mean primarily a person who has acquired from a proprietor or from another tenure-holder a right to hold land for the purpose of collecting rent or bringing it under cultivation by establishing tenants on it. Sub-section (2) of section 5 defines "raiyat" to mean primarily a person who has acquired such a right to hold land for the purpose of cultivating it by himself or by members of his family or by hired servants or with the aid of partners. Sub section (3) further provides that a person shall not be deemed to be a *raiyat* unless he holds lands either immediately under a proprietor or immediately under a tenure-holder. These definitions show that there may be a tenure holder directly under a proprietor as there may be a *raiyat* directly under a proprietor. The test to be applied in each case is furnished by section 5, sub-section (4), namely, the purpose for which the right of tenancy was originally acquired. Sub-section (5) formulates a rebuttable presumption, namely, that where the area held by the tenant exceeds one hundred standard *bighas*, the tenant shall be presumed to be a tenure-holder until the contrary is shown. There is no room, however, for the application of this statutory presumption when the terms of the original grant are known, as in the case before us. To ascertain the status of the plaintiff, we must consequently determine the purpose for which the tenancy was originally created; did the grantor intend to carve out the interest of a middleman or did he intend to settle the land with a person who would bring the lands under cultivation? The mere fact that the plaintiff has sub-let the land is not decisive, because a tenure-holder, though a middleman who collects rent, may yet cultivate a portion of the land himself, just as much as a *raiyat*, though himself a cultivator, may settle a portion of the land with under-*raiyats*. In cases where the origin of the tenancy is unknown, the mode of user of the land may furnish a valuable clue to determine the original purpose of the tenancy, and where the terms of the grant are ambiguous, evidence of conduct subsequent of the parties may also be admissible: *Pramotha Nath Kumar* v. *Nilmoni Kumar* (1), *Promoda Nath Roy* v. *Asir-ud-din* (2), *Bamapada Roy* v. *Midnapur Zemindary Co.* (3). The case before us, however, is free from the difficulty which arises when the terms of the original grant are either unknown or ambiguous. Here the *amalnamah*, which sanctioned the entry of the grantee on the land demised and the lease which followed, makes it plain beyond controversy that the purpose of the settlement was reclamation and cultivation by the grantee himself. The interest created was consequently that of a *raiyat* and not that of a tenure-holder. In this view, it is needless to consider the conduct of the parties. But we may observe that the judgment of the Subordinate Judge shows, and his view is amply sustained by the materials on the record, that the Settlement Authorities have, from time to time, regarded the plaintiff and his predecessor, not as tenure-holders, but as *raiyat* entitled to a right of occupancy. Stress was laid by the appellant on the decisions in *Secretary of State for India* v. *Jadav Chandra Misra* (4) and *Secretary of State for India* v. *Gobinda Prasad Barik* (5). No useful purpose would, however, be served by an analysis of decisions given on entirely different sets of circumstances, and we may usefully recall the emphatic protest of Lord Haldane, L. C., in the case of *Kreglinger* v. *New Patagonia Meat and Cold Storage Co.* (6), against the abuse of judicial precedents, when they are cited, not as authorities for principles enunciated therein, but as guides in the determination of the rights of parties which are dependent on the facts of individual cases, and the contractual obligations enforceable between them. We must accordingly confirm the findings of the Subordinate Judge that

(1) 10 Ind. Cas. 431; 14 C. L. J. 38; 15 C. W. N. 902.
(2) 11 Ind. Cas 262; 15 C. W. N. 896.
(3) 16 Ind. Cas. 876; 16 C L J. 322.
(4) 39 Ind. Cas. 404; 21 C. W. N. 452.
(5) 39 Ind. Cas. 934; 21 C. W. N 505.
(6) (1914 A. C. 25 at p. 40; 83 L. J. Ch. 79; 109 L. T. 802; 58 S. J. 97; 30 T. L. R. 114.

the plaintiff is a *raiyat* and not a tenure-holder.

The next question which requires examination is, is the plaintiff an occupancy or a non-occupancy *raiyat*, and what is the fair rent assessable on the lands in suit according to his status? In the Court below, it appears to have been assumed that if the plaintiff was not a tenure-holder as found by the Revenue Authorities, he must be an occupancy *raiyat*. This, however, does not necessarily follow. Indeed, it has been argued before us that after the creation of the holding, the plaintiff was for a period an Ijaradar, and that this circumstance interrupted the growth and perfection of the right of occupancy. This is an aspect of the matter which has not been fully investigated. Besides this, the question of the fair rent payable by the plaintiff must depend upon his precise status, and till that has been determined with accuracy, it is impossible to ascertain the amount of rent to be settled. In a suit under section 104H, it is not sufficient for the Court to hold that the entry in the settlement rent roll as to the status or the rent is erroneous. The Court must affirmatively determine the exact conditions and incidents of the tenancy as also the rent to be settled on such basis; this is obvious, as under sub-section (7), the rent settled by the Court is deemed to have been duly settled in place of the rent entered in the settlement rent roll. It is consequently impossible to affirm the decree of the Subordinate Judge, although we hold that his view that the plaintiff is not a tenure holder is correct.

The result is that this appeal must be allowed and the decree of the Court below set aside. The decree of this Court will declare that the status of the plaintiff is that of a *raiyat* and the case will be remitted to the Subordinate Judge, to determine whether the plaintiff is an occupancy *raiyat* or a non-occupancy *raiyat* and then to ascertain the fair rent payable by him. The plaintiff will have half his costs both here and in the Court below. The costs after remand will abide the result.

Appeal allowed.
Case remanded.

MADRAS HIGH COURT.
FULL BENCH.

SECOND CIVIL APPEAL No. 1288 OF 1916.
March 13, 1918.

Present:—Sir John Wallis, KT., Chief Justice, Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

ARAMPROTH ILLOTH VASUDEVAN MOOSAD, KARNAVAN AND MANAGER OF HIS ILLOM—DEFENDANT No. 1—APPELLANT

versus

KATTADI MOOTHEDATH ITTIRARICHAN NAIR—PLAINTIFF—RESPONDENT.

Malabar Law and Usage—Otti mortgagee, right of pre-emption of—Involuntary sale, enforceability of right in—Notice of sale and of sale price, whether necessary—Civil Procedure Code (Act V of 1908), ss. 60, 65, O. XXI, rr. 89, 90, 91, 92.

The right of pre-emption of an *otti* mortgagee in Malabar does not arise in the case of an involuntary sale, and he is not entitled to notice of the sale or of the sale price in such a case.

Baij Nath v. *Sital Singh*, 13 A. 224; A. W. N. (1891) 68; 7 Ind. Dec. (N. S.), 141, approved.

Second appeal against the decree of the District Court of South Malabar, in Appeal Suit No. 789 of 1915, preferred against the decree of the Court of the First Additional District Munsif, Calicut, in Original Suit No. 844 of 1914.

This second appeal coming on for hearing on the 5th of December 1917, upon perusing the grounds of appeal, the judgments and decrees of the lower Appellate Court and the Court of first instance, and the material papers in the suit, and upon hearing the arguments of Messrs. *C. V. Anantha Krishna Aiyar* and *K. P. Ramakrishna Aiyar* for the Appellant and of Mr. *C. Madhavan Nair* for the Respondent, and the case having stood over for consideration till the 11th December 1917, the Court (Ayling and Philips, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH.

PHILLIPS, J.—In this case the plaintiff is an *ottidar* of the plaint property. The *jenmi* granted a second mortgage, and in execution of a decree upon that mortgage 1st defendant's brother purchased the property subject to plaintiff's *otti* right. First defendant then sued for redemption of

the *otti* and obtained a decree. Plaintiff now sues to enforce his right of pre-emption. The question for consideration is the nature of the rights of an *ottidar*, when the property, over which he holds the *otti*, is sold in Court auction.

In *Cheria Krishnan* v. *Vishnu* (1) it was held that an *otti* mortgagee was entitled "to be fully informed what price he is to pay before he makes up his mind to buy" and that although he has notice of the sale by auction but fails to bid, he is not precluded from subsequently exercising his right of pre-emption. In *Ammotti Haji* v. *Kunhayen Kutti* (2) a somewhat different view was taken and it was held that an *ottidar* in Malabar loses his right of pre-emption if he fails to bid at a Court sale of the land after having been specially invited to attend and exercise his right, and makes no offer to take the property for a long time after the Court sale. The only distinction between the two cases is that in the former the *ottidar* had only public notice of the sale, whereas in the latter he had had special notice. In *Kanaran Nair* v. *Raman Nambiar* (3) this Court followed the ruling in *Cheria Krishnan* v. *Vishnu* (1), although the *ottidar* had had special notice of the sale and distinguished *Ammotti Haji* v. *Kunhayen Kutti* (2) on the ground that there may have been evidence in that case on which it could be held that the *ottidar* had been placed in a position to elect.

It is very difficult to reconcile these three decisions and I think it advisable that the question should be finally determined by a Full Bench, and I am further inclined to the opinion that the decision in *Cheria Krishnan* v. *Vishnu* (1) goes too far. An *ottidar* is a mortgagee with a right of pre-emption. It is contended for respondent that the pre-emption right of an *otti* mortgagee in Malabar is something higher than the right of pre-emption as ordinarily understood, it being a right based on custom. The right of an *ottidar* has been considered by Courts in Madras from 1854 onwards, but the question of whether his right of pre-emption was greater than the ordinarily recognized rights of pre-emption in other places does not appear to have been discussed. In *Cheria Krishnan* v. *Vishnu* (1), however, the learned Judges say that "the right of pre-emption is well understood. The *otti* mortgagee must pay for pre-emption whatever sum is *bona fide* offered to the *jenmi* for the purchase, if he has the offer made to him by the *jenmi* and is rightly informed of the circumstances in reference to the offer. If he does not pay such sum, then his right of pre emption is gone."

In *Mamabi* v. *Acharath Parakat* (4) the previous cases on the subject of *otti* were reviewed and it was held that the right of an *ottidar* consists in a right to elect when there has been an attempt on the part of the owner of the property to sell it to a third person, whether he will buy it for the same price as that offered by the third person or not. There would seem to be no difference between the right defined as above, and the ordinary right of pre-emption (as understood in Mohammadan and other laws).

When, therefore, the owner intends to sell the land by private treaty, the *ottidar* is entitled to come in and buy it at the same price, and according to *Cheria Krishnan* v. *Vishnu* (1) and *Vasudevan* v. *Kesharan* (5), he is further entitled to have an offer to that effect from the owner of the property, although this further right is doubted in *Mamabi* v. *Acharath Parakat* (4). When the property is to be sold by Court, it is an involuntary sale and presumably one contrary to the wishes of the owner. In such a case he cannot predict the price at which the property will be sold, and consequently he cannot offer the property to the *ottidar* for a certain fixed price. If he is to offer it after the sale is completed, he will be making an offer which may have the effect of upsetting a sale by Court even

(1) 5 M. 198, 2 Ind. Dec. (N. S.) 138.
(2) 15 M. 480; 2 M. L. J. 231; 5 Ind. Dec. (N. S.) 686.
(3) 4 M. L. J. 46.
(4) 17 Ind. Cas. 337; 38 M. 67; 12 M. L. T. 535; 23 M. L. J. 607; (1912) M. W. N. 1217.
(5) 7 M. 309; 2 Ind. Dec. (N. S.) 800.

after it is confirmed. It is questionable whether it is desirable that the right of pre-emption should be allowed to that extent, unless it is clearly established that the right does go so far. In *Baij Nath* v. *Sital Singh* (6) Mahmood, J., held that the right of pre-emption, whether claimed under the Muhammadan Law, the compact of the *wajib ul-arz* or local usage and custom, does not arise in respect of compulsory sales, and in this view followed *Abdul Jabel* v. *Khelatchandra Ghose* (7), *Shaikh Ferasut Ali* v. *Ashootosh Roy Singh* (8) and *Sheikh Nuzmoodeen* v. *Kanye Jha* (9). This aspect of the question does not appear to have been considered in relation to the pre-emptive rights of an *ottidar* in Malabar, but the arguments of Mahmood, J., in support of his view would equally apply to such rights. In equity the *ottidar* would be entitled to notice of the sale of property in which he has so large an interest, but I can see no ground for showing him any greater consideration. His right of pre-emption arises out of a contract between him and the owner, and when by order of Court the owner is prevented from intimating the exact amount of the sale price, he should in equity be deemed to have completed his part of the contract when he has informed the *ottidar* that a sale is to take place and has thus afforded him an opportunity of buying at the price which the property would properly fetch, assuming that the right of pre emption arises in such cases. There is no question of his being driven to give a fancy auction price, as remarked in *Cheria Krishnan* v. *Vishnu* (1), for he is not compelled to buy—can cease bidding whenever the bidding has reached the amount which he is willing to pay for the land.

We, therefore, refer the following questions for decision by a Full Bench:—

1. Does the right of pre-emption of an *otti* mortgagee arise in the case of an involuntary sale?

2. If so, is he entitled to be informed of the sale price before he can be called upon to exercise or forego his right, or is mere notice of the auction-sale sufficient?

AYLING, J.—I agree to the proposed reference: and am inclined to share my learned brother's view as to the applicability of the right of pre-emption in relation to enforced sales

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This second appeal came on for hearing on 4th March 1918, in pursuance of the above Order of Reference, before a Full Bench.

Messrs. *C. V. Ananthakrishna Aiyar*, and *K. P. Ramakrishna Aiyar*, for the Appellant, argued that the right of pre-emption exercised by a Muhammadan co-sharer applied only to private sales. The doctrine cannot be extended to involuntary sales. No express notice of the sale is necessary, the sale proclamation being sufficient notice. In *Ammotti Haji* v. *Kunhayen Kutti* (2), the *ottidar*'s pre-emptive right as against the Court purchaser was not recognised. See also *Vasudevan* v. *Keshavan* (5). It is a right arising out of contract and does not run with the land.

Mr. *C. Madhavan Nair*, for the Respondent, argued that the right of pre-emption was a customary right and was the creature of usage in Malabar. No analogy can be drawn from the rules of pre-emption in Muhammadan Law. See *Mammabi* v. *Acharath Parakat* (4). Proclamation of sale is not sufficient notice. There must be actual notice to the *ottidar* both of the sale and the sale price.

The right of pre-emption runs with the land and has not been curtailed by statutory enactments.

OPINION.

WALLIS, C. J.—It is strange that in none of the cases in this Court dealing with the *ottidar's* right of pre emption in Malabar, *Cheria Krishnan* v. *Vishnu* (1), *Vasudevan* v. *Keshavan* (5), *Kanharaukutti* v. *Uthotti* (10), *Ammotti Haji* v. *Kunhayen Kutti* (2), *Kanaran Nair* v. *Raman Nambiar* (3)

(6) 13 A. 224; A. W. N. (1891) 68; 7 Ind. Dec. (N. S.) 141.
(7) 1 B. L. R. A. C. J. 105; 10 W. R. 165; 1 Ind. Dec. (N. S.) 180.
(8) 15 W. R. 455.
(9) Marsh. 555; 2 Hay 651.
(10, 13 M. 490; 4 Ind. Dec. (N. S.) 1053.

or *Mamabi* v. *Acharat Parakath* (4) has the question been considered, how far such a right can be exercised in the case of Court and Revenue sales consistently with the provisions of the Statute Law regulating such sales. Both in Bengal and in Northern India, where cases of pre-emption are much more numerous than they are here, it appears to be well settled that it cannot in the absence of statutory provision being made for its exercise, as in the case of some revenue sales in the United Provinces. In *Baij Nath* v. *Sital Singh* (6) Mahmood, J., after reviewing the authorities, states: "It may, therefore, be taken as a rule of law settled by a long and uniform course of decision that a compulsory sale, such as a sale in execution of a decree or a sale under an authoritative order of the Revenue Authorities for arrears of Government revenue, does not render pre-emption enforcible, whether such right is claimed under Muhammadan Law, the terms of the *wajib-ul-arz*, or on the ground of local custom or private contract; but that such compulsory sales being the creation of Statute Law do furnish occasion for the exercise of the pre-emptive right where such right is provided subject to the rules and restrictions prescribed by those legislative enactments themselves." And he goes on to refer to the provisions of section 310 of the Code of 1882 and other local statutory provisions. The other learned Judges did not differ from Mahmood, J., on this point, but on the question whether such special statutory provisions had been made in the particular case, and the law as laid down by him was accepted as settled in *Kanhai Lal* v. *Kalka Prasad* (11).

On a careful consideration of the question I agree with the law as laid down by Mahmood, J. I find it quite impossible to reconcile the statutory provisions of the Civil Procedure Code as to sale in execution of decrees with the *ottidar's* right of pre-emption as now claimed. Section 60 of the Code makes immoveable property belonging to the judgment-debtor liable to attachment and sale in execution of a decree, and section 65 provides that, where property has been sold in execution of a decree and the sale has become absolute, it is to vest in the purchaser. Under Order XXI, rule 92, it becomes absolute where no application is made under rules 89, 90 or 91 of the Code of Civil Procedure, 1908, or where such application is made and disallowed. The rules in question do not provide for the exercise of a right of pre-emption.

There is a very limited recognition of the right of pre-emption in rule 89, and if any further recognition had been intended, it would have been expressly provided. Having regard to the course of the decisions and the importance of the right of pre-emption in Northern India, I can only infer that the omission to make such provision was deliberate. In *Manchester Ship Canal Company* v. *Manchester Racecourse Company* (12) it was contended on the one side and not denied on the other that a right of pre-emption was quite incompatible with a sale by auction.

In these circumstances we are bound, in my opinion, even at this late stage to uphold the objection taken and to answer the question in the negative.

SADASIVA AIYAR, J.—I entirely agree and have nothing to add.

SPENCER, J.—I also agree.

Reference answered in the negative.

M. C. P.

(12) (1901) 2 Ch. 37; 70 L. J. Ch. 438; 84 L. T. 436; 49 W. R. 418; 17 T. L. R. 410.

(11) 27 A. 670; A. W. N. (1905) 149; 2 A. L. J. 390.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 3001 OF 1914.

January 30, 1918.

Present:—Mr. Justice Fletcher and Justice Sir Syed Shamsul Huda, KT.

EDON MOLLAH AND OTHERS—DEFENDANTS—APPELLANTS

versus

Shaik BADAN—PLAINTIFF—RESPONDENT.

Landlord and tenant—Agreement to grant lease—Lessee admitted as tenant—Subsequent lease to third person, validity of.

EDON MOLLAH *v.* BADAN.

Defendant was tenant of certain land which the landlord agreed to re-let to him on his paying a certain sum of money in cash. Defendant paid the amount and continued in possession of the land agreed to be let to him. The landlord subsequently granted a lease of the same land to the plaintiff:

Held, (1) that the landlord was not entitled to grant a lease to the plaintiff, inasmuch as he had already, by reason of the agreement with the defendant followed by the acceptance of the money, constituted the latter as a tenant on the land; [p. 52, col. 1.]

(2) that plaintiff, when he came to deal with the landlord, must be deemed to have had constructive notice of the rights of the defendant who was actually in possession and cultivating the land. [p. 52, col. 1.]

Appeal against the decree of the Additional District Judge, Faridpore, dated the 7th August 1914, affirming that of the Munsif, 2nd Court, at Bnanga, dated the 9th September 1913.

FACTS material to the report will appear from the following judgment of the lower Appellate Court:—

"Sarat Kumar Mazumdar, Sosi Kumar Mazumdar and Sridhar Chatterji are closely connected in the transactions which concern us: let us for the moment assume that they are to all intents and purposes one person and let us call that person *Q*.

Then Exhibit 2 is a certified copy of a registered *kabuliyat* for the suit lands by plaintiff Shekh Badan in favour of *Q*. dated 10 *Aghrahan* 1315.

And Exhibit A is a certified copy of a registered *kabuliyat* for the suit lands by defendant Edon in favour of *Q* dated 5th *Baisak* 1315 and registered 23rd July 1908 (about *Saraban* 13.5.)

And Exhibit 3 is a *kabuliyat* for certain other land by one Kadir in favour of *Q*. dated 22nd *Bhadra* 1315 and registered 22nd September 1908.

Admittedly up to September 1907 this person *Q*. was at liberty to settle the suit land with whatever person he pleased.

Plaintiff's case is that by Exhibit 2 he settled the suit land with plaintiff and that plaintiff is, therefore, entitled to turn defendants out.

Defendants' case is that by Exhibit A this person *Q*. settled the suit land with Edon defendant and therefore the subsequent settlement, if any, embodied in Exhibit 2 is of no effect.

The plaintiff's witnesses in effect say that this person *Q*. has no knowledge of Exhibit A.

Formerly Edon was in possession of the suit land as a sub-lessee and Kadir was in possession of certain other land as a sub-lessee. Sridhar Chatterjee got a decree right up to the High Court to eject Edon and Kadir and to get Rs. 300 and interest as costs. Up to September 1907 he had failed to realise any part of the money by execution. He admits that on one occasion one Amar Nath Bhattacharjee came to see him on behalf of Edon; from Exhibit 6, we find the date must be September 1907. On 24th September 1907, it was notified to the Munsif's Court that the amount of Rs. 300 and interest as costs had been amicably realised.

The defendant's story of what happened at Amar Nath's visit is this. Sridhar said on that occasion in effect: "If Edon pays me Rs. 150 in cash I will settle the suit land with him (*i. e.* the present suit land) and if Kadir pays me the other Rs. 150 I will settle that other land with him." A few days later Edon actually paid Sridhar the Rs. 150. Sridhar handed Edon a draft for a *kabuliyat* for the present suit lands. Edon accordingly had a *kabuliyat* written out, there was delay as he was ill, and registered and handed it to Sridhar some ten days after the registration.

The Munsif finds: "there is no sufficient evidence to hold that Sridhar Chatterjee accepted the *kabuliyat* Exhibit A."

What the Munsif seems to think really happened is this. In September 1907 Sridhar said: "If Edon pays me the Rs. 150 in cash—decretal money—I will settle those 2 plots (*i. e.*, present suit land) with him." Accordingly in September 1907 Edon did actually pay Sridhar the Rs 150. But Sridhar did nothing further towards settling the land with Edon. Finally Edon without any further sanction from Sridhar or Sarat Majumdar or Sasi Majumdar created the original of Exhibit A and signed it and had it registered. But neither Sridhar nor Sarat nor Sasi ever sanctioned it either before or after registration.

I think that is what must have happened. I also think that Exhibit A is just on the lines of what Sridhar proposed in Amar Nath's presence. The former rent paid by Edon as sub-lessee was Rs. 4. In Exhibit A he

promises to pay Rs. 6. D W. No. 3, Dilmamud, says it was Amar Nath who suggested the rise from Rs. 4 to Rs. 6, implying that Sridhar concurred. Amar Nath does not remember; but it seems most likely.

Edon says the original of Exhibit A was copied from a draft made by Sridhar himself. The Munsif thinks that is a lie. I agree with him. I entirely agree with his reasons for thinking the wording of Exhibit A is not such as Sridhar would have adopted.

It is argued for appellant in effect that I should suppose that the natural thing to happen did happen, and that as Sridhar had agreed to accept a *kubuliyat* on the lines of Exhibit A he did accept the original of Exhibit A. But when I look at the wording of Exhibit A, *viz*, statements that Edon was tenant from before and paid rent at Rs. 4 formerly, I think it is not a likely thing that Sridhar would even have accepted such a document as Exhibit A.

It was not argued before me, except in reply as a mere afterthought, that Sridhar's mere verbal promise in September 1907 to settle the land if the Rs. 150 were paid, followed by the actual payment of the Rs. 150, sufficed to confer a title to the land on Edon even if Exhibit A was never accepted. Nor is it a thing which can be taken for granted.

The result is that I agree with the Munsif's finding that acceptance of Exhibit A is not established and with his order decreeing the suit.

Sridhar appears to have acted despicably and I think it unlikely that Badan the plaintiff is blameless in the transaction. Consequently I refuse costs in this Court.

The appeal is dismissed and the decree of the Munsif affirmed. Parties will bear their own costs in the appeal."

Babu *Prokash Chandra Mazumdar*, for the Appellant.—My client has been all along on the land. A suit was brought against my client by the landlord previously to this. That suit came up to the High Court. The landlord succeeded in that suit and a decree was made against my client and another person for Rs. 300. Subsequently the landlord agreed to re-let the land on getting Rs. 150 in cash from my client. The sum was paid by my client, so that the terms of the agreement were carried out by my client and the landlord, having accepted the sum, cannot resile from the agreement. I was a tenant by virtue of that agreement and so long as I remain in possession and do not give up my right as the lessee of the land, the landlord has no right to settle the land with the plaintiff. The lease granted by the landlord to the plaintiff being subsequent to my payment of Rs. 150 to the landlord in accordance with his verbal agreement to lease the land to me cannot be operative as against my right as a lessee. Moreover, the plaintiff cannot claim that he was a *bona fide* transferee because he knew or would have known by the exercise of reasonable diligence that I was in possession of the land as a lessee. Even assuming that the plaintiff has not notice, actual or constructive, he cannot eject me from the land which I held as a lessee before the plaintiff got his lease. My title being prior cannot be affected in any way by the subsequent lease which the landlord purported to grant to the plaintiff.

No one appeared for the Respondent.

JUDGMENT.

FLETCHER, J.—This is an appeal by the defendant against the judgment of the learned Additional District Judge of Faridpore, dated the 7th August 1914, affirming the decision of the Munsif of the second Court at Bhanga. The suit was one for ejectment brought by a lessee claiming under the same landlord as the defendant. The question, therefore, is who has got a prior title. The obvious facts are these:—

The defendant originally had a lease of this land. There is no doubt about that. A litigation took place between him and the landlord. The case went up to the High Court and Rs. 300 was decreed against the defendant and another person named Kadir. According to the findings, terms of settlement were determined and these terms of settlement, it was found by both the lower Courts, were these: that if the defendant Edon paid to the landlord Rs. 150 in cash out of the decretal amount, the landlord would re let two of the plots (that is, the land in contest in the present suit) to Edon. It was also found that the defendant complied with those terms, namely, that Edon paid Rs. 150 to the landlord in September 1907. Therefore the defendant Edon became

entitled to a lease of the two plots in suit. He was already in possession of those two plots. Therefore having complied with the terms and having got a verbal agreement and possession of the land, the defendant was in possession of the property as a lessee. It is quite true that he foolishly executed a *kabuliyat* which he said was in accordance with the terms which had been approved of by his landlord. That has been found against him by both the lower Courts. It was a foolish thing to do; but it cannot affect Edon's right to continue in possession of the land after he has paid the Rs. 150 to his landlord for that right. That was in September 1907. The plaintiff claims under a lease dated the 10th *Ayrahan* 1315, that is, in the year 1908. It is quite clear that the landlord was not entitled to grant that lease in 1908 to the plaintiff. He had already, by reason of the agreement followed by the acceptance of Rs. 150, constituted the defendant Edon as a tenant on the land. Moreover, the learned Judge of the lower Appellate Court considers that it is unlikely that the plaintiff is blameless in the transaction, by which I suppose he means that the plaintiff had notice of the actual agreement that had taken place between the landlord and the defendant Edon. In any case, the defendant Edon being in actual possession of the land and enjoyment thereof the plaintiff, when he came to deal with the landlord, had constructive notice of the rights of Edon who was actually in possession and cultivating the land. In that view of the case, the plaintiff by his *kabuliyat* got nothing from the landlord. The present appeal is, therefore, allowed and the plaintiff's suit dismissed with costs both here and in the Courts below.

SHAMSUL HUDA, J.—I agree.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 24 OF 1915.

October 5, 1917.

Present:—Mr. Justice Coutts Trotter and Mr. Justice Seshagiri Aiyar.

PALANIANDI CHETTY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

M. V. APPAVU CHETTIAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s 53—Transfer to defeat or defraud creditors, whether liable to impeachment by creditors as defence to suit—Right of individual creditors to set aside sale.

A transfer effected with intent to defeat or defraud the creditors of the transferor confers a good title on the transferee, until it is set aside by a suit by the creditors for that express purpose. The creditors cannot plead the colourable nature of the transaction by way of defence to an action by the transferee to establish his title under the sale, if they have not already sued for its cancellation. [p. 54, col. 1; p. 57, col. 1.]

Per *Coutts Trotter, J.*—The mere obtaining of a judgment in India creates no title or only an inchoate title in the judgment-creditor, and therefore a creditor who impeaches a transfer must follow up his judgment by attaching the properties in order to enable him to utilise section 53 in answer to a claim founded on the impeached deed of transfer. [p. 54, col. 1.]

It is inconvenient to allow each and every creditor in turn to attack such deed independently. [p. 54, col. 1.]

Per *Seshagiri Aiyar, J.*—There is nothing in Hindu Law which is inconsistent with section 53 of the Transfer of Property Act. At any rate, the section may be taken as indicating the principles of equity, justice and good conscience which ought to guide Courts in the absence of specific legislative provisions. [p. 55, col. 1.]

On the language of section 53 of the Transfer of Property Act it is open to any creditor to impeach a conveyance made by his debtor, provided he alleges in the plaint that the sale was intended to defraud him and others similarly placed. [p. 55, col. 2.]

Second appeal against the decree of the District Court, Tanjore, in Appeal Suit No. 865 of 1912, preferred against the decree of the Court of the Subordinate Judge, Mayavaram, in Original Suit No. 27 of 1910.

The Advocate-General and Mr. *A. Krishnasawmi Aiyar*, for the Appellants.

Mr. *C. V. Ananthakrishna Aiyar*, for the Respondents.

The second appeal coming on for hearing on 9th and 14th February 1916 and having stood over for consideration till 21st March 1916, the Court delivered the following

PALANIANDI CHETTY v. APPAVU CHETTIAR.

JUDGMENT.

COUTTS TROTTER, J.—Although this appeal raises questions of difficulty and importance the facts material to it can be stated very shortly. The plaintiff sued for a declaration that he was the absolute owner by purchase of the suit properties as against the defendants who were holders of decrees against his vendor. The plaintiff's title was based on a sale-deed dated the 5th of September 1903 from Velayudan Chetty to himself for a consideration of Rs. 14,250. It has been found that this deed and the transaction which it carried out was brought into existence with intent to defraud and defeat the creditors of the transferor, and that finding is not and cannot be challenged; but the appellant contends that it is not competent to the defendant to invoke that finding in aid in the present proceedings. For the moment, I am assuming that the transaction in question was in this sense a real one, that it effected and was meant to effect a real transfer of the property from the transferor to the transferee, that is to say, it was not a merely colourable paper transaction leaving the real beneficial enjoyment of the property with him who purported to transfer it. Had the transaction been a merely colourable one, it would, no doubt, have been void and the plaintiff could not have succeeded in his action. His contention is that if it is only voidable it stands good until set aside in proceedings appropriate for the purpose, such proceedings being a suit brought for the express purpose by or on behalf of all the creditors of the transferor.

The material section is section 53 of the Transfer of Property Act, which is as follows:—"Every transfer of immoveable property, made with intent to defraud prior or subsequent transferees thereof for consideration, or co-owners or other persons having an interest in such property, or to defeat or delay the creditors of the transferor, is voidable at the option of any person so defrauded, defeated or delayed."

The section broadly reproduces the effect of the famous Statute of Elizabeth, 13 Eliz. C. 5, and the English decisions on that Statute are always referred to in India as authorities for the construction of the Indian section. In England it has been held that a suit to avoid a settlement must be brought on behalf of all creditors: *Reese River Silver Mining Company* v. *Atwell* (1), and that decision has been followed in India in *Hakim Lal* v. *Mooshahar Sahu* (2) and *Burjor i Dorabji Patel* v. *Dhunbai* (3). But it has been held by the English Courts that where the plaintiff is a judgment-creditor who has sued out a Writ of Elegit, he may sue on his own behalf without reference to the general body of creditors and impeach the transfer as having been executed with intent to defraud his particular claim: *Blenkinsopp* v. *Blenkinsopp* (4). That case expressly left open the question as to whether the deed could be set aside by a person who had signed judgment but not sued out the writ. We are asked to say that in India the section may be called in aid by a creditor who has obtained a decree but has not attached the properties, it being conceded that a creditor who has attached the properties can use the section as a weapon of defence as well as of offence in a case like the present. See *Rajani Kumar Dass* v. *Gaur Kishore Shaha* (5) and *Chidambaram Chettiar* v. *Sami Aiyar* (6) The matter has been definitely decided by the High Court of Bombay in *Ishvar Timappa* v. *Devar Venkappa* (7), a decision to which Jenkins, C. J., was a party. In the absence of this Court, I propose to consider the matter on principle.

The remedy sought may be treated as the equivalent of a remedy by way of equitable execution in aid of the legal right given by the judgment. The English authorities subsequent to *Blenkinsopp* v. *Blenkinsopp* (4) seem clearly to show that such an equitable execution will not be granted until the title of him who seeks it has been completed; that is to say, according to the technical language of the English Law, a judgment-creditor cannot invoke the equitable relief until he has followed up his judgment by suing out a *writ of fi fa* or *Elegit*, as the case may be.

(1) (1869) 7 Eq. 347; 20 L. T. 163; 17 W. R. 601.
(2) 34 C. 949; 11 C. W. N. 889; 6 C. L. J. 410.
(3) 16 B. 1; 8 Ind Dec (N. s.) 479.
(4) 1852) 1 De G M. & G. 495; 22 Beav. 568; 21 L. J. Ch. 401; 16 Jur. 787; 42 E. R 644; 18 L. T. (o. s.) 324; 91 R. R 147
(5) 35 C. 1051; 7 C. L. J. 586; 12 C. W. N. 761.
(6) 30 M. 6; 16 M. L. J. 427; 1 M. L. T. 351
(7) 27 B. 146; 5 Bom. L. R. 19.

This was expressly decided by Turner, V. C., (as he then was) in *Smith* v. *Hurst* (8) and he cites in his judgment an interesting passage from Lord Redesdale's Treatise on Pleading. An authoritative and clear exposition of the principle on which Turner, V. C, founded his decision is contained in Lord Cottenham's opinion in *Neate* v. *Duke of Marlborough* (9). Applying that principle I think it must be held that the mere obtaining of a judgment in India creates no title or only an inchoate title in the judgment-creditor, and therefore he must follow up his judgment by attaching the properties in order to enable him to utilize section 53 in answer to a claim founded on the impeached deed of transfer. The inconvenience of allowing each and every creditor in turn to attack the deed independently is obvious and is amply illustrated by the history of the present plaintiff who has been compelled to buy off a series of creditors one after the other. Accordingly I am of opinion that *Ishvar Timappa* v. *Devar Venkappa* (7) is correctly decided and is in accordance with principle and I respectfully follow it. I, therefore, hold that the fact that the deed was executed with intent to defraud the creditors of the transferor affords the defendants no answer to the plaintiff's claim.

As the learned Judge has not decided the question as to whether the transaction is merely colourable, the case must go back to him for a finding on the point. Six weeks are allowed for submission of findings and seven days are allowed for filing objections. Costs will be reserved.

SESHAGIRI AIYAR, J.—The property in this suit belonged to one Velayudham Chetty. He executed a sale deed to the plaintiff in respect of it on the 5th September 1903. It is not disputed that at the time of the sale Velayudham Chetty was heavily involved in debt. The defendants in this suit had a number of decrees against him for sums of money due to them before the date of the sale to the plaintiff. They attached the properties in execution of their decree. The plaintiff filed a claim petition which was rejected in September 1910. Thereupon he filed the present suit for a declaration that the property belonged to him by virtue of the sale and that Velayudham Chetty had no interest left in the property for the defendants to attach and sell. The Subordinate Judge who tried the original suit held that the sale was binding to the extent of Rs. 9,945 odd, as that sum was applied towards discharging certain mortgages upon the property created by Velayudham Chetty. He dismissed the suit as regards the rest of the claim put forward by the plaintiff. On appeal to the District Judge, the Subordinate Judge's decree was confirmed. In this second appeal a point was raised for the first time by Mr. A. Krishnaswami Aiyar to the effect that as the defendants had not sued to set aside the sale in favour of the plaintiff before they attached the properties in execution of their decrees, they were not entitled to resist the claim of the plaintiff in this suit. Mr. Anantakrishna Aiyar objected to this contention being heard for the first time in second appeal, as he might have rectified the defect if the objection had been raised before the trial Court. It is difficult to see what new evidence could have been let in by the defendants in answer to the abstract legal position argued in this Court. The plaintiff's case is that at the time of the attachment Velayudham Chetty had no interest in the property; because at that time no suit had been brought to set aside the sale in plaintiff's favour. To such a contention, if it is sound, the only answer will be that the sale had been set aside in a properly framed suit. That is not the answer. The decision in *Hakim Lal* v. *Mooshahar Sahu* (2), where it was pointed out that an objection like this should not be entertained in second appeal, does not help the respondents. In that case the suit was brought by some of the creditors, and when objection was taken in a second appeal that the suit should have been brought in a representative character, it was met by the plea that if the objection had been taken in time this defect could have been cured. That is not the present case. Although it is unfortunate that this question was not raised in the earlier stages, I do not see my way to refusing to hear the question argued.

On the merits, the first contention of

(8) (1852) 10 Hare 30; 22 L. J. Ch 289; 17 Jur. 30; 68 E. R. 82; 20 L. T. (o. s.) 303; 90 R. R. 263

(9) (1838) 3 My and Cr 407 at p. 421; 2 Jur. (o. s.) 76; 40 E. R. 983; 45 R. R. 304.

Mr. Krishnaswami Aiyar was that under section 53 of the Transfer of Property Act, it is not open to any one of the creditors of the transferor to challenge the validity of the conveyance; he relied on the observations of Mookerjee and Holmwood, JJ., in *Hakim Lal* v. *Mooshahar Sahu* (2). In the first place it should be pointed out that section 53 does not in terms apply to the present case, as it is in Chapter II which preserves to Hindus, Muhammadans, and Buddhists their own law on the question covered by its provisions. This will not, however, materially affect the decision, as there is nothing in the Hindu Law which is inconsistent with section 53 of the Transfer of Property Act, see *Rangilbhai Kalyandas* v. *Vinayak Vishnu* (10). At any rate section 53 of the Transfer of Property Act may be taken as indicating the principles of equity, justice and good conscience which ought to guide Courts in the absence of specific legislative provisions. The decision in *Hakim Lal* v. *Mooshahar Sahu* (2), no doubt, lays down that it is settled law in England that if the debtor is alive and not a bankrupt at the time the action is brought to set aside a conveyance on the ground that it was voidable under Statute 13, Elizabeth, Chapter 5, it should be by a creditor or creditors on behalf of himself or themselves and all other creditors of the debtor. The learned Judges say that the rule appears to be based upon a perfectly sound and intelligible principle and point out the difficulties which the contrary conclusion may lead to. Speaking for myself, there are as many difficulties in demanding that all the creditors should join in a representative action as there are in permitting a number of actions being brought against the same purchaser. However that may be, the language of section 53 of the Transfer of Property Act, to my mind, is clear that any person who was defrauded, defeated or delayed can impeach the transaction,

Before dealing with the English cases quoted by the learned Vakil for the appellant, I wish to draw attention to section 11, explanation 6, of the Code of Civil Procedure. That will apply to actions which may be brought by one of the defeated or delayed creditors if he claims a right which is common to himself and to other creditors similarly situated. It may be that section 53 of the Transfer of Property Act has been so worded having regard to the language of this explanation to section 11 of the Code of Civil Procedure. The case of *Hakim Lal* v. *Mooshahar Sahu* (2) went up on appeal to the Judicial Committee but their Lordships did not decide the case on this point. See *Musahar Sahu* v. *Hakim Lal* (11). The only other Indian cases bearing on the question are *Burjorji Dorabji Patel* v. *Dhunbai* (3) and *Ishvar Timappa* v. *Devar Venkappa* (7). Among a number of points decided by Mr. Justice Telang in *Burjorji Dorabji Patel* v. *Dhunbai* (3) the learned Judge points out that the plaintiffs in that suit were only some of the creditors and that they were not entitled to succeed inasmuch as the suit was not filed by them on behalf of and for the benefit of all the creditors. When this decision was passed, the Transfer of Property Act did not apply to the Bombay Presidency and the decision proceeded solely upon English authorities. *Ishvar Timappa* v. *Devar Venkappa* (7) was after the Transfer of Property Act was applied to Bombay. It does not appear from the judgment that the learned Judges required that the other creditors should *eo nomine* be parties to the suit. Some observations of the Judicial Committee in *Chatterput Singh* v. *Maharaj Bahadur* (12) were relied upon by the appellant. The observation that "such an issue could be raised and such a decree could be made only in a suit properly constituted for that purpose" does not necessarily imply that a representative action is the only mode of setting aside a fraudulent sale. Therefore I am of opinion on the language of section 53 of the Transfer of Property Act that it is open to any creditor to impeach a conveyance made by his debtor, provided he alleges in the plaint that the sale was intended to defraud him and others similarly placed. A decree in such a suit will not give any personal rights to the litigating plaintiff but would enure for the benefit of all creditors like himself.

(10) 11 B. 636; 6 Ind. Dec. (N. S.) 488.

(11) 32 Ind. Cas. 343; 30 M. L. J. 116; 3 L. W. 207; 20 C. W. N. 393; 14 A. L. J. 198; (1916) 1 M. W. N. 198; 19 M. L. T. 203; 28 C. L. J. 406; 18 Bom. L. R 378; 43 C. 521 (P. C.).

(12) 32 C. 198 at p. 217; 2 A. L. J. 190; 9 C. W. N. 225 (P. C.).

The English cases to which our attention was drawn do not in unmistakeable terms lay down that all the creditors should join in a representative action before a fraudulent sale can be set aside. All that Justice Williams in *Veys* v. *Brown* (13) held was that the settlement should not be treated as void but it was liable to impeachment in a proper action. *Glegg* v. *Bromley* (14) does not take the matter any further. But both these cases are authorities for the position that the assignment by the debtor will be good and valid until it is set aside in a proper proceeding. There are certain observations in May on Fraudulent Conveyances which on their face appeared to mean that a judgment-creditor was in a different position from an ordinary creditor and that it was open to the former by virtue of his judgment to levy execution without having the assignment set aside in a suit for that purpose. The proposition is thus stated: "Where a creditor has a judgment, or order of Court, or process of execution in respect of his claim, and might obtain relief in equity thereunder against property held by, or in trust for, his debtor, and the debtor is living, a Court of Equity can declare a settlement made by the debtor, which is fraudulent within 13 Eliz. C 5 to be void against the plaintiff, without also declaring it to be void against the creditors generally, and may direct the settled property, or a sufficient part of it, to be applied in satisfaction of the plaintiff's claim." When the cases cited for this proposition are examined, they show that if a judgment was obtained at common law and a further action was brought in the Equity Court to have it declared that the settlement or conveyance by the debtor in fraud of creditors was void, the Court of Chancery will not move in the matter until all the common law remedies had been exhausted. See *Smith* v. *Hurst* (8) and *Neate* v *Duke of Marlborough* (9) and *Reese River Silver Mining Co.* v *Atwell* (1). But since the Judicature Act and since the Act of Edward I which define the rights of judgment-creditors, these decisions have no practical value. A judgment-creditor in England is in a very favourable position as compared with a judgment creditor in this country. He becomes practically the owner of the property which he seizes either under a Writ of Elegit or of *fi fa.* I do not think the English decisions which differentiate between the position of the judgment creditor and that of an ordinary creditor are of much use in deciding Indian cases. The judgment-creditor in India, for all practical purposes, is in the same position as any ordinary creditor. If he attaches the property it gives him no lien: if he realises monies, they would be subject to participation by those who may be entitled to rateable distribution. But the position in England is altogether different. Therefore the passage in May relating to the judgment-creditor has no relevancy in this country. Nor is there anything in the words of section 53 to differentiate between the position of the decree-holder and that of an ordinary creditor.

The next question is whether the judgment-creditor can protect his rights to proceed against the property of the judgment-debtor by pleading in defence that the sale which the plaintiff seeks to establish in the suit should be set aside. There is no question that if the sale is void or is found to be a sham transaction, it will not be necessary either for the creditor individually or conjointly with others to sue to set aside the sale. But if it is only voidable it seems to me that the creditors can have no remedy against the property conveyed until the sale is set aside. It is well settled that in cases of voidable transactions until the transaction is avoided it continues in force. See *Raja Rajeswara Dorai* v. *Arunachellam Chettiar* (15) and *Mahamad Haji Zakaria* v *Ahmadbhai Habibbhai* (16). Therefore at the time that the creditor attached the property the sale was effective to confer title upon the plaintiff.

It was held by the Judicial Committee in *Phul Kumari* v. *Ghanshyam Misra* (17) that the effect of a decree in a suit brought

(13) (1884) 13 Q. B. D. 199; Cab. & E. 223; 33 W. R. 168; 48 J. P. 151.

(14) (1912) 3 K. B. 474; 81 L. J. K. B. 1081; 106 L. T. 825.

(15) 19 Ind. Cas. 596; 24 M. L. J. 592; (1913) M. W. N. 453; 13 M. L. T. 469; 38 M. 321.

(16) 25 B. 327; 3 Bom. L. R. 365.

(17) 35 C. 202; 7 C. L. J. 36; 12 C. W. N. 169; 10 Bom. L. R. 1; 5 A. L. J. 10; 17 M. L. J. 618; 2 M. L. T. 506; 14 Bur. L. R. 41; 35 I. A. 22 (P. C.).

by a defeated claimant is to place the parties in the position they occupied at the time the claim was put in. Consequently if the defendant succeeds in his defence, the result of it will be to allow him to attach the property as if it were the property of the judgment-debtor. This, as I already pointed out, can do him no good so long as the sale is not set aside. Therefore I am of opinion that the defendant is not entitled to avoid the sale by his defence. Mr Anantakrishna Aiyar drew our attention to *Vasudeo Raghunath Oka* v. *Janardhan Sadashiv Apte* (18). All that was decided in that case was that a subsequent transferee was not entitled to impeach a completed sale. It is true that another answer to the defence could have been that the sale was subsisting at the time of the transfer. However, this is no authority for the position that without setting aside the sale a judgment-creditor can impeach the transaction as a defence to the action commenced by the purchaser. The point we have to decide was not considered in *Narayana Pattar* v. *Viraraghavan Pattar* (19), *Chidambaram Chettiar* v. *Sami Aiyar* (6) and *Ishan Chunder Das Sarkar* v. *Bishu Sirdar* (20), to which the learned Vakil for the respondents invited our attention. I have, therefore, reluctantly come to the conclusion that the objection raised by Mr. A. Krishnaaswami Aiyar should be allowed.

In compliance with the order contained in the above judgment, the District Judge of Tanjore submitted the following

FINDING.—The issue on which I have been directed to record a finding is whether the transaction created by the sale-deed, dated 5th September 1903, is merely colourable.

It has been found, and the finding stands good, that the transaction evidenced by the sale-deed was intended to defraud and defeat the creditors. The question now for consideration is whether the transaction was merely colourable or whether it was intended that the property should pass to the vendee.

(18) 29 Ind. Cas. 497; 39 B. 507; 17 Bom. L. R. 522.

(19) 23 M. 184; 8 Ind. Dec. (N. S.) 528.

(20) 24 C. 825; 1 C. W. N. 665; 12 Ind. Dec. (N. S.) 1217.

The consideration for the sale-deed was Rs 14,250 made up of (1) mortgage debts on the properties to the extent of Rs. 8,842 which the vendee undertook to discharge, (2) a debt of Rs. 2,408 due on a promissory note to Narayanasami Iyer, (3) Rs. 3,000 to be paid in cash to the vendors to discharge sundry debts.

With regard to the mortgage debts, I think on the evidence on record it must be held that they were paid by plaintiff. Exhibits B to J show that they were paid and that they were paid by plaintiff. There is really no evidence that the payments nominally made by plaintiff were really made by his vendor. It is true that the debts were not paid at once and no payments were made until the creditors of the vendor began to be troublesome, but this fact proves nothing. The vendor was obviously more or less bankrupt and it is difficult to see how he could raise the money.

The payment of the debt due on the promisory note to Narayanasami Iyer has not been satisfactorily proved. Narayanasami Iyer was not examined. There is no satisfactory evidence that the note is genuine as it was the plaintiff who alone spoke to it.

The cash payment is not satisfactorily proved. It was to be utilized for paying off sundry debts. There is no evidence at all that the whole sum was utilised in paying debts and not one of the persons who are alleged to have been paid off has been examined.

The conclusion, therefore, is that some Rs. 9,900 were paid and that the rest of the consideration was not paid.

The next point for consideration is whether the plaintiff had possession of the properties after the sale-deed. It is clear from the evidence on record that the family house which was sold under the sale-deed was occupied by the vendor and his relations. The vendor and the vendee are closely related, and I do not think that the fact that the vendee allowed his vendor's family to live in the house shows that the sale was meant to be inoperative. The more important question is with regard to the lands. The plaintiff has produced a number of lease deeds Exhibit M

series, though he has not examined the lessees. The evidence of these deeds is attacked on the ground that none of these are earlier than 1904, *i. e.*, after the vendor's creditors had begun to execute pressure. I do not think there is much in this. The sale-deed was in September 1903 and it is not usual to enter into leases at that time or until the next year. Exhibit N series are receipts for payment of *kist*. The earliest date of any of these receipts is January 1904 but *kist* would not in any case be paid till January. As to the oral evidence it necessarily has to be received with caution. But there is this fact. Sundaram Chetti, one of plaintiff's agents, lives in one of the villages where the lands are. It is true that Sundaram Chetti is related by marriage to the vendor, but I see really no reason to doubt that he is agent of the plaintiff. This man formerly lived in Swamimalai. It seems probable that the reason he has moved to Ayyavadi is that he is plaintiff's agent and plaintiff has bought the lands there. It is difficult to explain his change of residence otherwise. The evidence on the other side is entirely oral and to a certain extent hearsay. It has been proved that the plaintiff paid over Rs. 9,000 and it seems unlikely that even a close relation would pay so large an amount without getting something for it. It is true that the whole consideration for the sale was not paid and it seems certain that the consideration even if fully paid was not adequate. Otherwise there is no explanation at all for Exhibit R, a release deed by which the plaintiff was to pay an extra Rs. 6,000 This release deed was executed after plaintiff had been worsted in litigation. Plaintiff, no doubt, thought that his sale deed would be attacked on the ground of inadequate consideration and wanted to save himself further trouble. Though the full consideration was not paid and though the consideration was inadequate, it does not follow that the sale was merely nominal. The vendor was in a very bad way at the time of sale and was not in a position to dictate terms. He wanted to prevent his creditors getting his property and he had recourse to a relation. The relation, though willing to oblige him, was not likely to do it for nothing and it was quite likely that the relation would impose hard terms.

The subsequent conduct of the plaintiff is rather in favour of the theory that the transaction was a real one. He paid off under pressure a considerable number of creditors and unless it is shown that he did not really pay them off, the presumption is that he paid them off because the transaction was a real, though a fraudulent, one. There is really no evidence at all that the money which went to pay off the various debts came from the vendor and not from the vendee and it is certainly not shown that the vendor who was hopelessly bankrupt was in a position to find the money. It is contended that some of the debts may have been paid out of the income of the land, but though, as pointed out in paragraph 11 of the Subordinate Judge's judgment, this might apply to the Rs. 6,000 supposed to have been paid under Exhibit R, yet it is clear that this sum represented the income of some five years. It is not explained how the vendor could have raised the money to pay the other debts which were undoubtedly discharged.

The probabilities are, therefore, all in favour of the position that the sale was real and not nominal. I, therefore, find that the transaction created by the sale-deed, Exhibit A, is not merely colourable.

This second appeal coming on for final hearing after the return of the finding of the lower Appellate Court upon the issue referred by this Court for trial, the Court delivered the following

JUDGMENT.—We accept the finding, reverse the decrees of both the Courts below and give a decree to the plaintiff as prayed for.

Costs will be awarded to the appellants in this Court. Each party will pay his own costs in the lower Courts.

Appeal allowed.

SATINDRA MOHUN TAGORE *v.* SARALA SUNDARI DEBI.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL CIVIL No 15 OF 1917.

April 20, 1917.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir John Woodroffe, KT.

SATINDRA MOHUN TAGORE AND ANOTHER—APPELLANTS

versus

SARALA SUNDARI DEBI AND ANOTHER—RESPONDENTS.

Testamentary suit—Caveat, remote reversioners, whether can file.

In a testamentary suit caveats against the Will were entered by *B.*, the immediate reversioner of the deceased, and some other persons, alleging that the Will propounded was a forgery. Subsequently *B.* entered into an agreement with the propounders of the Will for an amicable settlement on their paying him a large sum of money raised by the sale or mortgage of a portion of the estate Before this agreement was assented to by the other caveators, *S.* and *R*, who would be immediate reversioners of the testator after the death of *B.* during the lifetime of the testators' widow filed caveats against the Will:

Held, that *S.* and *R.* had *locus standi* to enter the caveats, as *B.* by entering into the agreement had done his best to render it impossible for him successfully to challenge the Will or had at least shown that at all events he could not be relied upon seriously and successfully to contest the Will. [p 6, col 2]

Quære—Whether any interest however slight, or even the bare possibility of an interest in the estate left by an alleged testator, is enough to entitle a party to oppose the Will. [p. 51, col. 2.]

Appeal against the judgment of Mr Justice Chitty, in Testamentary Suit No. 9 of 1915. dated the 25th January 1917.

FACTS appear from the following judgment of.

CHITTY, J.—This is an application on notice by the plaintiff in a testamentary suit that the caveat filed on 20th December 1915 by Satindra Mohun Tagore and Ronendra Mohun Tagore be discharged. It appears that in this case when the present plaintiff put forward the Will of Atanunandan Tagore caveats were filed by Diptendra Mohun Tagore, Bidyut Prokash Ganguly and Srimati Hazari Dassi Devi. The case was accordingly set down as a contentious cause by an order of 30th June 1915 The present caveators Satindra Mohun Tagore and Ronendra Mohun Tagore had also filed caveats, they being distant agnates of the deceased. It was pointed out at that time that they had no *locus standi* to come in and contest the Will, and eventually in June 1915 their caveats were withdrawn. They have now filed them again and wish again to come in and contest the suit. It is conceded that though Diptendra Mohun Tagore, one of the other caveators, is dead the two caveators who came in with him, Bidyut Prokash Ganguly and Srimati Hazari Dassi Debi, are still on the record. It is alleged by Satindra Mohun Tagore and Ronendra Mohun Tagore that Bidyut Prokash Ganguly is contemplating a settlement of the case with the propounders of the Will. It is not suggested that Hazari Dassi Debi, who is the mother of the widow of the deceased, has entered into or proposes to enter into any such compromise. It appears to me that for two reasons the caveats of these two persons should be discharged. In the first place they deliberately withdrew them in June 1915, and I do not think that the defendants in a suit ought to be allowed to blow hot and cold in that way, and, having withdrawn their defence, be allowed to come in again after a year and a half without some very good and substantial reason. The other reason is that the position of these parties, so far as the relationship is concerned, is in no way altered from the position in which they stood in June 1915. It is conceded that the death of Diptendra Mohun Tagore has made no difference in that respect. It is clear, therefore, that they have now no better *locus standi* than they had before. I accordingly make an order in terms of the petition that the caveats of these two persons be discharged with costs. Bidyut Prokash Ganguly must bear his own costs. Certified for Counsel.

Mr. *N. Sarkar*, for the Appellants.

Mr. *S. R. Das*, for the Respondents.

JUDGMENT.

SANDERSON, C. J.—In this case the appeal is from the judgment of my learned brother Mr. Justice Chitty, which was given upon an application by the plaintiffs in a testamentary suit that a certain caveat, which was filed on the 20th of December 1915 by Satindra Mohun Tagore and Ronendra Mohun Tagore, should be discharged. The Will which was the subject-matter of the suit was the Will of one Atanunandan Tagore who died, as we are informed, at the age of 19 years, and left a widow who was then 13 years old and who at the time of the suit was said to be 16 years old. Caveats had been entered against the Will by three persons, Diptendra

Mohun Tagore, Bidyut Prokash Ganguly and Srimati Hazari Dasi Debi. Of these Diptendra Mohun Tagore is now dead; Bidyut Prokash Ganguly is alive; and so is Srimati Hazari Dasi Debi who is the mother of the widow of the testator Atanunandan. Caveats had also been entered by the two appellants Satindra Mohun Tagore and Ronendra Mohun Tagore. But on the 17th of November 1914, a letter had been written by the solicitor for the plaintiffs alleging on behalf of his clients, namely, the widow of the deceased testator and the executor and the executrix named in the Will, that the appellants had not any interest whatsoever, and that consequently the solicitor was instructed not to allow inspection of the Will for which the appellants had been asking. The result of that, and, I think, of further communications was that on the 8th of March 1915 the caveats which had been entered by Satindra Mohun Tagore and Ronendra Mohun Tagore were withdrawn.

Now, the position at that time was as follows: Bidyut Prokash Ganguly was contesting the validity of the Will as is shown by the fact that on the 11th of March 1915 he affirmed an affidavit in which he set up very serious allegations: In paragraph 9 of his affidavit he alleged that the brother-in-law of Srimati Sarala Sundari Debi, who was the executrix of the Will, had not only murdered his mother-in law but that also one Triguna Sundari Debi and had cut off four of the fingers of the hand of the said Srimati Sarala Sundari Debi and in addition to that, he struck the testator such a blow upon his face that he lost the sight of both his eyes and that in consequence of that unfortunate incident he had no training or education of any sort whatever and by constantly brooding over his misfortune he practically lost his memory and intelligence as well as balance of mind and lived the life of practical imbecility until his death: and in paragraph 22 he went on to allege that the Will was simply and wholly the act of Ashutosh Bannerjee and Srimati Sarala Sundari Debi (who are the executor and executrix of the Will), in order to get the estate absolutely in their clutches and to get the son of the said Ashutosh Bannerjee adopted. I ought to have said that although we have not the Will before us, we are informed that the main provisions of it are to the effect that the property was left to the widow with power to adopt a son, if she so desired. That was the position of affairs at the time when Satindra Mohun Tagore and Ronendra Mohun Tagore withdrew their caveats.

On the 30th of June 1915, the suit was set down as a contested suit. It appears that before that date an order had been made for a commission to issue for the examination of certain witnesses, namely, on the 22nd of May 1915: and, inasmuch as on the 18th of November Diptendra Mohun Tagore died, the death was recorded, and liberty was given to the Commissioner to proceed with the commission. That was the state of affairs up to the end of November 1915.

The next fact which is necessary for me to mention is this: Apparently, in December 1915, a proposed settlement with Bidyut Prokash Ganguly was made, and that is evidenced by a letter which was written on the 9th of December 1916 by Mr. Sen acting on behalf of the executor and the executrix, addressed to Messrs. Manuel, Agarwalla and De who were acting as solicitors on behalf of the mother of the widow in these terms: "I have the pleasure to inform you that subject to the sanction of the Court my clients and Mr. B. Ganguly have arranged to settle this case amicably on the terms of which I enclose for your information a copy. Having regard to the relationship of the parties and seeing that your client has no personal interest in the matter I trust you will agree with me that this settlement is very desirable and should be carried out." The material provisions of the settlement were as follows: Mr. B. Ganguly being the next reversioner after the widow of the deceased, in case no adoption takes place or fails, was to be paid out of the estate of the said A. N. Tagore the sum of Rs. 1,55,000 "out of which he will meet and pay his own costs and the costs of Srimati Hazari Dasi Debi, the mother of the said widow, one of the defendants in the suit;" and that the said sum of Rs. 1,55,000 should be paid by the executor and executrix by sale or mortgage of a portion of the estate of the deceased within two months after the grant

of probate. That agreement was to be subject to the sanction of the Court, as was provided by clause 6 of the agreement, namely, that these terms would be treated as without prejudice to any or either of the parties to the suit until recorded and confirmed by the Court with the usual certificate that they were for the benefit of the infant widow. We do not know what took place after that, but we must approach the case on the basis that the widow's mother has not agreed to that proposal up to the present time. Apparently, Satindra Mohun Tagore and Ronendra Mohun Tagore having got to know of this proposal proceeded on the 20th of December 1916 to file their second caveat, and the paragraph in their affidavit upon which they rely is paragraph 14, which is to this effect: "That previous to this there was no necessity for our entering caveat as we were under the impression that Bidyut Prokash Ganguly, who had always maintained that the Will was a forgery, would properly prosecute the proceedings started on the caveat entered into by him, but now that he is willing to have probate granted of a forged Will on being promised a large sum of money, we have been advised to contest the Will which has been set up as aforesaid." That is the caveat which the learned Judge in the Court below has directed should be struck off the file.

Now, two main points have been raised in the argument in this Court. The first is that Satindra Mohun Tagore and Ronendra Mohun Tagore have not got sufficient interest to entitle them to file caveats against the Will. The relationship is as follows: There is no doubt that Bidyut Prokash Ganguly is the immediate reversioner in case of the death of the widow without a son being adopted: and, that if Bidyut were to die before the widow then the persons who would then become the immediate reversioners are the appellants Satindra Mohun Tagore and Ronendra Mohun Tagore. There is no doubt that Bidyut Prokash Ganguly, the immediate reversioner, is entitled to contest the Will on the authority of the decision in the case of *Brindaban Chunder Shaha* v. *Sureshwar Saha Paramanik* (1), and it is said that that case is an authority for the proposition that any interest, however slight, and even the bare possibility of an interest is sufficient to entitle a party to oppose a testamentary paper. In my judgment I do not think it necessary in this case for us to consider whether the rule laid down in the English cases has been adopted in this country as the rule applicable to such a case as this, because it was admitted during the course of the argument that if the immediate reversioner is not protecting the estate, then the next reversioner is entitled so to do: and I intend to base my judgment in this case on the facts of this case and not to lay down any general rule upon the question whether any interest, however slight, or even the bare possibility of an interest is enough to entitle a party to oppose a testamentary paper. With regard to Bidyut Prokash Ganguly, as I have already pointed out, he has entered into this agreement to the material terms of which I have already referred; and, in my judgment, he has thereby done his best to render it impossible for him successfully to challenge the Will: or, looking at it from another point of view, in my judgment, he, by the agreement into which he has entered, has shown that at all events he cannot be relied upon seriously and successfully to contest the Will. But Mr. Das argued that it is not a concluded matter because there is the mother of the widow who is contesting, and there is no suggestion that she is going to abandon the position which she has taken up in contesting the Will. I assume that and I decide this case upon that assumption, because Mr. Das has pointed out that he has not had an opportunity of answering the affidavit which had been put forward on the actual day of hearing before Mr. Justice Chitty. But even assuming that the widow's mother at the present moment has not agreed to compromise the suit, I still think that under the special and peculiar circumstances of this case, the appellants Satindra Mohun Tagore and Ronendra Mohun Tagore have sufficient interest to entitle them to enter caveat and contest the suit. I do not think it necessary for me to say anything more upon that point.

The second point urged is that the appellants ought not to be allowed to enter

(1) 3 Ind. Cas. 178; 10 C. L. J. 263.

caveats at this stage, because they had already entered caveats on a previous occasion and withdrew them and, to use the words of the learned Judge, 'they ought not to be allowed to blow hot and cold in that way.' The answer to that seems to me to be that it cannot be said to be a case of blowing hot and cold, because the conditions which existed when caveats were first entered and withdrawn do not exist at the present moment. The caveats were withdrawn, as I have already pointed out, when the opposition of Bidyut Prokash Ganguly could certainly be regarded as a genuine and strenuous opposition; but having regard to the agreement into which he has entered I think, as I have already said, he cannot be relied upon in future seriously to contest the Will. Therefore, the conditions being different, the accusation of 'blowing hot and cold' cannot reasonably be made against the appellants, and I do not think that that is sufficient reason for preventing them from filing caveats on the 20th of December 1916.

The result, therefore, in my judgment is that the two appellants ought to be allowed to enter caveats. I think it would be a misfortune if there should be another suit, and consequently they ought to be added as defendants to the suit which is now proceeding. Mr. Sarkar has agreed that he will accept the evidence which has already been taken on commission, provided that he is allowed to have an opportunity of putting further questions in cross-examination, if he is advised so to do: and, the appellants will, therefore, be added as defendants to the suit upon the understanding that they will accept the evidence which has already been given, subject to any application which may be made by the appellants to the Judge trying the case for leave to put further questions in cross-examination. We cannot decide whether that leave ought to be granted or not, and it will be for the learned Judge trying the case to decide that.

For these reasons I think that the appeal should be allowed with costs here and in the Court of first instance.

WOODROFFE, J.—I agree with the order proposed by the learned Chief Justice on this ground: the caveator Diptendra Mohun Tagore is dead, and the caveator Bidyut Prokash Ganguly has entered into a compromise to settle this litigation, and there is thus left out of the original caveators, only Srimati Hazari Debi acting on behalf of the minor widow. It seems to me that it is very likely that Hazari Debi was consulted about the compromise, and though it has not been shown that she has actually assented to this compromise, I am not satisfied under the circumstances of this case that the interests of the reversioner appellants will be sufficiently protected unless they are allowed to intervene.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No 457 OF 1916.

September 18, 1917.

Present:—Mr. Justice Spencer and Mr. Justice Krishnan.

VANJAPURI GOUNDAN AND ANOTHER—DEFENDANTS NOS. 1 AND 5—APPELLANTS

versus

PACHAMUTHU GOUNDAN AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 4, 9 AND 10—RESPONDENTS.

Hindu Law—Joint family—Partition—Division in status, when effected - Sale by co-parcener divided in status and excluded from enjoyment of his share - Vendee, position of Profits, past, right of vendee to.

A definite and unambiguous indication by one member of a joint family of his intention to separate himself and enjoy his share in severalty will amount to a separation or division of status, and the filing of a plaint for partition is such an indication. [p. 64, col. 1.]

After a division of status between two co-parceners, they are in the position of tenants-in-common with reference to the property left undivided and, therefore, the party who is in exclusive possession of the property and takes the whole of the rents and profits thereof has to account to the other party for his share of such rents and profits [p. 64, col 2.]

A vendee from a co-parcener in a Hindu family, who has become divided in status from the other members and has been excluded from the enjoyment of his share in the property, is entitled to an award of profits from the date of such separation. [p 64, col 2; p 65, col. 2.]

The rule of law that profits cannot be claimed till after decree applies only to the case of a joint family and not to the case of a divided family with joint property. [p 64, col. 2.]

Maharaja of Bobbili v. *Venkataramanjulu*, 25 Ind. Cas. 585; 39 M. 265; 16 M. L. T. 181; 27 M. L. J. 409;

Kota Balabhadra Patro v. *Khetra Dass*, 37 Ind. Cas. 168; 4 L. W. 99; 31 M. L. J. 275; (1917) M. W. N. 149, distinguished

Pirthi Pal v. *Jowahir Singh*, 14 C. 493; 14 I.A. 37; 11 Ind. Jur 252; 4 Sar P C J. 758; Rafique and Jackson's P C. No 97; 7 Ind Dec. N S) 527 and *Shankar Baksh* v *Hardeo Baksh*, 16 C. 397; 16 I. A 71; 13 Ind. Jur. 93; 5 Sar. P. C. J. 299; Rafique and Jackson's P. C No 108; 8 Ind Dec. (N. S.) 261, distinguished and explained.

The Court will always endeavour as far as possible to allot to the purchaser the share he purchased [p 6 , col. .]

Per *Spencer, J.* —Whatever the seller can get by way of in one on his share, the purchaser of his right, title and interest can recover. [p. 65, col. 2.]

Second appeal against the decree of the Court of the Subordinate Judge, Salem, in Appeal Suit No. 4 of 1915, preferred against the decree of the Court of the Additional District Munsif, Salem, in Original Suit No. 556 of 1911.

Mr. *T. M. Krishnaswami Aiyar*, for the Appellants.

Mr. *T. R. Venkatarama Sastriar*, for the Respondents.

JUDGMENT.

KRISHNAN, J.—The lower Appellate Court has given the plaintiff a decree for the division of survey No. 44/1 into three equal shares with reference to good and bad soil and for delivery to him of one of those shares, and has directed defendants Nos. 1 and 5 to pay him past profits till the date of suit from the date of demand for partition and also from the date of suit to the date of decree and future mesne profits till the date of delivery of possession or for three years whichever be the shorter period. Defendants Nos. 1 and 5 are the appellants before us. The only point argued for them is that the award of profits before the date of decree is wrong in law. No objection has been raised to the rest of the decree.

The facts necessary for the disposal of the question raised are these. Plaintiff purchased in 1910 an undivided one-third share in survey No. 44/1 from one Sengoda Goundan, the 4th defendant in this case. He and the other defendants were originally members of a joint Hindu family and the land survey No. 44/1 was one of their joint properties and was in the possession of defendants Nos. 1 and 5. Plaintiff made a demand on them for a partition and delivery to him of the share he purchased and on their failure to comply with it, brought the present suit for a general partition against all the members of the family, praying that one third of survey No. 44/1 might be allotted to the share of his vendor and put into his possession with profits from the date of his demand.

The question of plaintiff's claim to the profits before decree was argued by the appellant's Vakil on the assumption that the 4th defendant, the vendor, continued as an undivided co-parcener of the other defendants till the date of the decree appealed against, and on this footing he cited the cases of *Maharaja of Bobbili* v. *Venkataramanulu* (1) and *Kota Balabhadra Patro* v. *Khetra Dass* (2) as also the observations of their Lordships of the Privy Council in *Pirth Pal* v. *Jowahir Singh* (3) and in *Shankar Baksh* v. *Hardeo Baksh* (4). But the learned Vakil for the 1st respondent has pointed out to us that the 4th defendant was really divided in status from the other members some time before the sale to his client. There is no express finding by the lower Courts on this particular point because the issue as to profits was not "seriously pressed" in the first Court, as the Munsif points out, and no question seems to have been raised about it in the Appellate Court. As the parties do not seem to be at variance on the question of fact from which the divided status is to be inferred, I think we may act under section 103, Civil Procedure Code, in the matter and find the fact ourselves and we need not call for a finding. The 4th defendant, the vendor, stated in his written statement that he was entitled to a third share in all the properties and that "for three years there was a Panchayat for dividing and giving him his share though it was not accomplished." The main contesting defendant, the 5th defendant, admitted as 1st defence witness

(1) 25 Ind. Cas. 585; 39 M. 265; 16 M. L. T. 181; 27 M L. J. 408.

(2) 37 Ind. Cas. 168; 4 L. W. 99; 31 M. L. J. 275; (1917) M W. N. 149.

(3) 14 C. 493; 14 I A 37; 11 Ind Jur. 232; 4 Sar. P C J 758; Rafique and Jackson's P C. No. 97; 7 Ind. Dec. N. S.) 527.

(4) 16 C. 397; 16 I. A. 71; 13 Ind. Jur. 93; 5 Sar. P. C. J 299; Rafique and Jackson's P. C. No. 108; 8 Ind. Dec. (N. S.) 261.

that Sengodan (*i.e.*, the 4th defendant) had asked him for partition and delivery of his share in the presence of witnesses and that Panchayatdars had also come and asked him on Sengodan's behalf to separate and give away his share. The 9th defendant also admitted in the written statement the allegation made by the 4th defendant. The case of defendants Nos. 1 to 2 and 5 to 8 in their written statement was that the 4th defendant had become divided from them long previously, though that has been found against. The 4th defendant and his son the 10th defendant recently brought a suit in 1913 for partition by metes and bounds and delivery over to them of their share in the remaining properties and that suit has been decreed. It seems, therefore, clear that the 4th defendant did make a demand on his co-parceners for partition some three years before the date of this suit and though the properties were not divided by metes and bounds at once he must be taken to have become divided in status from the others on the authority of the Privy Council decision in *Suraj Narain* v. *Iqbal Narain* (5), where their Lordships say that a definite and unambiguous indication by one member of his intention to separate himself and enjoy his share in severalty will amount to a separation or division of status. This proposition was adopted and acted upon in the Full Bench case of *Soundararajam* v. *Arunachalam Chetty* (6), where the filing of a plaint for partition was considered to be such an indication as above stated.

We have, therefore, to consider the validity of the award of profits in the present case with reference to a sale of his share by a member of a Hindu family who had become separate in status, and not with reference to sale by an undivided member of a joint family as was the case in the two Madras authorities cited for the appellants and referred to above. These cases are, therefore, clearly distinguishable from the present case.

After a division of status between two co parceners there can be no doubt that they are in the position of tenants-in-common with reference to the property left undivided and, therefore, the party who is in exclusive possession of the property and takes the whole of the rents and profits thereof will have to account to the other party for his share of such rents and profits. The plaintiff's alienor, the 4th defendant, was excluded from the enjoyment of the land and the share of his profits by defendants Nos. 1 and 5 who took the whole of the profits, and he was thus entitled to recover his share from them from the date of his exclusion after he became divided in status. The appellant has relied on the observations of the Privy Council in the cases in *Pirthi Pal* v. *Jowahir Singh* (3) and in *Shankar Baksh* v. *Hardeo Baksh* (4). In the former case, though their Lordships say that the provisions of the Code as to mesne profits apply only to suits for land or other property in which plaintiff has a specific interest and not to a suit for partition where he has no specific interest until decree, they point out in the sentence just previous that it is erroneous to treat a claim for an account of the proceeds or profits of a joint estate as a claim for mesne profits as defined in the Code. In the latter case, while they re-affirm the position that in a suit for partition of a joint family estate profits are not recovered till after decree, they hold that where there is an agreement between the members that each should get a share of the profits, a suit for such share of profits and for partition can be maintained when the enjoyment of that share is in any way disturbed. The observations that profits cannot be claimed till after decree apply only to the case of a joint family and not to a case like the present of a divided family with joint property.

Plaintiff's alienor having thus a right to obtain from defendants Nos. 1 and 5 his one-third share of the profits of the land in this case, is there any reason why plaintiff who stands in the shoes of that alienor with reference to the share he purchased should not get the same relief, the alienor con-

(5) 18 Ind Cas. 36; 35 A. 80; 13 M. L. T 194; 17 C. W. N. 333; 11 A. L. J. 172; (1913) M. W. N. 183; 17 C. L. J. 288; 24 M. L. J. 345; 15 Bom. L. R. 450; 16 O. C. 129; 40 I. A. 40 (P. C.).

(6) 33 Ind. Cas. 858; 39 M. 136 & 159; 2 L. W. 1247 & 1266; 29 M. L. J. 793 & 816; 18 M. L. T. 552 & 568; (1916) 1 M W N. 31 (F. B.).

senting? I can see none. It was argued that as partition by metes and bounds between the members of a joint family has to be effected by the Court with due regard to the interests of the sharers and to the debts due by the family and other such circumstances, it may happen that the purchaser of an undivided share in one item of property is unable to get that share allotted to him in a partition suit and that he may even chance to get no land at all but only money compensation or perhaps even nothing at all. This may very well be so in some cases, but of course the Court will always endeavour as far as possible to allot to the purchaser the share he purchased. See the observations of Bhashyam Aiyangar, J., in *Aiyyagari Venkataramayya* v. *Aiyyagari Ramayya* (7). It does not follow, however, as argued by the appellants, that, because a difficulty may arise in some cases and the profits awarded in such cases to the purchaser may be smaller than he would otherwise have got or no profits may be awarded to him, in all cases profits should be disallowed. Where, as in the present case, the Court has been able to award to the purchaser the very share he purchased and there is no dispute about that award, there is no reason for disallowing his proper share of profits.

As regards the amount awarded in the present case for profits before decree there has been no contest before us, so that the distinction between profits and mesne profits is immaterial.

For the above reasons, I am of opinion that plaintiff is entitled to the profits before decree as awarded to him and that the second appeal fails and should be dismissed with costs of the 1st respondent.

SPENCER, J.—I am of the same opinion. In *Maharaja of Bobbili* v. *Venkataramanjulu* (1) one of the most telling arguments for disallowing mesne profits prior to suit in a suit brought by a purchaser from a member of joint Hindu family was that it would be unfair to require the other members of the family to bear the expenses of the family including the alienating co-parcener, and simultaneously to bear the extra burden of allotting a portion of the income of the family properties to meet the alienee's claim." This argument, however, loses its force when the alienor has already ceased to be a co-parcener. From the moment he becomes divided in status, he is no longer entitled to be maintained out of the funds of the undivided family, but he is entitled to call for an account from the manager of the income of his share remaining in the hands of the latter, if there is any interval between the division of status and the actual partition, and if, as presumably is the case, he has been excluded from enjoyment of the property since the former event. *Bhivrav* v. *Sitaram* (8).

It follows also that whatever the seller can get by way of income on his share, the purchaser of his right, title and interest can recover.

The second appeal is dismissed with 1st respondent's costs.

Appeal dismissed.

M. C. P.

(8) 19 B. 532; 10 Ind. Dec. (N. S.) 355.

(7) 25 M. 690 at p. 716 (F. B.).

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 3444 OF 1913 AND 34, 35 AND 36 OF 1914.

January 11, 1917.

Present:—Mr. Justice Fletcher and Mr. Justice Richardson.

IN NOS. 3444 OF 1913 AND 35 AND 36 OF 1914

RAM KUMAR CHACKERBUTTY —DEFENDANT NO. 1—APPELLANT

IN NO. 34 OF 1914

GOUR CHANDRA CHACKERBUTTY—DEFENDANT NO. 2—APPELLANT

versus

Maharaja BIRENDRA KISHORE MANIKYA BAHADUR—PLAINTIFF—RESPONDENT IN ALL.

Bengal Tenancy Act (VIII B. C. of 1885), s. 103 B —Record of Rights, entry in—Presumption of correctness—Rebuttal of presumption, whether question of fact —Appeal, second—Appellate Court, whether can interfere with finding.

An entry in a Record of Rights is not conclusive, but it is an entry to which by Statute the presumption attaches that it is correct unless and until the contrary is proved by legal evidence. [p. 66, col. 2.]

RAM KUMAR CHACKERBUTTY v. BIRENDRA KISHORE MANIKYA BAHADUR.

The question whether the presumption of correctness attaching to an entry in a Record of Rights has been rebutted or not is a matter within the competence of a final Court of fact, and is incapable of being reviewed by a Court having the limited jurisdiction that the High Court has in hearing a second appeal. [p. 66, col. 2.]

IN NOS. 3444 OF 1913 AND 35 AND 36 OF 1914.

Appeals against the decrees of the District Judge, Noakhali, dated the 27th of June 1913, modifying those of the Munsif, 2nd Court, Feni, dated the 9th of May 1912.

IN NO. 34 OF 1914

Appeal against the decree of the District Judge, Noakhali, dated the 27th of June 1913, modifying that of the Munsif, Additional Court, Feni, dated the 27th of May 1912.

Babu *Upendra Kumar Ray*, for the Appellant.

Babus *Dwarkanath Chackerbutty*, *Romesh Chandra Sen* and *Birendra Kumar Das*, for the Respondents.

JUDGMENT.

FLETCHER, J.—These appeals are preferred by the defendants against the judgment of the learned District Judge of Noakhali, dated the 27th June 1913, reversing the decision of the Munsif of the Second Court at Feni. The plaintiff brought the suits out of which these appeals have arisen to recover rents from the defendants as his tenants after declaration of his title to the lands. Rents were asked for a period extending from Agrahan 1314 to Kartick 1317 B. S. In their written statements the defendants set up three pleas; *first* of all, that they held the lands as Niskar lands, *secondly*, that, if they were not Niskar, their possession had been adverse to the plaintiff since the 27th Agrahan 1290 T. E. and *thirdly*, that the plaintiff's suits were barred by limitation. The third plea obviously has reference to the amounts of rents sued for between Agrahan 1314 and Kartick 1317 B. S. The adverse title set up was from a specific date, the 27th Agrahan 1290 T. E. The cases came on for trial. The Munsif found that none of the lands was Niskar. He, however, found that the suits were barred by limitation and by adverse possession from an assertion of the defendants' right during the publication of the Record of Rights. That case was not pleaded anywhere in the written statement. The adverse possession that was pleaded was said to have run from the 27th Agrahan 1290 T. E. On appeal to the lower Appellate Court, the learned District Judge set aside the decision of the Munsif and assessed rents in favour of the plaintiff. The learned Judge had this evidence before him. He had the Record of Rights in which the defendants were stated to be settled Raiyats with liability to have the rents assessed. That Record of Rights had been duly published in the manner required by law. The learned Judge was competent to act upon that as the final Court of fact. The question he had to consider was whether the evidence that had been produced rebutted the presumption contained in that record. It is quite obvious, although the learned Judge dealt with the matter in a somewhat summary manner in his judgment, that he came to the conclusion that the evidence that had been adduced on behalf of the defendants did not rebut the presumption contained in the Record of Rights. That was a matter obviously within the competence of a final Court of fact. In my opinion it is a matter incapable of being reviewed by a Court having a limited jurisdiction that this Court has in hearing a second appeal. Whether, if the matter had been open to us, we should come to the same conclusion as the learned District Judge has come is not a matter we have to consider. The learned District Judge having come to the conclusion that he should act upon the Record of Rights, we are not competent in hearing in second appeal to review that decision. I think in the result the present appeals fail and must be dismissed with costs.

RICHARDSON, J.—As the decision in *Aman Gazi* v. *Maharaja Birendra Kishore Manikya Bahadur* (1), to which I was a party, has been so much referred to, I must add a few words. Having listened with an entirely open mind to the argument addressed to us by the learned Pleader for the appellant before us, I am still of opinion that the decision is correct in principle.

An entry in a Record of Rights is not conclusive but it is an entry to which by Statute the presumption attaches that it is correct unless and until the contrary is proved by legal evidence. In these cases

(1) 15 Ind. Cas. 64; 16 C. W. N. 929.

the entries necessarily imply that the landlord, the respondent Maharaja, was entitled when the Record of Rights was finally published to have a fair rent assessed on the land held under him by the appellant tenants. At the time, therefore, the possession of the tenants was *prima facie* a possession which was subject to the liability to pay rent. Whatever adverse claim the tenants had previously set up, the landlord then succeeded in obtaining an authoritative declaration importing that the claim was unfounded. *Prima facie* again the subsequent possession of the tenants was a possession consistent with the entries. It was, of course, open to the tenants to show that the entries were wrong when they were made or that by reason of something which had since happened, coupled perhaps with what had happened before, they had ceased to represent the true state of things. But the burden was on the tenants to displace the entries and the results flowing from them. As I gather from the judgment of the Court below, the learned Judge was of opinion that the tenants had not succeeded in rebutting the statutory presumption or in showing that the entries no longer represented the true state of the facts. The questions which arose in that connection were essentially questions of fact and there appears to be no ground for disturbing in second appeal the conclusions arrived at by the learned District Judge. Indeed very little attempt seems to have been made in the Courts below to show that the entry was wrong. According to the trial Court, the tenants had not shown any title to hold the land rent-free. In the Appellate Court no attempt or little attempt seems to have been made to contest this finding. The tenants seem to have relied on the fact that, before the final publication of the Record of Rights, they had asserted a claim to hold the land rent free. Their learned Pleader stated that the assertion was made not before, but during the course of the proceedings in connection with the preparation of the Record of Rights. It is clear, as it seems to me, that the learned Judge was entitled on the question of fact to hold that the mere fact that this adverse claim had been made was not sufficient to show that the entry in the finally published record was wrong. Apparently, no prescriptive title to hold the land rent-free, acquired prior to the Record of Rights, was established to the satisfaction of either of the Courts below.

The case of *Birendra Kisore Manikya Bahadur* v. *Nizir Mahommad* (2) and *Birendra Kisore Manikya Bahadur* v. *Kailas Chandra Sarkar* (3), to which our attention was invited, were cases in which it was held in the Courts below that the entry in the Record of Rights was rebutted. There is, therefore, no conflict between our decision in the present case and the decisions arrived at in those cases. For these reasons I agree that these appeals should be dismissed with costs.

Appeals dismissed.

(2) 30 Ind Cas 917; 22 C L. J. 122.
(3) 30 Ind. Cas. 937; 22 C. L. J. 140.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 58 OF 1916.
February 23, 1917.
Present:—Mr. Justice Oldfield and
Mr. Justice Bakewell.

S. K. MOHIDEEN KADIRSHAW MARAIKAR—RESPONDENT No. 1—APPELLANT

versus

THE OFFICIAL RECEIVER, TINNEVELLY, AND ANOTHER—PETITIONER AND RESPONDENT No 2—RESPONDENTS.

Provincial Insolvency Act (III of 1907, ss 24, 26, 36, 52—Official Receiver, framing of schedule by—Enquiry, nature of—Court, function of, nature of, under s. 26

The power delegated to the Official Receiver under section 52 of Act III of 1907 is to frame the schedule after an *ex parte* examination of the evidence tendered by the alleged creditors of the insolvent and he does not decide judicially or finally upon contested claims His entering a creditor's name in the schedule does not prevent the Court from entertaining applications under sections 25 and 36. [p 68, cols. 1 & 2.]

The provisions of section 26 contemplate a judicial enquiry. [p. 68, col. 1.]

Appeal against the order of the District Judge, Tinnevelly, in Original Petition No. 395 of 1915.

Messrs. *C. V. Ananthakrishna Ayyar* and *K. R. Rangasami Ayyangar*, for the Appellant.

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

JUDGMENT.—The first question in this case relates to an order passed by an

Official Receiver upon the claim of a creditor of an insolvent to rank as a secured creditor under an hypothecation bond which was disputed by another creditor. The Official Receiver received oral and documentary evidence and held that the bond was supported by consideration and was not fraudulent. His successor-in-office seeks to impeach the transaction notwithstanding this decision.

By virtue of section 52 of the Provincial Insolvency Act, 1907, and rules of this Court made thereunder, an Official Receiver has power (*b*) to frame schedules and to admit or to reject proofs of creditors, and (*f*) to hear and to determine any unopposed or *ex parte* application Section 24 (1) directs the Court to frame a schedule of creditors and the debts proved by them, and section 25 prescribes the ordinary procedure for proof of debts. Under these provisions all persons alleging themselves to be creditors are required to produce evidence of the amount and particulars of their debts, which may be upon affidavits containing certain particulars and the Court, by order, determines the persons who have proved themselves to be creditors and the amount of their debts, and then frames the schedule.

Section 24 (3) then provides for an application by a creditor after the schedule has been framed that his name may be entered therein, and section 26 provides that the Court may expunge an entry in the schedule or reduce the amount of a debt upon the application of a Receiver or, in certain cases, of a creditor or the debtor; and both provisions contemplate a judicial inquiry. Having regard to these express provisions for a judicial enquiry upon the rectification of the schedule when framed, and to the absence of any such provision in relation to the framing of the schedule in the first instance, we think that the latter operation is intended, at least in general, to be an *ex parte* determination by the Court upon the evidence furnished by the alleged creditors. If this construction be correct and the sections and rules already mentioned be read together, it is clear that the power delegated to the Official Receiver is to frame the schedule after an *ex parte* examination of the evidence tendered by the alleged creditors and that he does not decide judicially or finally upon contested claims.

For these reasons we are of opinion that the action of the Official Receiver amounted only to an entry of the appellant in the schedule of creditors under section 24, and does not preclude the Court from entertaining an application under sections 26 and 36.

[Their Lordships then dealt with the evidence and, holding that the appellant's mortgage bond was a *bona fide* transaction supported by consideration, allowed the appeal with costs.]

Appeal allowed.

M. C. P.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 752 OF 1917.

March 14, 1918.

Present:—Mr. Justice Scott-Smith.

JIWAN LAL—PLAINTIFF—APPELLANT

versus

BEHARI LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Estoppel—Both parties estopped, effect of—Court, duty of, to decide case on merits

In a case of one estoppel against another, the parties are set free and the Court has to see what their original rights are. [p. 70, col. 1.]

S, deriving title by sale from *B*., sold certain land to *J. B.* subsequently sold the same land to *L*. Before the sale to *S*., *B* had mortgaged the land and in 1905 he sued *S* and his co-mortgagees for redemption. On the same day *L*. sued *S*., *B* and one *R* for redemption of another mortgage executed by *B*. in favour of *R*. Both these suits were compromised:—*B*. withdrawing and acknowledging *S*. as full owner, and *L* agreeing to get possession (in the second suit) on payment of Rs. 5 000 *S. J.* now brought the present suit to recover the land from *L*:

Held, that though *S*. was estopped by the compromise decree from denying *L*'s right to redeem, *L* himself was estopped by the decree in *B*'s suit from denying that *S* was full owner and that, therefore, the plaintiff was entitled to recover the land in suit. [p. 70, cols. 1 & 2.]

Second appeal from the decree of the District Judge, Amritsar, dated the 21st February 1917, reversing that of the Munsif, 1st class, Amritsar, dated the 30th November 1916, decreeing the claim.

Bakhshi *Tek Chand*, for the Appellant.

Lala *Hukam Chand*, for the Respondents.

JUDGMENT.—The facts of the case

out of which this appeal arises are somewhat complicated and are fully stated in the judgments of the lower Courts and are briefly as follows:—

The land in dispute is a plot of 4 *kanals* 8 *marlas* in area and was Khasra No. 1182 in the Settlement of 85[illegible]. In that of 1881 it became Khasra No 15 0 and in that of 1911-1912 Khasra No. 1 5". The following alienations have been made in respect of this plot:—

(*a*) On 2nd November 1882 Bua Ditta through *Musammat* Sukh Devi, his guardian, mortgaged the land in dispute along with other land to Vaishno Das with possession for Rs. 1,200.

(*b*) On 19th May 1883 an additional mortgage of the same land was effected for Rs. 200 by Bua Ditta himself, who was then of full age.

(*c*) On 29th May 1886 Bua Ditta mortgaged the land in dispute together with Khasra No. 1183 to Ram Chand for Rs. 305 without possession. Both these Nos were included in mortgages (*a*) and (*b*).

(*d*) On the 11th October 1887 Bua Ditta sold the equity of redemption of (*a*) and (*b*) to Hardit Singh for Rs 2,400.

(*e*) On the 5th May 1899 Hardit Singh sold his right to Bhagat Ram, son of Vaishno Das. The result of the above was that Bhagat Ram became owner of the land covered by (*a*) subject to Ram Chand's mortgage (*c*).

(*f*) On the 2th September 1891 Ram Chand sold his mortgagee rights to Bhagat Ram. The latter thus became full owner of the land in dispute Bhagat Ram died in 1901 and mutation was effected in favour of his son, Sant Ram.

(*g*) On the 14th February 1905 Bua Ditta mortgaged the land in suit and other land to Behari Lal giving him the right to redeem from Ram Chand.

(*h*) On the 24th August 1906 Bua Ditta sold the equity of redemption of the land covered by (*g*) to Behari Lal.

(*i*) On the 13th May 1914 Sant Ram sold certain land including that covered by (*a*) to Jiwan Mal, plaintiff.

The present suit was brought by Jiwan Mal to recover the land in dispute from Behari Lal. It is also necessary to mention that two suits were brought relating to the land in dispute:—

(*A*) On the 1st March 1905 Bua Ditta brought a suit against Hardit Singh and Sant Ram to redeem the land covered by mortgages (*a*) and (*b*). In his plaint he ignored the sales (*d*) and (*e*).

(*B*) On the same day Behari Lal brought a suit in which he sued Ram Chand, Sant Ram and Bua Ditta to redeem the mortgage (*c*).

Both these suits were compromised on the 6th November 1905. Bua Ditta withdrew his suit acknowledging Sant Ram as full owner of the land claimed. In suit (*B*) the compromise was to the effect that Behari Lal was to get possession of the land claimed on payment of Rs. 550 to Sant Ram. The land now in suit was part of the land claimed in both suits (*A*) and (*B*).

The first Court has decreed plaintiff's claim, holding that after the sale (*d*) Bua Ditta had no interest in the land in dispute left which he could transfer to Behari Lal. The lower Appellate Court on the other hand held that the sales (*d*) and (*e*) were never acted upon, and that they were treated as a nullity by Sant Ram himself, and that the latter was estopped by the decree obtained by Behari Lal in 1905 for redemption of certain land which included the plot now in dispute. It, therefore, accepted the appeal and dismissed the plaintiff's suit.

Plaintiff has filed a second appeal to this Court. The point which has to be chiefly considered is, what effect have the suits (*A*) and (*B*) upon the rights of the parties? In suit (*B*) the compromise shows that Sant Ram allowed Behari Lal to redeem from him on payment of Rs. 550. The contention is that if Sant Ram was the owner of the plot now in dispute he would not have allowed Behari Lal to redeem from him. No doubt if this suit stood alone Sant Ram would probably be estopped thereby, but suit (*A*) was brought at the same time as suit (*B*) and both were disposed of on the same day. There can be no doubt that both were decided as the result of the same compromise between all the parties concerned. In suit

(*A*) Bua Ditta withdrew his claim and admitted Sant Ram to be the owner of the property then in suit, which included the land now in dispute. Behari Lal derives his title as owner from Bua Ditta and it is, therefore, urged by Mr. Tek Chand on behalf of the appellant that if Sant Ram is estopped by reason of suit (*B*) Bua Ditta and Behari Lal are estopped by suit (*A*) from denying Sant Ram's title as owner of the land in dispute. In the sale-deed effected by Bua Ditta in favour of Behari Lal it is clearly stated that Behari Lal incurred the expenses of both the 1905 cases. There can, therefore, be no doubt that he was fully acquainted, or could have made himself fully acquainted, with all the facts of both those cases. He knew, or had the means of ascertaining, that the land now in dispute was in dispute in both those cases. Under all the circumstances I do not see how it can be said that Sant Ram is estopped by the decree in the suit in which Behari Lal got a decree for redemption on payment of Rs. 550. It is a case of one estoppel against another, and where both the parties are estopped we have to see what their original rights were.

It is not contended that sales (*d*) and (*e*) were not acted upon in any respect. I questioned Mr. Hukam Chand, Counsel for the respondents, on this point and he stated that those sales were not acted upon only as regards the plot now in dispute. The revenue records show that on the 4th June 1891 effect was given by mutation to the sales (*d*) and (*e*) in the presence of Bua Ditta, Hardit Singh and Bhagat Ram. Thereafter the revenue entries are in favour of Bhagat Ram and Sant Ram. After the sale (*h*) Behari Lal applied for mutation, but mutation of the plot now in dispute was refused on the ground that at the time of the sale Bua Ditta had no saleable interest left in it. The lower Appellate Court considers that the fact that in 1891 Bhagat Ram acquired the mortgagee rights in (*c*) from Ram Chand shows that he was not at that time the owner. What is meant is that the deed should have been one showing redemption of the mortgage and not one transferring the mortgagee rights to Bhagat Ram. The argument loses a good deal of its force from the fact that mortgage (*c*) was of Nos. 1182 and 1183 and it was only of No. 1182 that Bhagat Ram had become the owner. He was not the owner of No. 1183 and it was only the mortgagee rights thereof which he could acquire from Ram Chand. I, therefore, hold that Sant Ram and Jiwan Mal, who claims as his representative, are not estopped by reason of suit (B), that the land was validly sold by Bua Ditta to Hardit Singh on the 11th October 1·87 and that Hardit Singh on the 5th May 1890 sold his rights to Bhagat Ram. When Ram Chand sold his mortgagee rights to Bhagat Ram on the 12th September 1891 the latter became full owner of the land now in dispute and his son, Sant Ram, made a valid transfer thereof to the present plaintiff.

I, therefore, accept the appeal and setting aside the order of the lower Appellate Court restore that of the first Court. Under all the circumstances of the case I direct that the parties shall bear their own costs throughout the litigation.

Appeal accepted.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1250 OF 1917.

November 22, 1917.

Present:—Mr. Justice Shadi Lal.

BASHARAT AND OTHERS—DEFENDANTS—APPELLANTS

versus

NAJIB KHAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Evidence Act (I of 1872), s. 108—Presumption of death—Date of death—Evidence.

The only rule which section 108 of the Evidence Act prescribes is that a person who has not been heard of for seven years by those who would naturally have heard of him if he had been alive, is presumed to be dead at the time when the question whether he is alive or dead is raised. There is no presumption as to the time of his death, and if any one seeks to establish the precise period at which such person died, he must do so by actual evidence. [p. 71, col 1.]

Second appeal from the decree of the District Judge, Ambala, dated the 31st January 1917.

Mr. *Abdul Ghani*, for the Appellants.

Mr. *Badr-ud-Din Kureshi*, for the Respondents.

JUDGMENT.—The sole question, which has been argued in this appeal, is whether there is a presumption that Kallu, the

collateral of the plaintiffs, who was the original owner of the land in dispute, died more than twelve years prior to the institution of the suit. Now, there can be little doubt that Kallu has not been heard of for more than twenty years, and the learned Counsel for the defendant-appellant contends that section 108 of the Indian Evidence Act raises a presumption that a person, who has not been heard of for more than seven years, died at the end of the first seven years of the period. To this contention I am unable to accede. The only rule which the section prescribes is that a person, who has not been heard of for seven years by those who would naturally have heard of him if he had been alive, is presumed to be dead at the time when the question whether he is alive or dead is raised. There is no presumption as to the time of his death, and if any one seeks to establish the precise period at which such person died, he must do so by actual evidence. This view is in accordance with the law laid down in several judgments, *vide*, *Muhammad Sharif* v. *Bande Ali* (1) and *Narki* v. *Phekia* (2). To the same effect is a passage in Taylor's Law of Evidence which runs in the following terms:—

"Although, however, a person who has not been heard of for seven years is presumed *to be dead*, the law raises no presumption as to the time of his death, and if any one seeks to establish the precise period during those seven years at which some person died, he must do so by actual evidence."

The question as to whether Kallu was alive or dead was first raised in the mutation proceedings taken in 1909, and the only presumption permissible under section 108 is that Kallu was dead in 1909. There is no evidence upon the record which would show that he died more than twelve years before the date when this suit was instituted.

For the reasons stated above I uphold the decree of the lower Appellate Court and dismiss the appeal with costs.

Appeal dismissed.

(1) 11 Ind. Cas. 474; 34 A. 36; 8 A. L. J. 1052 (F. B.).

(2) 5 Ind. Cas. 709; 37 C. 103; 14 C. W. N. 341; 11 C. L. J. 188.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 156 OF 1917.

February 5, 1918.

Present: Mr. Justice Oldfield and Mr. Justice Sadasiva Aiyar.

R. RAJACHARI—DEFENDANT—PETITIONER—APPELLANT

versus

THIRUMUGOOR DEVASTANAM REPRESENTED BY ITS MANAGER VENGU NAIDU—PLAINTIFF—RESPONDENT.

Madras Estates Land Act (I of Mad. 1908), ss. 3 (2) (d), 8 (1) (2) and Exception—Merger of kudivaram *interest in fractional* melvaram *holder in* inam *Lease — Rent, suit for, whether cognizable by Civil or Revenue Court -Jurisdiction—'The* inamdar,' *meaning of—Exception to s. 8, applicability of.*

A suit for rent by a fractional sharer in an *inam* village who has acquired the Kudivaram interest in the entire village in respect of a lease of a portion of the village after such acquisition, is cognizable by the Revenue and not by the Civil Court, the holding not having ceased to be part of the estate. [p. 72, col. 1.]

The expression 'the *inamdar*' in the exception to section 8 must be read in its strict sense as equivalent only to the owner of the entire interest in the *inam* and the exception is applicable only to sub-section (1). [p. 72, col. 2.]

Letters Patent Appeal against the judgment and decree of Mr. Justice Seshagiri Aiyar, dated 9th October 1917, in Civil Revision Petition No. 1195 of 1916 on the file of the High Court, preferred against the decree of the Court of the Subordinate Judge, Madura, in Small Cause Suit No. 427 of 1915.

FACTS appear from the judgment.

Mr. *K. V. Sesha Aiyangar*, for Mr. *K. N. Aiyar*, for the Appellant, contended that by the plaintiff's acquisition of the Kudivaram, the land had not ceased to be part of an estate. The exception to section 8 of Madras Act I of 1908 is inapplicable. If the exception be deemed to govern sub-section 2 of the section as well as sub-section (1), the co-sharer landlords would be put to inconvenience and hardship, as they would be deprived of the protection afforded by the Act and would be deprived of the security for their share of the rent.

Mr. *N. Chandrasekhara Aiyar*, for Mr. *A. Krishnaswamy Iyer*, for the Respondent, argued *contra*.

JUDGMENT.

OLDFIELD, J.—The only question argued is whether the learned Judge was right in hold-

ing that the Civil Court had jurisdiction.

The facts, as now agreed on, differ from those stated by the learned Judge. For they are that plaintiff, one of the fractional share-holders of the Melvaram right in an Inam village, that is one of the Inamdars, acquired by gift the Kudivaram right in the whole village, not in a portion of it, and that in 1897 he leased 50 cents of the whole to the defendant, the appellant before us. The suit is on that lease for rent. Ordinarily section 8 (2) of the Estates Land Act would apply, the defendant would be deemed an occupancy ryot and the suit would lie in a Revenue Court. But it is admitted that the land is comprised in an estate falling under section 3 (2) (*d*) and argued that the exception to section 8 is applicable and the land has ceased to be part of an estate. In effect, therefore, the question is whether the exception governs sub section (2) or only sub section (1) : that is, whether the expression "the Inamdar" in the exception can be read as equivalent also to "an Inamdar" or "any of the Inamdars."

The point is not, so far as we have been shown, covered by authority. On the one hand the exception stands at the end of the section consistently with its application to both sub sections (1) and (2) instead of only to the former ; and, as the definition of 'land-holder' in section 3 (5) includes a direct reference to joint land-holders, all references to the "land-holder" and, therefore, that to "the Inamdar" which the exception contains, should, it may be argued, be read in the manner proposed by plaintiff. But, on the other hand, although it is not clear that a distinction is drawn between 'the land-holder' and 'a land-holder' or can be implied regarding 'the Inamdar' except in provisions in respect of which such distinction would be material, I think that it would be in that under construction and that the strict reading of the expression 'the Inamdar' is necessary in the interests of convenience and reasonable interpretation. For otherwise the anomalies involved in the application of sub-section (2) to the Inam villages referred to in the exception are excessive. If the exception is applicable to acquisitions of the Kudivaram by a fractional Inamdar, the land in question ceases to be part of the estate; and it can only be regarded as doing so, either (1) as between the acquiring Inamdar and his lessee (if any) and not between the former and the other Inamdars, or (2) absolutely. The first alternative is untenable, since it is not consistent with the general language used in the exception or with the fact that sub section (2) does not refer to the acquiring Inamdar's right in the phraseology of the Act as that of an occupancy ryot, but simply as being to hold payment, in accordance presumably with the ordinary law. The second deprives the other Inamdars without their consent and perhaps against their will of the security for their share of the rent, which the provisions of the Act relating to distraint, sale of the holding and summary procedure afford. These anomalies can be avoided, only if 'the Inamdar' in the exception is read in its strict sense as equivalent only to 'the owner of the entire interest in the Inam' and the exception is treated as applicable only to sub-section (1). On this interpretation the decision must be that the suit holding has not ceased to be part of the estate and that the suit should have been filed in a Revenue Court.

The Letters Patent Appeal is allowed, the decisions of the learned Judge and the Subordinate Judge being set aside and the plaint being returned for presentation to the Revenue Court having jurisdiction. Plaintiff will pay defendant's costs to date.

SADASIVA AIYAR, J.—I entirely agree.

M. C. P. *Appeal allowed.*

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 627 OF 1917.

January 9, 1918.

Present:—Mr. Justice Chapman and Mr Justice Atkinson.

THE TATA IRON AND STEEL CO, LTD.—PLAINTIFF—APPELLANTS

versus

RAGHUNATH MAHTO—DEFENDANT RESPONDENT.

Chota Nagpur Tenancy Act (VI B. C. of 1908), ss.

TATA IRON AND STEEL CO. LTD. *v.* RAGHUNATH MAHTO.

4, 68, 139—Prodhan, *whether tenant—Suit for ejectment of* prodhan—*Jurisdiction—Estoppel, whether cures want of jurisdiction.*

The holder of a *prodhani pattah* is not in the position either of a non-occupancy *raiyat* or of an occupancy *raiyat*. He is in the position of a *quasi* service tenure-holder, that is, he is a tenure-holder of a kind but not one within the definition of the Chota Nagpur Tenancy Act. [p. 74, col. ·.]

There is no provision in the Chota Nagpur Tenancy Act to justify a Court, constituted to hear suits under that Act, to eject a tenure-holder. [p. 74, col. 2.]

Section 139 (6) of the Chota Nagpur Tenancy Act gives jurisdiction to the Deputy Commissioner to deal with disputes as between parties claiming the office of *prodhan* coupled with possession of land attached to such office in a civil proceeding between parties other than landlord and tenant, which would otherwise be apparently outside the scope of the Act. [p. 75, col. .]

A suit to eject a *prodhan* does not fall within the provisions of this sub-section nor is it covered by sub-section (8) of section 139. The Deputy Commissioner has, therefore, no jurisdiction under the Chota Nagpur Tenancy Act to hear such a suit. [p. 75, cols 1 & 2.]

In cases where there is an inherent absence of jurisdiction no subsequent action or conduct of the parties can validate the proceedings. [p. 75, col. 2.]

Appeal from a decision of the Deputy Commissioner, Singhbhum.

Messrs. *Pugh*, *Mritunjoy Lal* and *Sivanarain Bose*, for the Appellants.

Mr. *Shishir Kumar Mitter*, for the Respondent.

JUDGMENT.

ATKINSON, J.—The plaintiffs in this suit, namely, the Tata Iron and Steel Co., Ltd., seek to eject the defendant from certain lands held by him under a Prodhani Pattah lease dated 1852. The interest of the lessor in that lease has now by divers mesne assignments become vested in the Tata Iron and Steel Co., and of that there is no question at all. The lease that was made to the defendant as Prodhan was made by the Deputy Commissioner of Singhbhum while the owner of the estate was a disqualified proprietor. The lease covered an area of 64 *bighas* odd of cultivated lands in the village of Beldih for a period of 15 years, subject to an annual rent of Rs. 25-9-9. The lease was subject to certain conditions, namely, that the Prodhan was to maintain the *sal* jungles for the benefit of the lessor, and also that he was to pay his rent according to the stipulations contained in the lease, *kist* by *kist*, and that he was to collect no rent from the *bastu* lands in excess of the rent stated in the *doul jamabandi*, and that if in the discharge of his duties as Prodhan he was proved unfit, then the lessor for the time being would be entitled to eject him from the lands and also from his office as Prodhan. Irrespective of the lands comprised in the lease, the defendant has also a right to certain other lands and in respect of which he is a *raiyat*; but Mr. Pugh disclaims on behalf of the plaintiffs any intention to eject the defendant from such *raiyat* lands. The plaintiffs' claim is conversant only with the ejectment of the defendant from the lands covered by the lease of 1852; and for which he pays a reserved rent, subject to the due discharge of his duties as Prodhan.

The case was originally instituted by the plaintiffs in the Court of the Subordinate Judge of Singhbhum; and in that Court the defendant raised the contention that the learned Subordinate Judge had no jurisdiction inasmuch as the claim was governed by the provisions of the Chota Nagpur Tenancy Act of 1908; and that therefore the only Court that had jurisdiction to hear and dispose of that suit was the Deputy Commissioner of Singhbhum. The learned Subordinate Judge held that by reason of the existence of the relationship of landlord and tenant between the parties, this suit was cognizable only by the Court of the Deputy Commissioner of Singhbhum The plaintiffs accepted that contention, without demur, and accordingly instituted the present suit on the 28th February 1916 in the Court of the Deputy Commissioner, relying on the contention that the cause of action sued upon was one governed by the provisions of the Chota Nagpur Tenancy Act, and as such cognizable by the Deputy Commissioner.

Before the Deputy Collector to whom the case was properly assigned for disposal, the defendant took up a novel position and urged that the Deputy Collector had no jurisdiction to hear the case; having raised before the Subordinate Judge formerly the contention that he (the Subordinate Judge) had no jurisdiction but that the Deputy Collector only had jurisdiction. It would be interesting to inquire if the Deputy Collector had no jurisdiction and the Civil Courts had no jurisdiction, then what Court had jurisdiction to try the case and

grant the relief claimed in this suit? The question as to jurisdiction does not seem to have been pressed before the learned Assistant Judicial Commissioner in appeal. The Deputy Collector, however, proceeded to try the case, holding that there was jurisdiction inasmuch as the plaintiffs were seeking to eject a tenant, and that the facts as proved before him warranted the plaintiffs' right to eject the defendant; and he accordingly granted a decree to the plaintiffs. The learned Deputy Collector found on the question of fact submitted to him that there had been breaches by the Prodhan of the conditions of the lease which justified his eviction; and on the issues of fact raised by the parties before him, the Deputy Collector decided in favour of the plaintiffs. No question as to limitation was raised before the Deputy Collector. On appeal whether any, and if so which, party raised the question of limitation does not appear; but the learned Judge decided that the plaintiffs' suit was barred under the provisions of section 231 of the Chota Nagpur Tenancy Act, inasmuch as the specific breaches relied upon by the plaintiffs to warrant the eviction of the defendant under the terms of the lease were breaches which occurred more than a year prior to the institution of the suit. We are not called upon now, having regard to the view we take, to consider the propriety of that decision; but we take leave to say that inasmuch as the question of limitation was not taken expressly in the pleadings or before the Deputy Collector at the trial, the learned Judicial Commissioner, if he intended to hold that the suit was barred by limitation, might very properly have given the plaintiffs an opportunity to establish by proof that the specific breaches of the lease alleged to have taken place were within one year before the institution of this suit.

The main discussion before us now has been whether or not the Deputy Collector in point of law had jurisdiction to try this case. It is necessary, first, in determining this legal consideration that we should ascertain what is the nature of the relationship which exists between the plaintiffs on the one hand and the defendant on the other. Is he a tenant, if so, what class of tenant is he? Is he an occupancy *raiyat* or a non-occupancy *raiyat*? If the defendant fulfils neither of these qualifications, then is he a tenure holder.? I asked Mr. Pugh what class of tenant the defendant was and Mr. Pugh candidly confessed, "I do not know what class of tenant is he." I think myself, having regard to the definition of tenant provided by section 4 of the Chota Nagpur Tenancy Act, that the defendant was not in the position of either a non-occupancy Raiyat or an occupancy Raiyat *qua* the lands held as Prodhan under the lease. The furthest that it could be pushed would be to contend that the defendant was a tenure-holder holding lands under the plaintiffs. Mr. Pugh contends that with regard to the 64 *bighas* odd of cultivated lands which were covered by the lease of 1882 the defendant is a tenure-holder. But the plaintiffs' claim in this suit is not merely to recover these 64 *bighas* of land but also to eject the defendant from his office as Prodhan and to have it declared that the defendant has ceased to exercise the right of Prodhan, so far as his rights are concerned outside the mere collection of rents of the lands occupied by tenants. We think the defendant occupies the position of a *quasi* service tenure holder, that he is a tenure holder of a kind; but certainly not one within the definition of the Chota Nagpur Tenancy Act. If the defendant is a tenure-holder, and not a *raiyat*, then there is no power vested in the Deputy Commissioner to eject him under the provisions of the Chota Nagpur Tenancy Act. The Chota Nagpur Tenancy Act gives express power to deal with the eviction of occupancy *raiyats* and non occupancy *raiyats*. But there is no provision, so far as we can find, to justify a Court, constituted to hear suits under that Act, to eject a tenure-holder. Section 63 says that "no tenant shall be ejected from his tenancy or any portion thereof except in execution of a decree, or in execution of an order of the Deputy Commissioner, passed under this Act."

Section 22 also bears upon this consideration relative to the position of occupancy and non-occupancy *raiyats* under the Act. But the Deputy Collector acquires a special jurisdiction only in suits specified in section 139 of the Chota Nagpur Tenancy Act. The suits set out in the sub-clauses of that section are

suits which he alone has jurisdiction to try and which no other Court has any jurisdiction to try.

It is contended before us that this suit, if maintainable, would be maintainable under the provisions of section 139, sub-clause (6). But we are clearly of opinion that sub clause (6) of section 139 has no application to the facts of this particular case; although that section does provide that "suits by or against headmen of villages for declaration of title in, or for possession of their office or agricultural lands" may be maintained in the Court of the Deputy Commissioner irrespective of the fact whether the relationship of landlord and tenant exists. This enactment involves nothing more than a provision which empowers the Deputy Commissioner's Court to hear suits between the Prodhan on the one hand and rival claimants on the other with regard to the right to hold the office coupled with the possession of the agricultural lands attached thereto, and it provides that such a suit is maintainable although it is a suit between parties between whom the relationship of landlord and tenant does not exist. And thus this section in our view gives jurisdiction to the Deputy Commissioner to deal with disputes as between parties claiming the office of Prodhan coupled with possession of land attached to such office in a civil proceeding between parties other than landlord and tenant, which would otherwise be apparently outside the scope of the Act. The present suit is clearly not within the express provisions of sub clause (6). The only other sub-clause in respect of which this suit could be maintained would be clause (8) of section 139, and that clause runs as follows: —

"All suits and applications in respect of which jurisdiction is conferred by this Act on the Deputy Commissioner."

Is the present suit one in respect of which jurisdiction is conferred by this Act? Yielding to Mr. Pugh's argument that there is no kind of tenancy existing between the plaintiff on the one hand and the defendant on the other, except some kind of tenancy in the nature of a tenure-holder's interest, then as there is no jurisdiction conferred on the Deputy Commissioner by the Chota Nagpur Tenancy Act to eject a tenure-holder, this suit cannot be maintained under the provisions of sub-clause (8) of section 139. In our view it is manifestly clear that there was an utter absence of jurisdiction in the Deputy Collector to try this suit. Mr. Pugh contends on the other hand that by some principle of equitable estoppel the defendant having forced the plaintiffs to obtain such relief in the Deputy Commissioner's Court, that we should recognise the decision of that Court. It is quite impossible to accept this argument, having regard to the authorities which lay down clearly that in cases where there is an inherent absence of jurisdiction no subsequent action or conduct will validate the institution of a proceeding instituted without jurisdiction. Accordingly we must reluctantly hold, that in this particular case, the Deputy Collector had in law no jurisdiction to dispose of this suit and consequently this appeal must be dismissed.

This decision, of course, involves the dismissal of the present suit instituted by the plaintiffs. As at present advised, we are inclined to think that the fact that the suit has been dismissed for the reasons stated, will not operate as a bar to any fresh suit which may be instituted by the plaintiffs in a Court having competent jurisdiction to try and decide it on the issues raised between the parties. But having regard to the attitude adopted by the defendant, it is equitable and just that he should not receive costs in any Court. Accordingly the plaintiffs' suit must be dismissed without costs in the Deputy Collector's Court, without costs in the Judicial Commissioner's Court, and without costs in this Court.

CHAPMAN, J.—I agree.

Suit dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 97 OF 1916.

August 31, 1917.

Present:—Mr. Justice Oldfield and Mr. Justice Krishnan.

M. PATTABIRAMA NAIDU DECEASED, BY HIS LEGAL REPRESENTATIVES T. K. A. L. BALU NAIDU, AND OTHERS—PETITIONER AND HIS LEGAL REPRESENTATIVE—APPELLANTS

versus

SUBRAMANIA CHETTI AND OTHERS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 181, 182—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 5 (2)—Mortgage suit—Application for final decree—Limitation applicable.

Article 181 and not Article 182 of Schedule I of the Limitation Act is applicable to an application for a final decree in a mortgage suit under Order XXXIV, rule 5 (2), Civil Procedure Code, where the preliminary decree was passed after the new Code, Act V of 1908, came into force.

Mahammad Husain v. *Abdul Kareem*, 29 Ind. Cas. 237; 39 M. 544; 17 M. L. T 424, distinguished.

Nimmala Mahankali v. *Kallakuri Subba Rao*, 41 Ind. Cas. 268; 32 M. L. J. 455, followed.

Appeal against the order of the District Court, Salem, in Appeal Suit No. 67 of 1915, preferred against the order of the Court of the Principal District Munsif, Salem, in Interlocutory Appeal No. 250 of 1915, in Original Suit No. 392 of 1910.

Messrs. *V. C. Seshachariar* and *M. Raghavachariar*, for the Appellants

Messrs. *T. R. Venkatarama Sastriar* and *M. S. Vaidyanatha Aiyar*, for the Respondents.

JUDGMENT.—The question is whether this application under Order XXXIV, rule 5 (2), of the Code of Civil Procedure for a final decree in a mortgage suit is subject to Article 181 or Article 182, Schedule I of the Limitation Act.

We do not think it necessary to refer to any case before *Mahammad Husain* v. *Abdul Kareem* (1). It no doubt goes some way, if it is applicable, in support of appellants' contention for Article 182.

But it is, in our opinion, inapplicable to the case before us, the preliminary decree now in question having been passed after, whilst the decree then in question was passed before, the present Code of Civil Procedure came into operation. This distinction is drawn in the judgment in *Nimmala Mahankali* v. *Kallakuri Subbi Rao* (2), with which we express our respectful concurrence. We are further fortified in that concurrence by the fact that the judgment is in accordance with the decisions of two other High Courts, those of Bombay and Allahabad, and that it is not in conflict with those of the High Court of Calcutta. *Datto Atmaram Hosabnis* v. *Shankar Dattatrayi* (3), *Madho Ram* v. *Nihal Singh* (4), *Rani Singh* v. *Barhamdeo Singh* (5). We hold that Article 181 is applicable and dismiss the appeal against appellate order with costs.

Appeal dismissed.

M. C. P.

(1) 29 Ind. Cas. 237; 39 M. 544; 17 M. L. T. 424.

(2) 41 Ind Cas. 268; 32 M. L. J. 455.

(3) 21 Ind. Cas. 318; 38 B. 32; 15 Bom. L. R. 841.

(4) 30 Ind. Cas. 494; 38 A. 21; 13 A. L. J. 985.

(5) 28 Ind. Cas. 211; 19 C. W. N. 473; 22 C. L. J. 66.

PATNA HIGH COURT.

FIRST CIVIL APPEAL No. 588 OF 1914.

December 11, 1917.

Present:—Mr. Justice Roe and Mr. Justice Imam.

Babu JAGDISH NARAYAN PERSHAD SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Babu MANMATHA NATH DEY AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Mortgage for necessity—Minor members, whether necessary parties to suit on mortgage—Mortgage-decree—Sale—Joint family property, whether passes under sale—Transfer of Property Act (IV of 1882), s. 90.

Where a mortgage is effected for family purposes, it is not necessary to make the minor members of the family parties to the suit on the mortgage. [p. 78, col. 2.]

In order to ascertain what passes upon an execution sale upon a decree made against the *karta* of a Mitakshara joint family it is necessary to look, *first*, at the circumstances in which the debt was contracted, *secondly*, at the form in which the plaintiff's claim was pressed, *thirdly*, at the decree made, *fourthly*, at the attachment, *fifthly*, at the sale proclamation and *lastly*, at the certificate of sale. [p. 79 col. 1.]

JAGDISH NARAYAN PERSHAD SINGH *v.* MANMATHA NATH.

Appeal from a decision of the Subordinate Judge, Patna.

Messrs. *Pugh* and *G. D. Singh*, for the Appellants.

Messrs. *P. R. Das*, *Sivanandan Rai*, *Surendra Mohan Das* and *Gangadhar Das*, for the Respondents.

JUDGMENT.

ROE, J.—Of the plaintiffs in this case four are the sons of Lachman Prasad Singh, two of whom have recently come of age and two are still minors. Lachman Prasad Singh is still alive. He is a *pro forma* defendant, so joined on the allegation that he was unwilling to be a plaintiff. Joined with these youngmen as plaintiffs are the real litigants, purchasers of ten annas of one part of the property and twelve and a half annas of another part. The narrative set forth in the plaint is that Bishen Dyal Singh was the father of Lachmi Prasad and Lachman Prasad Singh. In 1866 he found himself in difficulties and adopted the usual course of executing a *benami mokurrari* in favour of his son Lachmi Prasad's father-in-law, Parsidh Narayan Singh, in respect of the most valuable part of the family property, the village Powara, on a rent reserved of Rs. 5 per annum. On his death the property passed to Lachmi Prasad and Lachman Prasad. They in 1891 and 1892 mortgaged the whole of the family property except Powara to the defendant No. 1, Manmatha Nath Dey, who in 1896 foreclosed the mortgage and after bringing to sale the mortgaged property obtained a decree under section 90 of the Transfer of Property Act, and under that decree bought on the 16th of August 1902 Powara said to be worth Rs. 80,000 for Rs. 500. On the 23rd August 1906 Manmatha Nath Dey sold both Powara and the mortgaged properties to one Eknath Sahai, in the *benami* name of his daughter in-law, and on the 21st May 1908 and the 7th January 1909 Eknath Sahai sold these properties to defendant No. 2 Jaimurat Koer.

The plaint then sets forth the history of an *ijara* lease granted to Hari Pershad Lal and others in 1893 and the subsequent history of the *mokurrari* lease above mentioned. These histories are immaterial to the decision, save that they indicate that any stranger attempting to obtain *khas* possession would find himself at once in a sea of difficulties.

In the course of the argument mention has been made of another mortgage (and of execution proceedings in relation to a decree made thereon) in favour of one Harbans Narayan Singh. No mention is made of this mortgage in the plaint. I refer to it here as relevant only as still further diminishing the chances of Manmatha Nath Dey's entry into possession of the property.

It was stated incidentally in the plaint that Lachmi Prasad Singh was a man of dissolute habits, that the money raised by him on the mortgages was not utilised for the purpose of the joint family, that the whole of the proceedings in execution of Manmatha Nath Dey's mortgage decree was fraudulent, and that Manmatha, having notice of the existence of the plaintiffs Nos. 1 and 2 who were alive at the time of the proceedings, deliberately omitted to join them as defendants in his mortgage suit

On the suit as framed the following reliefs were sought:—

"That it may be held that the *mokurrari* deed, dated the 31st December 1866, executed by Babu Bishen Dayal Singh in favour of Babu Parsidh Narain Singh, paternal grandfather of the defendants Nos. 5 and 6, is collusive and fictitious and is without the passing of consideration, that under that deed the said Babu Parsidh Narayan Sing, and Babu Jagarnath Pershad Singh, father of the defendants Nos. 5 and 6, never got possession, nor did Babu Jagarnath Singh, father of the defendants Nos. 5 and 6, and the defendants Nos. 5 to 7 possess any right in the property shown in Schedule No. 1, nor did the defendant No. 2 or the defendant No. 4 also acquire any right therein by virtue of the deed of sale, dated the 31st December 1908, and that possession by the defendant No. 2 is unlawful.

"That upon decision of the above points, and upon passing a decree and by eviction of the defendants Nos. 1 and 2, the plaintiffs may be awarded possession of the properties in suit, shown in Schedules Nos. 1 and 2, and the properties Nos. 2 and 4 to 13 entered in Schedule No. 3 and that possession of the plaintiffs Nos. 1 to 4 in respect of the properties Nos. 1 and 3 entered in Schedule No. 3 may be confirmed.

"That if in consequence of the sale proceedings, etc., above mentioned or on any ground the plaintiffs Nos. 1 to 4 be considered to be dispossessed of the properties Nos. 1 and 3 in any way, in that case the plaintiffs Nos. 1 to 4 may be awarded the passing of decree for possession of the properties Nos. 1 and 3 out of the properties entered in Schedule No. 3.

"That if on any ground relief No. 1 be not granted, and if the plaintiffs be held to be entitled only to redemption in respect of the decrees, dated the 24th July 1896 and the 23th November 1899 and the sales held on 16 August 1897 and the 15th July 1902 and the 16th November 1908, the plaintiffs may be granted opportunity for redemption, and an account of the principal and interest on account of the bonds, dated respectively the 27th September 1891 and the 28th March 1892, may be prepared and upon fixing the amount of the income from the property in suit received by the defendants Nos. 1 and 2 with interest thereon, and what may be received by them from the date of suit to that of decree, may be set off against the amount due under the said bonds, that thereafter whatever surplus amount may be found by the account to be justly due to the defendant No. 1, or to any defendant to date of the decree or to any time the Court may think proper, may be caused to be paid by the plaintiffs and then order may be passed for them to take possession of the property in suit or that the Court may be pleased to pass a decree for redemption in the manner or subject to any conditions the Court may deem fit and proper that the plaintiffs may be awarded right of possession by redemption, that if by the account any surplus amount be found due to the plaintiffs besides possession of the property, upon taking Court-fees, may be awarded against the defendant or defendants from whom it may be found due, that the sales held on the 16th August 1897 and the 15th July 1902 and the 16th November 1908 may be set aside.

"That costs of suit with interest may be awarded to the plaintiffs against the liable defendants. That any other relief that may in justice be required may be granted to the plaintiffs."

The learned Subordinate Judge found on the facts that the debts were not contracted for immoral purposes, that the sale proceedings were in order, that the mortgagees at the time of their suits upon the mortgages of 1891 and 1892 had no notice of the existence of the plaintiffs, and that, therefore, the proceedings against Lachman Prasad Singh were good proceedings and passed the whole property to the auction-purchasers. Finding, therefore, that the plaintiffs Nos. 1 to 4 had no title to the property he dismissed the suit. Against the decree made the plaintiffs now appeal.

In appeal it is contended, firstly, that though the decision in the case of *Sheo Shankar Ram* v. *Jaddo Kunwar* (1) by their Lordships of the Judicial Committee precludes the argument that where a debt is contracted for family purposes it is necessary to make the minor sons of the family parties to the case, it may still be said that inasmuch as the village Powara round which the whole contest in this Court centres was not a part of the mortgaged property, it is necessary to examine carefully the proceedings under section 90 of the Transfer of Property Act, to ascertain whether in fact it was intended to bring to sale the property of the whole family or only the share in that property of the judgment-debtor on the record, Lachman Prasad Singh. Failing success on this ground it is suggested that there is upon the record a considerable body of evidence which will show that Eknath Sahay was in a position of confidence as an employee of Lachman Prasad Singh, and in that position had obtained a special knowledge of his affairs and that on well-known rules of English equity any purchase made by one in his position must enure to the benefit of his employer. The transaction assailed is the purchase from Manmatha Nath Dey on the 23rd August 1906 of Powara, of which the real value is asserted to be Rs. 80 000, by Eknath for Rs. 500. For a stranger the *mokurrari*, the *ijara* and Harbans Singh's mortgage would create a hopeless *cameu flage*. To Eknath by virtue of knowledge acquired as Lachman Prasad's employee it would be apparent that the

(1) 24 Ind Cas. 504; 36 A. 383; 18 C. W. N. 968; 16 M. L. T. 175; (1914) M. W. N. 593; 1 L. W. 695; 20 C. L. J. 282; 12 A. L. J. 1173; 16 Bom. L. R. 810; 41 I. A. 216 (P. C.).

decree-holder-auction-purchaser had a clear title to direct possession of the property. Eknath took advantage of this knowledge to make a bargain. His bargain must enure to the benefit of the sons of his employer, and though he has transferred his bargain to Jaimurat Koer, this lady is the wife of Ram Hari Lal and Ram Hari Lal was well aware of Eknath's relationship to Lachman Prasad Singh and through Ram Hari Lal, Jaimurat Koer must be held to have constructive notice of Eknath's fraud.

Mr. Pugh's argument on the first point is that though the decision in *Sheo Shankar's case* (1) completely cuts away the ground from under his feet with regard to any property covered by the mortgage, nevertheless a decree under section 90 for the sale of properties not covered by the mortgaged properties is in the nature of a personal decree and under that personal decree nothing but the personal property of Lachman Prasad Singh passed by the sale. The decision of the Judicial Committee in the case of *Nawab Babu sin* v. *Modhun Mohun* (2) is a complete answer to this argument. In order to ascertain what passes upon an execution sale upon a decree made against the *karta* of a Mitakshara joint family it is necessary to look, *firstly*, at the circumstances in which the debt was contracted, *secondly*, at the form in which the plaintiff's claim was pressed, *thirdly*, at the decree made, *fourthly*, at the attachment, *fifthly*, at the sale proclamation and *lastly*, at the certificate of sale. The money borrowed from Manmatha Nath Dey was taken for the purpose of paying Government revenue. I can conceive no family interest higher than an avoidance of a revenue sale. The plaint (page 33 of respondent's portion) attacks Lachmi Prasad as the head and managing member of the family. The decree made was against the whole interest of the family in the mortgaged property. In the proceedings under section 90 the entire Powara village was attached, proclaimed and sold. All that the minor members of the family can now do is to show that the story that the money borrowed was taken for the payment of revenue is a myth. It is not even suggested in argument that this was so. Mr. Pugh's argument is based upon the fact that the sale proclamation describes the property to be sold as sixteen annas of village Powara, the right, title and interest of the judgment-debtor. He suggests that the latter phrase limits the former. Obviously sixteen annas and the right, title and interest of the judgment-debtors were intended to be synonymous terms.

It is argued by Mr. Pugh that this obvious interpretation is negatived by the value set upon the property. I am unable to appreciate this argument. At the date of the sale Lachman Prasad had at the time two sons. Mr. Pugh says Powara was worth Rs. 80,000. If it was intended to put an accurate value on the individual share of Lachman Prasad that value would be Rs 26,666. The value Rs. 500 was estimated not on a consideration of the interests to be sold but upon the hideous clouds upon a title to possession. If the *mokurrari* was genuine the property was worth only Rs. 5 per annum. If it was not genuine the *ijaradar* had to be considered. No one but a *lathial* would have dared set foot in the village. Manmatha Nath Dey was not a *lathial*. Rs. 500 was a fair value for the privilege of holding a certificate of sale of this hornets' nest. There is no substance in the argument based upon this valuation. The whole interest of the joint family was liable for the debt and was sold.

On the second part of the case Mr. Pugh realizes that he is arguing a case that was not made in the lower Court, but urges that on the long series of English decisions and Indian decisions on the point, an Appellate Court has the widest jurisdiction to give leave to amend the pleadings. This is a case, he says, in which poor minors have been ill-advised by incompetent practioners in the Courts below. This appeal to one's pity is somewhat discredited by the fact that these poor minors will, if the suit is successful, receive $3\frac{1}{2}$ annas of one and six annas of the other property and the remainder go to persons who have been deliberately brought into this litigation. A further reason for viewing this petition for amendment of the pleadings with some lack

(2) 13 C. 21; 13 I. A. 1; 10 Ind. Jur. 151; 4 Sar. P. C. J. 682; 6 Ind. Dec. (N. s.) 510 (P. C.)

of sympathy is that the person who in English Law would be required to contest the proceedings of Eknath Sahay would have been Lachman Prasad Singh himself. He has preferred to stand in the background as a defendant. The suggestion that Jaimurat Kuer had notice of Eknath's character and relationship with Lachman Prasad Singh is based on such flimsy ground that, so far as I can see, the only possible result, if the pleas now suggested by Mr. Pugh could be proved, would be a decree against Eknath Sahay for a refund, to Lachman Prasad as *karta* of the family, of the profits made by him on the purchase of Powara from Manmatha Nath Dey. Eknath is not a party to the suit, and Lachman Prasad is not a plaintiff. For that reason we declined to allow the pleadings to be amended.

There is nothing on the record on which Jaimurat Koer can be asked to surrender the property to the plaintiffs. Eknath Sahay is said to have been a Mukhtar and employee in the plaintiffs' family. He is a notorious character and well known as a practising Mukhtar. In what capacity he was employed by Lachman Prasad is nowhere apparent upon the record.

In order to succeed as against Jaimurat Koer on the line taken by Mr. Pugh it was necessary to prove:

(1) that Eknath Sahay was employed in a confidential capacity by Lachman Prasad Singh;

(2) that in the course of that employment he obtained special knowledge of Lachman Prasad Singh's affairs:

(3) that taking advantage of that special knowledge he made a purchase from Manmatha Nath Dey of his employer's property at a price below its value, and

(4) that Jaimurat Koer was cognizant of all these facts.

From stray passages in the evidence Mr. Pugh has built up an ingenious structure which, when examined, is found to rest on nothing at all. Eknath Sahay paid Lachman Prasad's revenue in 1898. So might any Mukhtar. Eknath Sahay instructed Pleaders to get Lachman Prasad released when arrested for debt in 1905. So might any Mukhtar. Eknath was a co-accused with Lachman Prasad in a criminal case with regard to an affray or riot in connection with Manza Powara. Both were acquitted. How Ram Hari Lal could have had knowledge of these three facts is nowhere apparent, and how, if he had knowledge of them, it could have amounted to notice of a fraud by Eknath Sahay as a confidential agent is even less apparent.

On case law the plaintiffs have no cause of action against defendant No 1, Manmatha Nath Dey. On the facts proved they have no cause of action against defendant No. 2, Jaimurat Koer. No relief is claimed against defendants Nos. 3, 7 and 8. No title is in the plaintiffs for the maintenance of a suit against defendants Nos. 4 5 and 6. The suit was rightly dismissed. I would dismiss this appeal with costs.

IMAM, J.—I agree.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1278 OF 1916.

January 11, 1918.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Napier.

MAHANKALI LAKSHMIAH AND OTHERS —PLAINTIFFS - APPELLANTS

versus

KARNAM NARAYANAPPA AND OTHERS —DEFENDANTS—RESPONDENTS.

Water rights—Government channel, right to use of, for irrigation—Easement—Possessory rights, claim of, legality of—Injunction, suit for, to restrain threatened interference with possessory rights, maintainability of—Declaration, prayer for—Government not impleaded as party, effect of—Specific Relief Act (I of 1877), ss. 42, 54.

Ryotwari landholders can only claim a supply of water for irrigation of their lands from a Government channel subject to the right of the Government to regulate the distribution and supply in such manner as they deem fit. [p 81, col. 2]

No easement or prescriptive right can be acquired by a person in water in a Government channel when that water has been supplied by Government for the purpose of irrigating lands and in fulfilment of the duty cast on them to supply water to lands which they classify as wet. [p. 83, col. 2.]

No person can claim possessory rights in a channel and ask for an injunction restraining threatened interference with such rights [p. 82, col. 2.]

There can be no possessory rights in connection with incorporeal hereditaments. Where a right to

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easement, has not ripened by enjoyment for the prescribed period, the person who is in actual enjoyment would not get any remedy against any person interfering with such user and enjoyment. [p. 82, col. 2.]

Kondapa Rajan Naidu v. *Dwarakonda Suryanarayana*, 6 Ind. Cas. 266, 34 M. 173, 20 M. L. J. 803, 7 M. L. T. 352, (1910) M. W. N. 117, doubted.

Narasappayya v. *Ganapathy Rao*, 29 Ind. Cas. 255; 38 M. 280, followed.

Plaintiffs sued for recovery of certain lands from their lessees, the defendants. They also asked for an injunction restraining defendants from obstructing the flow of water into their lands from a Government channel called the Diguva channel and for a declaration of their rights. Plaintiffs did not establish any right of easement to the water in the channel, but they based their right to the injunction on the ground that, as the defendants, their lessees, were enjoying the water in the channel under some arrangement with Government, they must be deemed to have been in possession of the right to take water. The Secretary of State was not made a party to the suit:

Held, (1) that plaintiffs were not entitled to the injunction, as they could not be deemed to have had such possession as to entitle them to the relief; [p. 82, col. 2.]

(2) that as the Government was not a party, the Court could not, behind their back, give the plaintiffs the declaration asked for. [p. 83, col. 1.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Bellary, in Appeal Suit No. 10 of 1916 (Appeal Suit No. 18 of 1915 on the file of the District Court, Bellary), preferred against the decree of the Court of the District Munsif, Bellary, in Original Suit No. 521 of 1910.

FACTS appear from the judgment.

Mr. *L. A. Govindaraghava Aiyar*, for the Appellants, contended that though they had not acquired a right of easement to the water in the channel, their lessees, the defendants, had had the use of such water for 30 years and their possession must, in law, be deemed to be the possession of the plaintiffs. When that right was threatened, the plaintiffs had a cause of action for the issue of a prohibitory injunction.

Mr. *T. Prakasam*, for the Respondents, contended that the plaintiffs were not entitled to the reliefs claimed in the absence of Government. They had no possession, in law, of the water, and the defendants' enjoyment as lessees did not constitute the plaintiffs' possession. There was no easement and none could be claimed.

JUDGMENT.

ABDUR RAHIM, J.—The plaintiffs-appellants sued to recover possession of two plots of land, 12A and 12B, and asked for a declaration of their rights and sought to restrain the defendants from causing obstruction to the flow of water from a channel called Diguva Kalava to the lands in dispute. They got a decree for possession of the lands excepting an acre. There are two questions in this appeal—one is whether they are entitled to an injunction as prayed for or at least to a declaration that they are entitled to the use of the water in the Diguva Channel for irrigating the lands 12A and 12B and the other, whether the judgment of the lower Appellate Court with respect to one acre disallowed to them is right.

The channel takes its rise in the bed of a river called Pennar. The land of the defendants is lower than the land of the plaintiffs. The channel is admittedly a Government channel and the lands of both parties are *ryotwari*. It seems to be an admitted fact that the channel, which is shown in the Government Register as the source of supply to the land in dispute, is another channel called Yerraguntla Kalava and the Diguva Channel is shown in the register as the source of supply to the defendants' land. The defendants have been in possession of the disputed lands for a long time, about 30 years or so, as lessees of the plaintiffs. During that period they used the Diguva Channel for irrigating the lands in suit. It would also appear from the evidence that for sometime Yerraguntla Channel was in disrepair. That might explain the fact why the water of the Diguva Channel was used by the defendants for irrigation while they were in possession of the plaint lands. The channel being a Government channel, neither the plaintiffs nor the defendants have any right to it. Both of them holding wet *ryotwari* lands are entitled to the supply of water from the Government for the irrigation of their lands. But it is for the Government to distribute the water in any way it thinks fit. That proposition has not been disputed before us and cannot be disputed having regard to the rulings on the subject. The case of the plaintiffs, as put before us, was, not that they had acquired any right of easement by prescription, which the lower Court has negatived, but that Government, having regard to the practice that has obtained within the last 20 or 30 years, would have no objection to their using the

Diguva Channel for irrigating Survey Nos. 12A and 12B. It is then contended that the defendants have no right to interfere with their use of the water of the Diguva Channel as they have threatened to do. It is not alleged that the defendants have done anything on the plaintiffs' land to interfere with their enjoyment of the water, nor even that they have in any way as yet interfered with the channel which belongs, as already pointed out, to the Government. The only ground for asking for an injunction or for a declaration is that the defendants have threatened interference and claim the right to do so. The important point in this connection is that the Secretary of State, who is the owner of the channel and against whom alone the plaintiffs are entitled to claim a supply of water, has not been made a party. The plaintiffs have not only not established what was their original case, that the channel itself belonged to them; but also failed to establish that they had acquired any easement or right to take water from this channel by prescription. They undoubtedly have a right to a proper supply of water to be secured by the Government. But that is quite a different thing from any right in the channel itself or to the use of the water of this particular channel. If, in a case of this nature, we were to give a declaration in favour of the plaintiffs in the absence of the Government, we should be really deciding the plaintiffs' right as against the Government without Government being represented in the suit. Indeed, Mr. Govindaraghava Aiyar for the appellants did not claim that they (appellants) were entitled to such a decree. What he says is that the plaintiffs must be held to be in possession of this right to take water, and as the possessory right has been threatened, they are entitled, on the analogy of cases regarding possessory rights in land, to a prohibitory injunction. In this connection our attention has been drawn to a ruling of Benson and Krishnaswami Aiyar, JJ., reported as *Kondapa Rajan Naidu* v. *Dwarakonda Suryanarayana* (1). That case has been considered in a recent decision of this Court reported as *Narasappayya* v. *Ganapathy Rao* (2), judgment in which was delivered by Miller and Sadasiva Aiyar, JJ. In that case, the learned Judges thought that the decision in *Kondapa Rajan Naidu* v. *Dwarakonda Suryanarayana* (1) might be right on its facts, but they held, after a careful and elaborate discussion of the law, that it was not quite accurate to speak of possessory rights in connection with incorporeal hereditaments, and laid down that where a right to easement has not ripened by enjoyment for the prescribed period, the person who is in actual enjoyment would not have any remedy against any person interfering with such user and enjoyment. They were, therefore, not prepared to endorse a proposition to the contrary, if any such proposition was laid down in *Kondapa Rajan Naidu* v. *Dwarakonda Suryanarayana* (1). I respectfully agree with the ruling in *Narasappayya* v. *Ganapathy Rao* (2), but it is not necessary to pronounce upon the soundness of the view propounded in *Kondapa Rajan Naidu* v. *Dwarakonda Suryanarayana* (1) as the facts of the present case are clearly distinguishable. Here it was the defendants that were, for 20 or 30 years before the suit, using the water of the channel in question for irrigating the land in dispute which was then in their possession. They had lands lower down which, strictly according to custom and practice, should be irrigated by the Diguva Channel. We have no evidence here as to the arrangement by which the defendants obtained from the Government water from this channel for the irrigation of Survey Nos. 12A and 12B. But there can be no doubt that whatever the nature of that arrangement, it was made to suit their own convenience. It is impossible to see how the enjoyment of water under such an arrangement by the defendants would amount in law to possession of the channel by the plaintiffs. Whether the proposition laid down in *Kondapa Rajan Naidu* v. *Dwarakonda Suryanarayana* (1) is correct or not, has to be considered more fully when the point directly arises. In the present case, the plaintiffs could not in any way be said to have been in possession of the channel or of any easement with reference to it. That being so, there is no authority for granting the injunction which they seek. The fact is, the plaintiffs have

(1) 6 Ind. Cas. 266; 34 M. 173; 20 M. L. J. 803; 7 M. L. T. 352; (1910) M. W. N. 117.
(2) 29 Ind. Cas. 255; 38 M. 280.

established no right as against anybody in the water of this particular channel, whatever rights they may have as against the Government for the supply of water to the land in dispute. Further I may add that so far as the question of declaration is concerned, it is a discretionary remedy and the facts of the case are certainly not such that we should be justified in granting a declaratory decree in the absence of the Secretary of State, the owner of the channel. On this ground, therefore, I shall hold that the Subordinate Judge was right in dismissing the plaintiffs' claim to an injunction, and that they are not entitled to any declaration with respect to this channel.

As regards the one acre in Survey No. 12B, it would appear that there was a dispute as to the right to this land sometime in 1878. The land was obtained on Darkhast by the plaintiffs, while the defendants claim that they had no right to the *patta* and that they themselves were entitled to it. The matter was compromised and the claim of the plaintiffs, to that land was given up. The defendants remained in possession in their own right. The question really is whether the defendants have not acquired title to the land by adverse possession. Mr. Govindaraghava Aiyar contends that, according to the defendants, they acquired title to the land under a document which has been marked as Exhibit II in the case and he says that, as it is unregistered, it cannot give any right in the land to the defendants. But on the question of adverse possession, we have evidence apart from Exhibit II that the defendants have been in possession of the land for more then 12 years in assertion of their own right, and that is sufficient to dispose of the question.

The appeal fails and must be dismissed with costs. The memorandum of objections is also dismissed with costs.

NAPIER, J.—I agree and would only add a few words. The lower Appellate Court has refused the injunction asked for on grounds which my learned brother and myself think are not correct, and it is for that reason that I wish to state what I conceive to be the correct view to take. The lower Appellate Court has held that as the plaintiffs could not claim against the Government the right to take water from this channel, therefore, the defendants were entitled to prevent the plaintiffs taking it. That statement of law is to be found at page 35 of the judgment, where the learned Judge says, "the defendants who hold land irrigated by the channel are entitled to prevent the plaintiffs from using the water, to which they have no right." This statement of law is, in my opinion, entirely unsound and I agree with my learned brother in holding that the rights both of the plaintiffs and of the defendants to water in respect of the *ryotwari* wet land which they hold are, as has been laid down by this Court time after time, the rights to their customary supply by whatever means the Government chose to put the water on their land. But it appears that, in the lower Courts, the claim by the plaintiffs for an injunction was put on the ground that they had acquired some sort of easement, probably by the user of the water by the defendants for 20 years when they were the plaintiffs' tenants. That contention, I agree with the lower Appellate Court, is entirely unsound. It is impossible for a person to acquire an easement in water in a Government channel when that water has been supplied by Government for the purpose of irrigating land and in fulfilment of the duty cast upon them to supply water to lands which they classify as wet. Therefore no easement can possibly be acquired. Mr. Govindaraghava Aiyar in this Court has put his case on an entirely different footing and has asked us to give an injunction limited to the time and period during which the Government is prepared to give the necessary water for this land down the channel. The answer to that claim is to be found in the judgment which has been delivered by my learned brother, in which he points out that there is no possession here and that there is no specific right in particular water in this particular channel; and in view of the fact that the Government is not a party to this suit, it would be inadvisable to give any injunction which would necessarily be based on a declaration of right when such declaration of right can only be operative as long as the Government thinks it advisable to supply water by

this channel. I, therefore, entirely agree that this is not a case in which an injunction should be granted and, on this ground, I would uphold the lower Appellate Court's judgment. On the other points, I am in entire concurrence with the view expressed by my learned brother. The appeal is dismissed with costs.

Appeal dismissed.

M.C.P.

PUNJAB CHIEF COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 2170 OF 1916.

December 13, 1917.

Present:—Mr. Justice Chevis and Mr. Justice Shadi Lal.

KISHEN DAS AND OTHERS—APPELLANTS

versus

OFFICIAL LIQUIDATOR, DOABA BANK, LTD., IN LIQUIDATION—RESPONDENT.

Company - Liquidation - Question decided by liquidating Court, whether can be re-opened by regular suit—Review of order by lower Court after dismissal of appeal, legality of.

The Legislature never intended that matters should be decided twice over, once by the liquidating Court and then again by the regular Courts. Therefore, a question which has once been settled by the liquidating Court, cannot be re-opened by a regular suit. [p. 85, col. 2.]

When an appeal from an order has been dismissed by a higher Court, the lower Court cannot review its order. [p. 85, col. 1.]

Miscellaneous first appeal from the order of the Additional Judge, in charge of liquidation work, Lahore, dated the 18th July 1916.

Messrs. *Herbert* and *Madan Gopal*, for the Appellants.

Mr. *Santanam*, for the Respondent.

JUDGMENT.—This is an appeal from the order of the liquidation Judge refusing leave to the appellants to bring a regular suit to obtain a declaration that a sum of Rs. 45,000 deposited with the Doaba Bank of Amritsar should have priority over ordinary debts due by the Bank.

The circumstances in which this sum of Rs. 45,000 were deposited are described in the order of the lower Court. The liquidators recommended that this deposit should have priority, and on 1st April 1914 the liquidating Judge passed an order in these terms: "as this repayment is objected to by nearly all the depositors I am unable to sanction it. The Directors would be well advised if they institute an interpleader suit because then the whole law will be discussed and the question will be finally decided by a ruling of the Chief Court."

No suit was filed as suggested and later on comes another order of the liquidating Judge, dated 11th January 1915, definitely refusing to give preference to the debt. Apparently nobody was present in Court when this order was passed except one Karam Chand, the head clerk of the liquidators. No notice was sent to the appellants, who were the persons primarily concerned.

Against this order of the liquidating Judge an appeal was lodged by the present appellants.

This appeal was dismissed by a Division Bench of this Court as barred by limitation. (See the case published as *Bishen Das* v. *Liquidator of the Doaba Bank, Ltd.* (1).] The creditors then applied to the liquidating Judge asking for leave to bring a regular suit to get a decree declaring their claim to be entitled to priority over other claims.

On this the liquidating Judge passed the order now under appeal, holding that though the question was not *res judicata*, it was doubtful whether he as liquidating Judge could go into the question again, seeing that an appeal from the order of 11th January 1915 had been rejected by the Chief Court, and holding further that the question was one primarily for decision by the liquidating Court and that no good reason was shown why that Court should divest itself of its jurisdiction and hand over the matter to another Court for decision.

The learned Advocate for the appellants strongly urges that the order of 11th January 1915 was passed without notice to his clients, and that so they have never had a chance of being heard, and that justice demands that they should be given a hearing either in the liquidating Court or in some other Court.

(1) 31 Ind. Cas 725; 42 P. L. R. 1916 5 P. W. R. 1916.

We will assume for the purposes of argument that the appellants have a good case on the merits, and that had they been given due notice they might have advanced sound arguments before the liquidation Judge for claiming priority for their debt, and that the said Judge in passing the order of 11th January 1915 without giving notice to the appellants made a mistake, which was an injustice to the appellants. But still we think it wrong to say that the appellants have been deprived of their fair chance of a hearing. Against the order of 11th January 1915 they had a right of appeal and in pursuance of that right they preferred an appeal to this Court. Through their dilatoriness this appeal was filed too late, and so the appeal, which, according to our assumption, should, and presumably would, have succeeded on the merits was dismissed. The result was that the order of 11th January 1915 stood. How after this the liquidating Judge could again consider the question we are quite at a loss to understand. When an appeal from an order has been dismissed by a higher Court the lower Court cannot review its order. The dismissal of the appeal means that the order of the lower Court has been confirmed (though not necessarily on the merits), and after that the order ranks as the order of the higher Court. It is not such a very rare thing to see an appeal, which on the merits would stand an excellent chance of succeeding, thrown out on the ground of limitation; in such a case the lower Court's order or decree is not confirmed on the merits, but nevertheless the order then ranks as the order of the higher Court and the lower Court cannot review it. We hold then that after the appeal from the order of the 11th January 1915 had been dismissed by this Court the liquidating Judge could not re-open the question. For the appellants it is urged that the order of the 11th January 1915 was not an order passed against them, and that they need not have appealed. We can only say that even though the order was not passed on an application presented directly by them (though apparently the liquidators who presented the application did so on their behalf and at their instance) their interests were adversely affected by the order, and that if they wished to contest it they were bound to appeal. Their grievances were that they had not had a hearing, and that the order was wrong in law; they lost their right to a hearing on these points by their dilatoriness in presenting their appeal.

The other question for decision in the case is whether the liquidating Judge should have given them leave to bring a regular suit. For the respondents it is urged that the liquidating Judge and the ordinary Courts have concurrent jurisdiction, and that it is only in cases where the liquidating Judge thinks that for some reason or another a dispute can be settled better by regular suit than in liquidation proceedings that the liquidating Judge gives leave to persons to lodge a suit against the Company, and that when a matter has once been decided by the liquidating Judge there is an end of the matter, unless the liquidating Judge's decision is upset on appeal. These arguments seem to us perfectly correct. If the liquidating Judge's order is wrong the aggrieved party can appeal. If he does not appeal, or if his appeal fails, there is an end of the matter. We see no reason whatever to suppose that the Legislature ever intended that matters should be decided twice over, once by the liquidating Court and then again by the regular Courts. To hold otherwise would lead to absurd results. Suppose that the appeal from the order of the 11th January 1915 had been dismissed by this Court, the highest Court in the Province, not on the ground of limitation but on the merits; would it not then be absurd to re-open the question in a District Court of jurisdiction inferior to that of this Court? We hold that the question, having been settled by the liquidating Court, cannot be re-opened by a regular suit

In conclusion we note that Mr. Herbert contends that the order of 1st April 1914 gives the appellants leave to bring a regular suit. It certainly says the Directors (the present appellants) would be well-advised to bring an interpleader suit. Apparently the Judge who passed this order had vague ideas as to the nature of an interpleader suit; but this is merely

an expression of opinion, and does not amount to a formal permission. It is, of course, quite possible, or we may even say probable, that, if on 1st April 1914 permission to bring a regular suit had been asked for, permission would have been given, but no such permission was asked for and we cannot hold that permission was given.

The appeal fails and is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL APPEAL No. 30 OF 1917.

November 23, 1917.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Oldfield.

LAKSHMANAN CHETTY—PLAINTIFF—APPELLANT

versus

NAGAPPA CHETTY AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXX, r. 9, applicability of—Partnership—Suit by one partner against another or between firms having common partners for recovery of monies due on accounts, maintainability of.

No suit lies as between partners or between firms having common partners for recovery of monies without asking for accounts. [p. 87, col. 1.]

Karri Venkatareddi v. *Kollu Narasayya*, 1 Ind. Cas. 384; 32 M. 76; 19 M. L. J. 10; 4 M. L. T. 456, *Thiruvengada Mudaliar* v. *Sadagopa Mudaliar*, 7 Ind. Cas. 811; 34 M. 112; (1910) M. W. N. 446; 8 M. L. T. 231, 20 M. L. J. 987, *Sokkanadha Vannimundar* v. *Sokkanadha Vannimundar*, 28 M. 344, distinguished.

Kashinath Kedari v. *Ganesh*, 26 B. 739; 4 Bom. L. R. 525, *Chunder Sikhur Biswas* v. *Ram Buksh Chetlungee*, 1 C. L. R. 545, followed.

Order XXX, rule 9, Civil Procedure Code, contemplates the possibility of suits between a firm and one or more of the partners therein and suits between firms having one or more partners in common, but it does not profess to lay down when and under what circumstances such suits would be entertained and it is not within the scope of the Civil Procedure Code to lay down any such proposition. [p. 87, col. 1.]

Appeal against the decree of the Court of the Temporary Subordinate Judge of Sivaganga, in Original Suit No. 26 of 1916.

Mr. *K. V. Krishnaswami Aiyar*, for the Appellant.

Mr. *K. Rajah Aiyar*, for the Respondents.

JUDGMENT.—This is a suit instituted to recover a sum of Rs. 8,000 and odd from the defendants. The plaintiff and the father of the defendants were partners in a firm, at first called R. M. S. L. P. P. and afterwards changed into R. M. S. L. S. This firm carried on business in Soomangai and Kyato. The plaintiff had also a firm of his own at Rangoon.

The case of the plaintiff is that his Rangoon firm called R. M. S. L. advanced sums of money on different occasions to the defendants' firm of which he himself is a partner, that the latter firm was dissolved long before the institution of the suit, and on taking accounts as between the plaintiff's firm and the defendants' firm it was found that a balance of Rs. 25,000 and odd was due to the plaintiff's firm. The contract between the plaintiff and the father of the defendants with relation to the partnership was that the plaintiff was to have $\frac{3}{4}$th share and the father of the defendants $\frac{1}{4}$th share and we may also take it, so far as we can gather from the pleadings, that the plaintiff's share of the liability was $\frac{3}{4}$ths to $\frac{1}{4}$th of the defendants' father's. The plaintiff sues to recover, not the entire sum of Rs. 25,000 and odd which was found to be due from the R. M. S. L. S. firm to the plaintiff's firm, but $\frac{1}{4}$th of that sum on the basis that his liability being to the extent of the $\frac{3}{4}$ths, the defendants would only be liable for $\frac{1}{4}$th of Rs. 25,000 and odd, and that nothing is due to anybody else from the R. M. S. L. S. firm. It is not proved that there are any other debts due from that firm. But we may take i to be proved that there are outstandingt in respect of a decree debt due to the R.M.S.L.S. firm and otherwise. The question is whether a suit of this character is maintainable.

The plaintiff is practically suing himself and his partner, and he says that for the debt due to himself $\frac{3}{4}$th of that liability falls upon him. That is to say, he really seeks to establish a certain liability against the defendants on the basis of accounts. The defendants do not admit that upon the taking of the entire account, the amount due would be that claimed by the plaintiff. It may be said on behalf of the plaintiff that if there were any other assets due to the R. M. S. L. S. firm, the only difference which it

would make would be that the plaintiff will have his share of those assets as well. But that does not by any means conclude the question.

We may take it that one partner can sue another in certain cases, such as the one which this Court had to deal with in *Karri Venkatareddi* v. *Kollu Narasayya* (1). There the defendant partner was sued upon a special agreement to hand over certain promissory notes and other documents to the plaintiff. In such a suit no question of accounts arose. It was, therefore, held that to entertain a suit of that character could in no way work injustice to the defendant partner. The cases referred to in *Thiruvengada Mudaliar* v. *Sadagopa Mudaliar* (2) and *Sokkanadha Vannimundar* v. *Sokkanadha Vannimundar* (3) are different cases. In these, the suits were to recover a share of a particular item of partnership assets after the dissolution of partnership and the decisions lay down the principle and the conditions under which such suits will lie. They have no bearing on the present case.

Mr. K. V. Krishnasami Ayyar, the learned Vakil for the appellant, relies very strongly on the provisions of Order XXX, rule 9 of the Civil Procedure Code, which says this Order 'shall apply to suits between a firm and one or more of the partners therein and to suits between firms having one or more partners in common; but no execution shall be issued in such suits except by leave of the Court, and, on an application for leave to issue such execution, all such accounts and enquiries may be directed to be taken and made and directions given as may be just.' Now all that can be said is that this rule contemplates the possibility of suits between a firm and one or more of the partners therein and suits between firms having one or more partners in common. But it does not profess to lay down when, and under what circumstances, such suits would be entertained, and it would not ordinarily be within the scope of the Civil Procedure Code to lay down any such proposition. The rule in question only lays down that if such suits are entertained, the procedure to be followed is that set out in the Order.

On the other hand, we have been referred to at least two cases which seem directly to bear on the point, *Kashinath Kedari* v. *Ganesh* (4) and *Chunder Sikhur Biswas* v. *Ram Buksh Chetlungee* (5). The facts of those cases are very similar to the present case, and it was held that such suits would not lie.

We must, however, say that we do not understand the reasons given by the Subordinate Judge in support of his view on this question. He says that it is shown by the evidence that there are some assets belonging to the firm and, therefore, the suit ought to have been instituted against the assets. We do not understand what the learned Subordinate Judge means. He could have been right if he had held that a suit like this could not be entertained as the plaintiff has not asked for accounts. But there is no meaning in his saying that the suit ought to have been 'against the assets'. He also decided against the plaintiff on other grounds, namely, that certain entries in books of accounts filed by him had not been proved; and, even if proved, they would not be sufficient in law to support his case. It is unnecessary, in view of what we have expressed as regards the maintainability of the suit, to pronounce any opinion on that question. We dismiss the appeal with costs.

Appeal dismissed.

M. C. P.

(1) 1 Ind. Cas. 384; 32 M. 76; 19 M. L. J. 10; 4 M. L. T. 456.
(2) 7 Ind. Cas 811; 34 M. 112; (1910) M. W. N. 446; 8 M. L. T. 231; 20 M. L. J. 987.
(3) 28 M. 344.
(4) 26 B. 739; 4 Bom. L. R. 525.
(5) 1 C. L. R. 545.

COURT OF THE FINANCIAL COMMISSIONER, PUNJAB.

REVENUE APPEAL No. 10 OF 1917-18.

February 19, 1918.

Present:—Mr. Maynard, F. C.

Chaudhri MASHIR ALI—

APPELLANT

versus

Malik CHIRAGH KHAN—

RESPONDENT.

Lambardari Rules, r. 15—*Appointment of* lambardn

MASHIR ALI *v.* CHIRAGH KHAN.

on death without heirs of last incumbent—Matters to be considered—Collector, discretion of, interference with.

Where a *lambardar* dies without heirs, the question of the appointment of a successor should be dealt with under rule 15 of the Lambardari Rules as though it were a case of the first appointment of a *lambardar*.

An officer making an appointment under rule 15 of the Lambardari Rules is at liberty to consider all matters which may reasonably be regarded as relevant to the suitability of an appointment, and he is expected to decide between rival candidates according to the general balance of their respective claims and of the administrative advantages, or disadvantages, of appointing each respectively. If he exercises his discretion in a reasonable manner, neither ignoring any portion of those matters which he ought to consider, nor perversely running counter to the general sense of the rule, his decision ought to be allowed to stand, and the mere fact that an appellate or revising officer takes a different view of personal claims is not a good reason for upsetting or modifying that decision.

Appeal from the order of the Commissioner, Multan, dated the 22nd October 1917.

Mr. *Mukand Lall*, for the Appellant.

Bakshi *Tek Chand*, for the Respondent.

JUDGMENT.—I have heard Counsel for the parties. There is no claim on the part of either to succeed as heir to the late headman, and No. (8) in the grounds of appeal is misleading in this respect. The case is as, observed by the Commissioner, one to be dealt with under rule 15, as though it were a case of the first appointment of a headman.

Rule 15 specifies four matters for consideration. But these four matters are not the only matters to be taken into account. They are to be taken into account "among other matters," as the first sentence of the rule shows. An officer making an appointment is at liberty to consider all matters which may reasonably be regarded as relevant to the suitability of an appointment, and he is expected to decide between rival candidates according to the general balance of their respective claims and of the administrative advantages, or disadvantages, of appointing each respectively. If he exercises his discretion in a reasonable manner, neither ignoring any portion of those matters which he ought to consider, nor perversely running counter to the general sense of the rule, his decision ought to be allowed to stand; and the mere fact that an appellate or revising officer takes a different view of personal claims is not a good reason for upsetting or modifying that decision.

The Collector had the facts regarding the property and services of the rival candidates before him, and Malik Chiragh Khan is evidently a well-known man, being a retired military officer of distinction and a considerable landed proprietor in the Colony. The order of appointment mentioned the fact that "there is an old feud between him and the other *lambardar* L. Girdhari Lal," and observed: "In fact Malik Chiragh Khan has a great many feuds. He should not be appointed *lambardar* in this *chak* so long as it can be helped."

Against the Collector's order appointing Mashir Ali (who appears at the present time to be the owner of 6 squares in the *patti*, while Malik Chiragh Khan is the owner by purchase of the other eight) Malik Chiragh Khan appealed to the Commissioner. The Commissioner found that he owns more property than Mashir Ali, and that his services and those of his son are equal or greater than those of Mashir Ali and his forefathers, and also that his influence in the neighbourhood is considerable. He also observed that Malik Chiragh Khan is not to be blamed in the matter of his feud with Girdhari Lal. He, therefore, set aside the Collector's order and appointed Chiragh Khan.

The Collector's further remark that Malik Chiragh Khan has a great many feuds, and should not be appointed *lambardar* in this *chak* so long as it can be helped, was overlooked, or at all events not specifically dealt with in the Commissioner's order.

The Collector gave full consideration to the claims of the parties, and assigned a definite reason for not selecting the present respondent. Since he neither ignored any of the considerations which the rule requires him to take into account, nor gave a decision, which could be described as perverse or unreasonable, between the claims, taken each as a whole, of the two parties, his decision should not have been reversed upon appeal. I, therefore, accept the present appeal and restore the Collector's order appointing the appellant. I give the costs of the present proceeding in favour of the appellant.

Appeal accepted.

NARAYAN NAIR *v.* CHERIA KATHIRI KUTTY.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 519 OF 1917.

February 1, 1918.

Present:—Mr. Justice Oldfield and Mr. Justice Sadasiva Aiyar.

P. NARAYAN NAIR AND OTHERS —DEFENDANTS—PETITIONERS

versus

A. P. M. CHERIA KATHIRI KUTTY —PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. VII, r. 10—Plaint, return of, for presentation to proper Court—Presentation to Court indicated, whether bars right of appeal—Pre-emption, suit for, valuation of—Suits Valuation Act (VII of 1887), s. 3 (1)—Court Fees Act (VII of 1870), s. 7 (v)—Madras Civil Courts Act (III of 1873), s. 14.

A party who complies with an order of Court returning a plaint to be filed in the proper Court by filing it in the Court indicated in the order does not forfeit his right of appeal against the order returning the plaint.

The proper valuation of a suit to enforce a right of pre-emption is, in accordance with section 14 of the Madras Civil Courts Act, that fixed in the manner provided by section 7 (*v*) of the Court Fees Act.

Petition, under section 115 of the Act of 1908, praying the High Court to revise the order of the District Court, North Malabar, in Civil Miscellaneous Appeal No. 4 of 1917, preferred against the order of the Court of the Additional District Munsif, Tellicherry, in Original Suit No. 36 of 1916.

Mr. *K. P. M. Menon*, for the Petitioners.

Messrs. *C. Madhavan Nair* and *P. Appu Nair*, for the Respondent.

JUDGMENT.—The plaintiff-respondent first filed his plaint in the District Munsif's Court. When it was returned, he filed it in the Subordinate Court and it was returned again. He appealed to the lower Appellate Court against the order of return by the District Munsif; and the first question is whether by electing to file his plaint in the Subordinate Court, he forfeited his right of appeal. It has been held that he could do so in *Beni Madhub Das* v. *Jotindra Mohan Tagore* (1). But that decision was doubted in *Baikunta Nath Dey* v. *Nawab Salimulla Bahadur* (2) and was dissented from by one of us and another learned Judge of this Court in A. A. O. No. 403 of 1914. We do not find in Order XLI or XLIII of the Civil Procedure Code any recognition of the principle that any such election as may have taken place in the case before us affects the right of appeal. We, therefore, hold that an appeal lay to the lower Appellate Court.

On the merits the question is whether a suit to enforce a right of pre-emption should be valued for the purpose of jurisdiction with reference to the gross value of the property or otherwise, the lower Appellate Court having held that it should be valued with reference to the net value after the amount of encumbrances on it has been deducted. Under section 3 (1), Suits Valuation Act (VII of 1887), Local Governments are empowered to make rules for determining the value of land for purposes of jurisdiction in the suits mentioned in the Court Fees Act, section 7 (*v*); and suits such as that before us are so mentioned. Under section 6, when such rules are made section 14 in Madras Civil Courts Act (III of 1873) is to be deemed repealed. Section 14 no doubt refers to the subject-matter of suits for land, etc. But it is not, in our opinion, possible to accept the argument that the subject-matter includes only immediate rights to possession and not such rights relating to lands as pre-emption, when the contrary is indicated clearly by the last mentioned provision of the Suits Valuation Act. We, therefore, hold that the proper valuation is, in accordance with section 14 of the Madras Civil Courts Act, that fixed in the manner provided by the Court Fees Act, section 7 (*v*). It is not disputed that so valued the suit will be within the District Munsif's jurisdiction. We, therefore, agree with the District Judge's decision and dismiss the petition with costs.

Petition dismissed.

M. C. P.

(1) 5 C. L. J. 580; 11 C. W. N. 765.
(2) 6 C. L. J. 547 at p. 556; 12 C. W. N. 590.

RAMJI DAS *v.* DURGA PARSHAD.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 1442 OF 1914.

May 26, 1917.

Present:—Mr. Shah Din, Chief Judge, and Mr. Justice LeRossignol.

RAMJI DAS—PLAINTIFF—APPELLANT

versus

DURGA PARSHAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Adoption—Orphan boy, whether can be adopted—Will in favour of adopted son, construction of—Widow, power of, to dispose of property inherited from father—Collaterals, rights of.

According to Hindu Law no other than the father or mother can under any circumstances give a boy in adoption. An orphan boy, therefore, cannot be adopted. [p. 92, col. 2.]

Bhagabat Pershad v *Murari Lal*, 7 Ind. Cas. 427; 15 C. W. N. 524; 15 C. L. J. 97, distinguished.

Where a Will is made in favour of an adopted son and the adoption is held to be invalid, the question is whether the mention of the devisee in the Will as an adopted son is merely descriptive of the person to take under the Will, or whether the assumed fact of his adoption is the reason, and motive of the bequest, and a condition of it. [p. 93, col. 2.]

Where a Hindu widow, who had no authority from her husband, adopted a son and subsequently made a Will in his favour, in which after reciting the fact of adoption she stated that she was making the Will "with a view to remove subsequent disputes arising in connection with the management of the property of the family":

Held, that the validity of the adoption was not a condition precedent to the devisee taking under the Will, and that in spite of the adoption being held invalid the devisee was entitled to the property which the widow had power to dispose of by Will. [p. 95, col. 1.]

Property inherited by a Hindu widow from her father is not, strictly speaking, her *stridhan* and a collateral of her husband has, therefore, no *locus standi* to contest her power of disposition in respect of such property. [p. 95, col. 1.]

First appeal from the decree of the Divisional Judge, Delhi, dated the 14th March 1914, decreeing claim in part.

The Hon'ble Mr. *Muhammad Shafi* and Mr. *Santanam*, for the Appellant.

Mehta *Bahadur Chand* and Mr. *Tarlochan Das Khanna*, for the Respondents.

JUDGMENT.—One Chhote Lal, a Bania of Delhi, died sonless on the 31st October 1909, leaving a widow *Musammat* Kashmiro. On the 29th March 1911, *Musammat* Kashmiro executed a registered deed by which she adopted an orphan boy, named Durga Parshad, in accordance with the alleged instructions of her deceased husband Chhote Lal. In the said deed it was declared that Durga Parshad would be the owner of the moveable and immoveable property that had devolved upon *Musammat* Kashmiro from her husband and her father. On the 17th June 1911 *Musammat* Kashmiro executed a registered Will in which, after setting forth in detail the properties which she had inherited from her father and also those that had come into her possession from her husband, she stated as follows:—

"With the permission of Lala Chhote Lal, my husband, I have adopted Durga Parshad, minor, under a deed of adoption, dated the 29th March 1911 and registered on the 31st March 1911, on behalf of my husband. I have also performed his *Baryan* ceremony. The said boy is my heir * * * *

I do hereby, while in the enjoyment of sound health and in full possession of my senses * * * * * make a Will in favour of Durga Parshad, minor, adopted son of Chhote Lal, my husband * * * * * with a view to remove subsequent disputes arising in connection with the management of the property of the family to the following effect:—

(1) As long as I am alive, I shall be owner of the whole of my property, moveable and immoveable * * * * When I pass away, the legatee will be bound to perform my funeral and other ceremonies.

(2) As the legatee is a minor, I appoint (here follow the names of four persons) as guardians of the said minor for carrying on the management of the property. *

* * * * * *"

(5) * * * When the said adopted son attains the age of maturity he will be given proprietary possession of the whole of the moveable and immoveable property left by me which would be forthcoming at that time * * *

* * * * * *"

Musammat Kashmiro died on the 12th September 1913; and on the 11th November 1913 the suit which has given rise to the present appeal was instituted by Ramji Das, who is the sole surviving male collateral of Chhote Lal, deceased husband of *Musammat* Kashmiro, against

Durga Parshad and three of the executors named in *Musammat* Kashmior's Will, for

(1) a declaration that Durga Parshad had not in fact been adopted and that, if adopted, his adoption was invalid;

(2) a declaration that *Musammat* Kashmiro had no power to make the Will, dated the 17th June 1911, that the Will was invalid, and that the plaintiff was the lawful heir to the estate left by Chhote Lal and *Musammat* Kashmiro.

The defendant Durga Parshad pleaded, *inter alia*, that the plaintiff was not in possession of all the properties in suit which had been left by Chhote Lal and *Musammat* Kashmiro, and, therefore, a suit for a mere declaration did not lie; that the plaintiff had no *locus standi* to sue in respect of the property which *Musammat* Kashmiro got from her mother under a Will, as he was not an heir to that property; that *Musammat* Kashmiro had adopted the defendant Durga Parshad under the authority of her deceased husband Chhote Lal; that the adoption was valid; and that she had full power to bequeath the properties obtained by her from her husband and from her mother.

We may note here that at a subsequent stage of the litigation it appears to have been admitted by both parties that the house in Ambala and two houses situate in Kucha Lattu Shah, Delhi, which form part of the properties in dispute, had been inherited by *Musammat* Kashmiro from her father and had not come to her under a Will of her mother (page 93, lines 5 and 6 of the paper-book). On the pleadings of the parties the lower Court drew seven issues, which are as follows (page 48):—

(1) Does the suit for declaration not lie?

(2) Is the plaint insufficiently stamped?

(3) Is plaintiff a relative of Chhote Lal and has he a *locus standi* to sue?

(4) Were the house in Ambala and the two houses in Kucha Lattu Shah acquired by *Musammat* Kashmiro from her mother?

(5) If she succeeded her father to this property, has plaintiff as a relative of Chhote Lal any *locus standi* to sue?

(6) Did Chhote Lal give *Musammat* Kashmiro authority to adopt Durga Parshad?

(7) Did she in fact adopt him?

Later on an additional issue was drawn in the following terms (page 65):—

"Had Durga Parshad no father or mother alive at the time of his alleged adoption; and if so, does this fact invalidate the adoption?"

On the more material of issues set out above the lower Court has held as follows:—

(1) that the plaintiff's suit for a mere declaration is maintainable;

(2) that the plaintiff is a collateral of Chhote Lal, deceased, and has a *locus standi* to bring the present suit;

(3) that inasmuch as the house in Ambala and the houses situate in Kucha Lattu Shah were admittedly inherited by *Musammat* Kashmiro from her father, she had full power to dispose of the said houses by Will, and the plaintiff, as a collateral of her deceased husband, had no right to contest her power of disposition regarding the said houses;

(4) that Chhote Lal had given no authority to *Musammat* Kashmiro to adopt the boy Durga Parshad; and

(5) that the adoption of Durga Parshad by *Musammat* Kashmiro was invalid on the grounds—

(*a*) that he had been adopted by *Musammat* Kashmiro without the express or implied authority of her husband; and

(*b*) that he was an orphan boy at the time of the adoption and could not, therefore, be given in adoption under Hindu Law;

(6) that although the adoption of Durga Parshad was invalid, the Will made in his favour by *Musammat* Kashmiro was valid and operative after her death in regard to the three houses inherited by her from her father.

Upon these findings the lower Court has decreed the plaintiff's suit, except as regards the house in Ambala and the two houses in Kucha Lattu Shah, in respect of which it has held that the bequest of *Musammat* Kashmiro is perfectly valid, and to this extent only the plaintiff's suit has been dismissed.

The plaintiff has preferred an appeal

to this Court in regard to the three houses just referred to; and the defendant Durga Parshad has filed cross-objections, under Order XLI, rule 22, Civil Procedure Code, against that part of the decree of the lower Court by which it has granted the plaintiff (with the exception noted above) the declarations asked for by him. The questions which we have to decide in this appeal are:—

(1) whether the present suit for a mere declaration is or is not maintainable;

(2) whether Durga Parshad was adopted by *Musammat* Kashmiro under the authority of her deceased husband, and if he was so adopted, whether the adoption was valid under Hindu Law;

(3) if the adoption in question is invalid, whether the Will made by *Musammat* Kashmiro on the 17th June 1911 is also invalid on the ground that the Will was made in favour of Durga Parshad in his sole capacity as adopted son, the fact of his alleged adoption being the sole reason and motive of the bequest in question.

Upon the first question, we find no difficulty in holding that the suit is maintainable in the form in which it has been instituted. It is no doubt true that some of the moveable property to which the suit relates is in possession of the defendants (page 47), but the plaintiff's Counsel has expressly given up the claim in regard to that property before us. The rest of the moveables in suit are said to be in the possession of the *Nazir* who was appointed by the District Judge, Delhi, curator under Act XIX of 1841 in November 1913; and we are clearly of opinion that the suit for a declaration in respect of such moveable property is maintainable. So far as the immoveable property in dispute is concerned, it was admitted in the written statement of the defendants that house No. 5 was in possession of the plaintiff and houses Nos. 3 and 6 in possession of third parties (page 44). The only dispute was as to the possession of houses Nos. 1, 2 and 4, which were claimed by the defendants to be in the possession of their tenants. On this point, however, the defendants have adduced no evidence at all; whilst, on the other hand, the plaintiff has gone into the witness-box and deposed that the said houses are in his possession through his tenants Manohar Lal and Kundan Lal who had executed leases in his favour. We hold, therefore, that none of the properties in suit are in possession of the defendants, and that a suit for a mere declaration is maintainable by the plaintiff.

With respect to the second question, upon the view that we take of the case it is unnecessary to decide whether Durga Parshad had been adopted by *Musammat* Kashmiro with the express or implied authority of her deceased husband. Assuming that he was so adopted, in our opinion, the adoption in question was invalid on the short ground that Durga Parshad being an orphan boy at the time could not be given in adoption under Hindu Law by his grand-uncle Sheo Dial, who is a party to the deed of adoption, dated the 29th March 1911. In his Hindu Law, page 130, Trevelyan says:—

"Under no circumstances can any other than the father or mother give a boy in adoption. A step mother, a brother and a paternal grandfather have no power to give in adoption. The power to give a son in adoption cannot be delegated to any person; but a father or mother may authorize another person to perform the physical act of giving a son in adoption to a named person."

Similarly, Rama Krishna in his Hindu Law, Volume I, says (page 112):—

"According to Hindu Law it is only the father that can give a son in adoption, and in case he is incompetent, the mother can give him in adoption. No other person can give a son in adoption."

See also pages 113, 117 and 187 of the same Volume; Mayne's Hindu Law, 8th Edition, paragraph 132, pages 167—170; and Mulla's Hindu Law, 2nd Edition, page 386.

The learned Pleader for the defendant Durga Parshad has relied, in support of the alleged validity of his client's adoption, on the decision of the Calcutta High Court in the case of *Bhagabat Pershad* v. *Murari Lal* (1). The facts of that case were very peculiar. In 1873 an

(1) 7 Ind. Cas. 427; 15 C. W. N. 524; 15 C. L. J. 97.

orphan boy, named Murari Lal, was given in adoption to a Hindu widow by his brother Hazari Lal; and since the date of adoption Murari Lal had been in possession of the properties left by the widow's husband as his adopted son. Upon a suit being instituted in 1906 by a reversionary heir of the widow's husband in which the validity of the adoption of Murari Lal was contested on the ground that he being an orphan boy could not have been validly given in adoption by his brother Hazari Lal, the learned Judges of the High Court, after referring to certain cases in which the maxim *quod fieri non debet, factum valet* had been held to apply to cases of adoption, went on to observe as follows:—

"To disturb the adoption now would, we think, be to do grave injustice to the person adopted, Murari Lal, by destroying his civil status after it had been accepted for forty years, and we are, therefore, led to the conclusion, *though not without considerable hesitation*, that in the present case the maxim (of *factum valet*) may be applied, and that we should not hold that the adoption was invalid because it was made by the elder brother, the father and the mother of the person adopted being then dead. On this ground, therefore, we are of opinion that the suit must fail." The italics in the above passage are ours.

The facts of the present case are different from those of the case just cited; and there are no reasons whatever for applying the maxim of *factum valet* to the present litigation to the extent of accepting the validity of the adoption of Durga Parshad, in the face of the clear doctrine of Hindu Law that a Hindu boy cannot be validly given in adoption by any one except his father or mother. We hold, therefore, that the adoption of Durga Parshad by *Musammat* Kashmiro was invalid.

This brings us to the question as to whether, the adoption of Durga Parshad by the widow being invalid, her Will, dated the 17th June 1911, by which she bequeathed her own property to Durga Parshad was also invalid on the ground that his adoption was the sole reason and motive for the bequest. In support of his contention that the Will in question was invalid on the ground stated, the learned Counsel for the plaintiff relied on *Fanindra Deb Raikat* v. *Rajeswar Das* (2), *Lali* v. *Murlidhar* (3), *Karamsi Madhowji* v. *Karsandas Natha* (4), *Rango Balaji* v. *Mudiyeppa* (5) and *Surendro Keshub Roy* v. *Doorgasoondery Dossee* (6). In *Fanindra Deb Raikat* v. *Rajeswar Das* (2) one of the questions involved was whether a person, who was alleged to have been validly adopted according to the custom of the family but whose adoption was found to be invalid, was entitled to succeed to the estate of the alleged adoptive father under a Will (*angilrar patro*) executed by him in favour of the adopted son subsequent to the adoption.

At page 483 of the report their Lordships of the Privy Council say:—

"There is some evidence in this case of a family custom forbidding alienation by gift, and consequently by Will, but their Lordships do not propose to enter into the question whether there is sufficient proof of it, as they have come to the conclusion that, as Jogendra had no power to adopt a son who would succeed to the estate, it did not pass to Rajeswar by the *angilrar-patro*. Their Lordships feel no difficulty about Rajeswar being sufficiently designated as the object of the gift, although the adoption may not be valid. They think the question is whether the mention of him as an adopted son is merely descriptive of the person to take under the gift, or whether the assumed fact of his adoption is not the reason and motive of the gift and indeed a condition of it. The words are:—

"'I authorise you by this *angilrar-patro* to offer oblations of water and *pinda* to me and my ancestors after my death by virtue of your being my adopted son. Moreover, you shall become the proprietor of all the moveable and immoveable properties which I own and which I may leave behind; you shall become entitled to my

(2) 11 C. 463; 12 I. A. 72; 4 Sar. P. C. J. 610; 9 Ind. Jur. 277; 5 Ind. Dec (N. S.) 1068.

(3) 28 A. 488; 3 C. L. J. 594; 8 Bom. L. R. 402; 3 A. L. J. 415; 10 C. W. N. 730; 33 I. A. 97 (P. C.).

(4) 23 B. 271; 7 Sar. P. C. J. 427; 12 Ind. Dec. (N. S.) 180.

(5) 23 B. 296; 12 Ind Dec. (N. S.) 197.

(6) 19 C. 513; 19 I. A. 108; 6 Sar. P. C. J. 150; 9 Ind. Dec. (N. S.) 786.

dena-pawna (debts and dues) and you and your sons and grandsons shall enjoy them agreeably to the custom of the family.' He is to make the offerings by virtue of being an adopted son, and 'moreover' he is to become the proprietor. This is to be the consequence of the adoption. In fact the *angikrar-patro* only states what would have happened without it. The distinction between what is description only and what is the reason or motive of a gift or bequest may often be very fine, but it is a distinction which must be drawn from a consideration of the language and the surrounding circumstances."

It is clear from this passage in the judgment of their Lordships of the Privy Council that it has to be decided in each particular case, after a consideration of the language of the relevant documents and the surrounding circumstances, whether the distinction between what is description only and what is the reason or motive of a gift or bequest, as pointed out by their Lordships, exists or not in that case. In *Lali* v. *Murlidhar* (3) their Lordships of the Privy Council, following the rule laid down in *Fanindra Deb Raikat* v. *Rajeswar Das* (2), held that the intention of the testator in that case, who had bequeathed his property to a boy, named Murli Dhar, whom he had adopted several years before in virtue of a special custom, was to give his property to Murli Dhar as his adopted son capable of inheriting by virtue of the adoption; and that, as the adoption was invalid according to general Hindu Law, and not warranted by family custom, it gave him no right to inherit, and the gift or Will, therefore, did not take effect. The same principle which has been laid down in the above mentioned cases has been enunciated by the Judicial Committee of the Privy Council in *Surendro Keshub Roy* v. *Doorgasoondery Dossee* (6) and *Karamsi Madhowji* v. *Karsandas Natha* (4) and *Rango Balaji* v. *Mudiyeppa* (5).

The question for decision in the present case is, whether *Musammat* Kashmiro made the Will, dated the 17th June 1911, in favour of Durga Parshad simply and solely because he had been already adopted by her under the alleged authority of her deceased husband; in other words, whether his adoption was the reason and motive of the bequest, and its validity a condition precedent to his capacity to succeed under the Will to the property owned by *Musammat* Kashmiro in her own right in contradistinction to the property left by her deceased husband and held by her in her capacity as his widow. We have carefully considered the language of the deed of adoption, dated the 29th March 1911, and that of the Will, dated the 17th June 1911; and reading the two deeds in the light of the oral evidence on the record and of the surrounding circumstances, we have come to the following conclusion. *Musammat* Kashmiro had no authority whatever, express or implied, from her deceased husband to adopt the boy Durga Parshad. She adopted him under the influence of Durga Parshad's grand-uncle and certain other persons who were interested in defeating the reversionary claims of the present plaintiff. After executing the deed of adoption, dated the 29th March 1911, *Musammat* Kashmiro came to entertain grave doubts as to whether the device of adoption would be successful as against the present plaintiff; and she was, therefore, advised to execute a Will in favour of Durga Parshad in which the adoption of the boy was to be referred to by way of formal confirmation of what had been done by her before, but, in addition to it, she was to devise specifically and in detail (*a*) the properties which had been inherited by her from her own father; (*b*) properites which had come into her possession from her deceased husband. It has been admitted in argument before us that if the adoption of Durga Parshad by *Musammat* Kashmiro had been valid, he would have succeeded immediately, on the execution of the deed of adoption, dated the 29th March 1911, to the properties left by her husband Chhote Lal; but that he would not have had an immediate right of succession to the properties which had been inherited by *Musammat* Kashmiro from her own father. It seems to us that by executing the Will, dated the 17th June 1911, what *Musammat* Kashmiro intended to do was to place beyond dispute the right of Durga Parshad to succeed to the property inherited by her from her own father in the event of the adoption of the boy being held invalid, which would carry

with it the legal consequence of depriving him of succession to Chhote Lal's property. It is thus clear to our minds that the bequest in dispute was made by *Musammat* Kashmiro to Durga Parshad, because she wanted him to succeed to her own property referred to in the Will not merely by virtue of his adoption as the son of her deceased husband, but quite apart from, and independently of, his capacity of such adopted son. The adoption of the boy was not the reason and motive of the bequest, nor was its validity a condition precedent to the bequest taking effect; the underlying motive of the bequest was that Durga Parshad should succeed at least to *Musammat* Kashmiro's own property after her death in case his adoption, for some reason or other, was found to be invalid, as *Musammat* Kashmiro had, in view of the facts within her own knowledge, strong reasons for thinking that the *factum* of the adoption or its validity would not stand examination. Upon these grounds the present case is clearly distinguishable from the Privy Council decisions cited before us by the learned Counsel for the plaintiff; and we hold that the Will, dated the 17th June 1911, was not invalid simply because the prior deed of adoption, dated the 29th March 1911, did not confer on the boy the status of a validly adopted son.

There remains the subsidiary question as to whether *Musammat* Kashmiro had power under Hindu Law to bequeath to Durga Parshad the Ambala house and the two houses in Kucha Lattu Shah which she had inherited from her father. It is indisputably clear upon the authorities that the houses in question having been inherited by *Musammat* Kashmiro from her father were not, strictly speaking, her *stridhan* according to Hindu Law, a proposition which was not disputed before us by the plaintiff's learned Counsel; and it is equally clear that the plaintiff, who is a collateral of *Musammat* Kashmiro's husband, but is in no way connected with her father's family, has no *locus standi* to contest her power of disposition in respect of the property in question.

For the foregoing reasons we maintain the decree of the lower Court and dismiss both the appeal and the cross-objections with costs.

Appeal dismissed.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 74 OF 1917.

November 27, 1917.

Present:—Mr. Justice Bakewell and Mr. Justice Kumaraswami Sastri.

GOVINDASAMI PILLAI—PETITIONER—APPELLANT

versus

THE MUNICIPAL COUNCIL, KUMBAKONAM—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXIII, r. 5 (d), scope of—Pauperism, enquiry into—Jurisdiction to determine doubtful questions of law—Limitation, decision on question of, legality of.

Order XXXIII, rule 5 (*d*), Civil Procedure Code, applies only to cases where the allegations of the petitioner do not show a cause of action and it precludes an elaborate enquiry into doubtful and complicated questions of law during the enquiry into pauperism. [p. 95, col. 2.]

A question of limitation cannot be determined at the stage contemplated by Order XXXIII, rule 5, especially if its decision depends on the taking of evidence. [p. 96, col. 2.]

Appeal under clause 15 of the Letters Patent against the judgment and order of Mr. Justice Spencer, dated the 27th March 1917 reported as 42 Ind. Cas. 519, in Civil Revision Petition No. 887 of 1916, praying the High Court to revise the order of the Court of the Principal District Munsif, Kumbakonam, dated the 5th February 1916, in Original Suit No. 1251 of 1915.

Mr. *K. Ramachandra Ayyar*, for the Appellants.

Mr. *N. Rajagopala Chariar*, for the Respondent.

JUDGMENT.—We are of opinion that the District Munsif was not justified in determining a question of limitation, as to which there has been considerable difference of judicial opinion, upon an application to sue *in forma pauperis*. Order XXXIII, rule 5 (*d*), applies only to cases where the allegations of the petitioner do not show a cause of action, and we think that this should appear clearly upon the face of the petition.

We have been referred to cases where

it was held that the Court can go into the question of limitation to see if the petitioner has a subsisting cause of action. The cases do not decide that an elaborate enquiry into doubtful and complicated questions of law should be raised at the stage contemplated by Order XXXIII, rule 5. The pauper has no right of appeal if the decision on the question of law is wrong. We do not think it necessary to decide the question of limitation at this stage. This should form the subject-matter of an issue.

In the present case, moreover, the question of limitation may depend upon the construction of the contract between the parties, and it is possible that other evidence may be admissible as to the rights of the parties to the deposit made by the applicant, and we think that such matters should not be considered by the Court at this stage.

The appeal is allowed, the order of the District Munsif is set aside and the petition is remanded for disposal according to law. The costs in the Civil Revision Petition No. 887 of 1916 and this Letters Patent Appeal will abide the result of the suit.

Appeal allowed.

M. C. P.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 596 OF 1917.

October 17, 1917.

Present:—Mr. Justice Leslie Jones.

NANDU AND OTHERS—DEFENDANTS—APPELLANTS

versus

PUNJAB SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Custom—Abadi deh—*Alienation—Non-proprietors, right of, to sell sites*—Mauza *Tuto Mazara, District Hoshiarpur.*

In Mauza Tuto Mazara, District Hoshiarpur, non-proprietors have by custom the right to sell their sites. [p. 98, col. 2.]

Second appeal from the decree of the District Judge, Hoshiarpur, dated the 28th November 1916.

Lala *Madan Gopal*, for the Appellants.

Mr. *Vaughan*, for the Respondents.

JUDGMENT.—The facts of this case are briefly as follows:—Defendants Nos. 1 and 2, who are Khatris, sold the house and site in dispute to defendant No. 3, a Brahman, who re-sold 2/3rds to defendants Nos. 4 and 5 who are comparatively recent proprietors. The plaintiffs are Jats; and they sued for the dispossession of the vendees, alleging that defendants Nos. 1 and 2 had no right of alienation. The Munsif held that Tuto Mazara, where the property in dispute is situate, is not a *qasba* but a village and that the right of alienation of sites by the non-proprietary body is not established. The District Judge concurred in this finding, but granted a certificate on the point of custom. On the basis of that certificate the alienees have preferred a second appeal to this Court.

It may be remarked at the outset that having regard to the fact that the alienees are themselves village proprietors and the plaintiffs have no better title, having failed to establish the claims which they set up, (*a*) that they were the original owners of the site and (*b*) that the site belonged to their *Patti*, they ought not to have obtained a decree for more than joint possession.

As regards the merits of the case, the District Judge was evidently in considerable doubt as to whether on the evidence adduced he ought not to have found that a custom of right of alienation was established, and the finding at which he arrived was based mainly on a comparison of the facts of this case with those detailed in *Maya Das* v. *Jan Muhammad* (1) and *Khudayar* v. *Kapur Singh* (2). In the earlier of those cases evidence has been adduced regarding 31 sales and 26 mortgages; in the second case 97 deeds had been filed of which 20 specifically referred to the site as included in the sale, but in none was the sale-deed registered, although in many of them registration was compulsory by law. In the present case according to the District Judge documentary evidence regarding 32 sales and 49 mortgages and gifts was put forward.

(1) 13 P. R. 1889.
(2) 50 P. R. 1889.

The documents on the record relate to 27 sales, 5 mortgages with possession, 36 mortgages without possession, 5 gifts and 2 agreements regarding rights in such property. The District Judge thought that in the present case the evidence could not be said to be stronger than that under consideration in the cases of 1889.

Of the sales now under consideration 12 have been registered, and there is no case in which registration was not obtained where it was compulsory.

Though there may be some Jat non-proprietors in the village, the main proprietary body is admittedly Jat and it has not been suggested that any of the sales which were effected in favour of Brahmans were of doubtful value because those Brahmans were members of the proprietary body. There is only one sale which is in favour of a Jat and there are only three sales effected by Jats. All the rest are sales effected by obvious menials such as Chamars, potters, barbers, blacksmiths and carpenters in favour of other persons of similar class or by persons who are presumably non-proprietors, and even residents of other villages.

Again, in the great majority of cases the sales refer not merely to a house or even materials but to the site itself. Indeed there are constant references to the fact of a courtyard being also sold; and in some cases the sales relate even to vacant sites. There is not a single case from which it could be inferred that the intention was to sell the materials only.

The question now in dispute came before the Courts in 1880 and it was then held by the Munsif, an Extra Assistant Commissioner, that the right of alienation by the non-proprietary body was fully established. The District Judge has stated that he is not prepared to attach much importance to this decision, partly because it is that of a Munsif and was not carried on appeal to a higher Court, and partly because he regarded it impossible that any number of instances sufficient to prove such a custom could have been put forward in that year. He has also referred to two later decisions as weakening the value of the decision of 1880.

I am, however, unable to see how the considered decision of 1880 is affected by the later cases in which the question of the right of alienation was not in issue. Both of them related to cases in which the proprietors were suing to eject trespassers who had taken possession of abandoned sites.

Nor do I think that the decision of 1880 has been appreciated at its true value. In that case a house had been in possession of a Brahman family for many years. The direct line becoming extinct, the house was sold to certain Jat proprietors by the collaterals of the last occupant. Other Jats obtained forcible possession and the vendees accordingly brought the suit.

Amongst other lines of defence it was pleaded that non-proprietors could not alienate their sites, and a local commission issued with the result that the Munsif, who wrote a clear and careful judgment, came to a confident finding that the right of alienation was fully established. He did not rely only on the instances cited but had before him the statements of three Lambardars to the effect that the non-proprietary body had a full right of alienating their sites; and he remarked in his judgment that ultimately this plea was given up by the then defendants. It is to be noted that one of the said Lambardars was the father of one of the plaintiffs in the present case.

This being so, it is perhaps not surprising that the defendants, who failed to establish their other pleas, should not have carried the case to a higher Court on the point of custom; and it appears to me that the judgment loses none of its force merely because it was not affirmed on appeal. There was, then, in 1880 a direct challenge to the rights of the proprietary body as a whole, and I do not think that it would be legitimate to assume that the numerous alienations which have since taken place were effected with the consent of the proprietors, tacit or otherwise. The traffic in open sites points directly to a contrary conclusion. It appears to me rather that at least since 1880 the rights of the non-proprietary body in matters of alienation have been recognised as valid and unassailable.

Although, moreover, the lower Courts have concurred in holding that Tuto Mazara is not a town or a *qasba* but is still a village, it is one of considerable size, and it has a

bazâr. No doubt, as the District Judge points out, it does not appear in the list of principal towns and villages in the Hoshiarpur District, as shown in a comparatively recent map prepared by a late Deputy Commissioner. But it is, nevertheless, the kind of place in which it might be reasonably expected that a custom of disposition by non-proprietary body would establish itself.

No doubt, again, there is no provision in the *wajib-ul-arz* of Tuto Mazara relating to the power of non-proprietary residents to make valid transfers of their houses by sale, but the same thing was true in the well-known case of Bilgah, a village of the neighbouring Jullundur District, *Ramji Das* v. *Hamir Chand* (3). In that case there was evidence to show that formerly a non-proprietary resident had no such power. There were 102 cases there in which transfers of their houses had been made by non-proprietary residents and in only eight of them had disputes arisen. The best that could be said of the decision of these disputes was that on the whole they were in favour of the right of the non-proprietary residents. It was remarked "that the village had much increased under British rule and is now more like a *qasba* than an ordinary agricultural village, and a practice has grown up, and has for a long time prevailed, for the non-proprietary residents to sell their houses without the consent of the proprietors of the sites; but it is usual in these cases for the vendor or vendee on the occasion of a sale to pay a small fee or *nazar* to the proprietor of the site in recognition of his proprietary right and to prevent disputes arising."

The present case is stronger in that there is no allegation that the non-proprietors pay such *nazars*; and there has only been one dispute in which the contesting proprietors conspicuously failed. Tuto Mazara is certainly much smaller than Bilgah but here as there a practice may well have grown up, and have for a long time prevailed, according to which the non-proprietors have acquired the right which they have so long asserted; and in my opinion the statement of the Lambardars in 1880 is an exceedingly strong proof that the said custom was already recognised in that year.

(3) 9 P. R. 1882.

Accordingly I hold that in the case of Tuto Mazara the right of the non-proprietors to sell their sites is established by the evidence on the record. I, therefore, accept the appeal and dismiss the plaintiffs' suit with costs throughout.

Appeal accepted.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1098 OF 1916.

November 29, 1917.

Present:—Justice Sir William Ayling, KT., and Mr. Justice Phillips.

SRINIVASA UPADYA - PLAINTIFF—APPELLANT

versus

RANGANNA BHATTA (DEAD) AND OTHERS —DEFENDANTS—RESPONDENTS.

Easements Act (V of 1882), *s.* 15—*'Belongs to Government', meaning of—Servient tenement, transfer of, by Government to private individual, after 40 years' enjoyment of easement by dominant owner, effect of—Easement, acquisition of, against transferee.*

The words 'belongs to Government' in the last paragraph of section 15 of the Easements Act refer not to the time of suit but to the time during which the easement is enjoyed. [p. 99, col. 1.]

Where, therefore, after 40 years' enjoyment of an easement as against Government, the latter transfers the property to a private party, the easement does not become absolute, but the person claiming it must make good his title by 20 years' enjoyment against the transferee after the transfer. [p. 99, col. 1.]

Semble.—Where the 60 years' period has nearly expired during Government ownership of the land and the land is then transferred by Government to a private party the acquisition of the easement might be held to be completed if the deficiency was made up by subsequent enjoyment against the transferee. [p. 99, col. 1.]

Second appeal against the decree of the Court of the District Judge of South Kanara in Appeal Suit No. 286 of 1915, preferred against that of the Court of the District Munsif, Udipi, in Original Suit No. 126 of 1914.

Mr. *K. Y. Adiga*, for Mr. *B. Sitarama Rao*, for the Appellant.

Mr. *K. Sundara Row*, for the Respondents.

JUDGMENT.—The subject of dispute is

an easement claimed as acquired by prescription. The servient tenement belonged to Government till 2 years before suit and was then assigned by Government to the defendant. At the time of assignment the easement had been exercised only for 30 or 40 years and had, therefore, not become absolute as against Government. Appellant contends that the transfer of ownership had the effet of rendering it absolute, inasmuch as the servient tenement became the property of a private individual against whom the previous 30 or 40 years' enjoyment would be sufficient under section 15 of the Easements Act.

The point is a novel one and is not covered by authority. But we think appellant's contention cannot be admitted. We think the words "belongs to Government" in the last paragraph of section 15 must refer not to the time of suit, but to the time during which the easement is enjoyed. An easement can only be acquired by 20 years' enjoyment against a private person or by 60 years' enjoyment against Government. Here neither condition is satisfied. It may be that where the 60 years' period has nearly expired during Government ownership of the land and the land is then transferred by Government to a private party, the acquisition of the easement might be held to be completed when the deficiency was made up by subsequent enjoyment against the transferee, but subject to this the person claiming the easement must make good his title by 20 years' enjoyment against the transferee after the transfer.

If we adopt the view contended for by the appellant, we should have to hold that the transfer of the servient tenement by a private owner to Government would have the effect of destroying any easement right, which had been legitimately acquired by 20 years' enjoyment but which had not been enjoyed for the period of 60 years required as against Government.

The appeal is dismissed with costs.

Appeal dismissed.

M.C.P.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2107 OF 1916.

July 24, 1917.

Present:—Mr. Shah Din, Chief Judge.

KAPUR CHAND—PLAINTIFF—APPELLANT

versus

NARINJAN LAL—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), s. 19—Acknowledgment—Deposition made by defendant, whether acknowledgment.

A deposition made by the defendant in a previous case but not signed by him or by an agent duly authorised by him in that behalf does not fulfil the requirements of section 19 of the Limitation Act and does not, therefore, amount to a valid acknowledgment of liability within the meaning of that section. [p. 100, col. 1.]

Second appeal from the decree of the Additional District Judge, Karnal at Ambala, dated the 17th June 1916.

Bakshi *Tek Chand* and Lala *Sangam Lal*, for the Appellant.

Lala *Moti Sagar*, R. S., for the Respondent.

JUDGMENT.—The sole question for decision in this second appeal is whether the defendant respondent can be held to have made a valid acknowledgment of liability in respect of the promissory note sued upon by the plaintiff-appellant within the meaning of section 19 of the Limitation Act—

(*a*) in the deposition made by the defendant on the 30th June 1913 before Mr. LeRossignol, Divisional Judge of Ambala, in Appeal No. 263 of 1913, *Munna Lal* v. *Narinjan Lal*; and

(*b*) in the written statement filed by the defendant on the 2nd July 1912 in Original Suit No. 47 of 1912, *Munna Lal* v. *Narinjan Lal*.

As regards the deposition made by the present defendant before Mr. LeRossignol on the 30th June 1913, it is not signed by the defendant or by an agent duly authorised by him in this behalf; and the case of *Allah Ditta* v. *Karam Chand* (1) is authority for holding that the deposition in question does not fulfil the requirements of section 19 of the Limitation Act. In support of his contention that the defendant's deposition, though not signed by him, must be held to contain a valid acknowledgment of liability as required by section

(1) 10 Ind. Cas. 142; 194 P. W. R. 1911; 151 P. L. R 1911.

19 aforesaid, the learned Pleader for the plaintiff-appellant has relied on *Ram Ditta* v. *Ibrahim-ud-Din* (2) and *Gul Muhammad* v. *Akbar* (3) and *Jeba* v. *Chaman* (4). These rulings have no material bearing on the point before me, which is directly covered by the decisions in the case of *Allah Ditta* v. *Karam Chand* (1) above referred to. I hold, therefore, that the deposition of the defendant-respondent, dated the 30th June 1913, does not amount to a proper acknowledgment of liability by the defendant and cannot save limitation.

As regards the second contention, *viz.*, that the pleas of the defendant in the case of *Munna Lal* v. *Narinjan Lal* contain a valid acknowledgment of liability, I have no hesitation in agreeing with the District Judge that this contention is wholly untenable. All that the second plea of the defendant, on which reliance is placed, means is that the defendant wanted the plaintiffs to produce the promissory note to which reference was made in the concluding sentence of their plaint. No specification of the promissory note is contained either in the plaint or in the pleas, so that it is impossible to say whether the promissory note referred to therein was the promissory note which is now sued upon. The mere fact that the defendant called upon the plaintiffs to produce the promissory note adverted to in the plaint is insufficient to establish an acknowledgment of liability in respect of the promissory note which is the foundation of the present claim.

For these reasons I maintain the judgment and decree of the District Judge and dismiss the appeal with costs.

Appeal dismissed.

(2) 122 P. R. 1889.
(3) 145 P. R. 1889.
(4) 16 P. R. 1891.

PATNA HIGH COURT.
SECOND CIVIL APPEAL No. 357 OF 1916.
November 19, 1917.
Present:—Sir Edward Chamier, KT., Chief Justice, and Mr. Justice Roe.
RAGHUNATH DAS—APPELLANT
versus
JHARI SINGH—RESPONDENT.

Appeal—*Decree for possession and remand for ascertainment of mesne profits*—*Court-fee payable on appeal.*

Plaintiff's suit for possession and mesne profits was dismissed by the first Court. On appeal, the lower Appellate Court held that the plaintiff was entitled to possession and sent back the case to the first Court for ascertainment of mesne profits and for passing a decree:

Held, (1) that the lower Appellate Court in fact reversed the decree of the first Court and should have passed a decree for possession in favour of the plaintiff and sent the case to the first Court for enquiry as to mesne profits;

(2) that the order of the lower Appellate Court must be considered as a decree in favour of the plaintiff and the defendant's appeal against it must be considered as an appeal against an appellate decree and must bear Court-fee accordingly.

Appeal from a decision of the Additional District Judge, Patna, dated the 25th January 1916, setting aside the decree of the Subordinate Judge, Patna, dated the 12th December 1914.

JUDGMENT.—This appeal was filed as an appeal from an order of remand. Order XLIII, rule 1 (*u*) is referred to. The respondents object that the appeal is not an appeal from an order of remand but from an appellate decree and must bear Court-fee accordingly. On looking into the record we find the first Court dismissed the suit on various grounds. The plaintiff appealed and the District Judge held that plaintiff was entitled to the land which he claimed, that the suit was within limitation and that, therefore, he was entitled to get possession, and he concluded his order in these words:—

"The case must go back to the lower Court for determining whether the plaintiff is entitled to mesne profits and if so what, and whether the plaintiff has any cause of action against defendant No. 6. After determining these remaining issues the lower Court will pass a decree accordingly. The costs of the appeal are to be paid by the defendants Nos. 1 and 2."

It is quite clear that the District Judge reversed the decree of the first Court and should have passed a decree for possession in favour of the plaintiff and sent the case to the Court below for enquiry as to mesne profits. We must consider this as a decree for possession in favour of the plaintiff, and the defendants' appeal against it must be considered as an appeal against an appellate decree. The appeal has been filed on a two rupee Court-fee stamp. The Court-fee paid is obviously deficient. Let

the record be sent into the office at once in order that a report may be made as to the amount of Court-fee payable on the appeal. Let the case be entered on the list for to-morrow and if the Court-fee is paid it will be heard.

Order accordingly.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 3418 OF 1916.

March 29, 1917.

Present:—Mr. Justice Shadi Lal.

ALLAH DIN—DEFENDANT—APPELLANT

versus

FATEH DIN AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Punjab Alienation of Land Act (XIII of 1900), s. 10—Mortgage—Condition operating by way of conditional sale, legality of—Mortgagor not member of agricultural tribe, effect of—Interest, payment of, after date fixed for redemption—Charge, interest, whether is—Excessive rate of interest, whether ground for relief—Contract Act (IX of 1872), s. 16—Appeal, second—Point not taken in lower Courts or in Chief Court, whether can be given effect to.

The language of section 10 of the Punjab Alienation of Land Act is wide enough to include every mortgage which contains a stipulation as to conditional sale, and it is absolutely immaterial whether the mortgagor is or is not a member of an agricultural tribe. [p. 101, col. 2.]

A point of law, which is patent upon the record but which is not raised either in the lower Courts or in the Chief Court, can be given effect to by the Chief Court *suo motu* in second appeal. [p. 101, col. 2.]

The mere fact that the rate of interest stipulated for in a mortgage deed is excessive is no ground for relief, unless it is shown that the lender was in a position to dominate the will of the borrower. [p. 102, col. 1.]

A mortgage-deed provided that the principal money together with interest at a certain rate shall be paid within one year, and that on default the transaction shall be deemed to be a sale. It was further stipulated that the interest shall be payable from year to year, and that in the event of non-payment every year the debtor shall be liable to pay compound interest. The mortgagor was also prohibited from transferring the property until redemption:

Held, (1) that the covenant as to the payment of interest from year to year and as to the liability of the debtor to pay compound interest showed that the parties contemplated that interest should be payable after the expiry of the period fixed for redemption; [p. 102, col. 1.]

(2) that the mortgagor's liability to pay interest having been established, there was no equitable reason why he should get the property without discharging his obligation, *i. e.*, the mortgagor must pay the interest before redemption. [p. 102, col. 1.]

Second appeal from the decree of the District Judge, Hissar, dated the 22nd August 1916.

Mr. *Nanak Chand*, for the Appellant.

The Hon'ble Mr. *Fazl-i-Husain*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for the redemption of a mortgage by way of conditional sale executed on the 6th July 1901 by one Jamal Din, Sheikh of the Hissar District, in favour of Allah Dia, Kunjra of the same District. There was a good deal of discussion in the lower Courts as to the regularity of the foreclosure proceedings and as to the validity of the tender or deposit alleged to have been made by the mortgagor before the expiry of the year of grace. The learned Counsel on both sides wanted to argue the same points before me, but I drew their attention to section 10 of the Punjab Alienation of Land Act, which provides that in any mortgage of land made after the commencement of the Act any condition which is intended to operate by way of conditional sale shall be null and void. It is clear that the Act came into force on the 8th June 1901 before the date of the mortgage in question, and that the circumstance that the mortgagor was not a member of an agricultural tribe does not make any difference so far as the operation of the section is concerned. The language of the enactment is wide enough to include every mortgage which contains a stipulation as to conditional sale, and it is absolutely immaterial whether the mortgagor is or is not a member of an agricultural tribe. It is true that this point was not raised either in the Courts below or by the learned Counsel in this Court, but it is patent upon the record and I am bound to give effect to the law which, I find, is clearly applicable to the case.

Upon this finding the defendant cannot claim to be the owner of the property, and the only matter for determination is whether he is entitled to interest after the date fixed for redemption and whether the interest is a charge upon the property. The determination of the question must

depend upon the terms of the deed, which must be construed in a reasonable manner and with due regard to the ordinary expectations of persons entering into a transaction of this character. Now, the instrument provides that the principal money together with interest at Rs. 1-9-0 per cent. per mensem shall be paid within one year, and that on default the transaction shall be deemed to be a sale. It is further stipulated that the interest shall be payable from year to year, and in the event of non-payment every year the debtor shall be liable to pay compound interest. Lastly there is again a clause repeating the stipulation as to conditional sale on failure to redeem the property. Now, there can be no manner of doubt that the covenant as to the payment of interest from year to year and as to the liability of the debtor to pay compound interest shows that the parties contemplated that interest should be payable after the expiry of the period fixed for redemption. Indeed, any other construction would render the above covenant absolutely unnecessary, and we cannot possibly assume that the parties intended to insert in the document a clause which was never to come into operation.

As regards the question whether the interest and compound interest should be paid to the mortgagee before redeeming the land, it must be remembered that it is not the mortgagee who seeks the assistance of the Court but that the suit has been instituted on behalf of the debtor, and if his liability to pay interest has been established, there is no equitable reason why he should get the property without discharging his obligation. It is to be observed that the mortgagor transferred his rights to the respondents who have purchased the litigation with their eyes open and are consequently not entitled to any indulgence whatsoever. It appears that the mortgagee asserted his right to get interest according to the stipulated rate before surrendering the property, and it was never alleged in the pleadings that the interest was not a charge upon the property. Indeed, certain applications were made during the pendency of the suit for amending or adding to the issues, but it was not until the final arguments in the case that the matter in question was raised and the liability was denied. I have carefully examined the language of the document including the term prohibiting the borrower from transferring the property until redemption, and come to the conclusion that it was never intended that the interest should not constitute a charge upon the property and that the creditor's only remedy was to file a suit for the recovery thereof as it became due. This construction is in accordance with the principle enunciated by their Lordships of the Privy Council in *Mathura Das* v. *Raja Narindar Bahadur* (1) and adopted by this Court in *Mota Singh* v. *Bishen Singh* (2).

The amount of interest has no doubt become a large sum, but the stipulated rate cannot be regarded as exorbitant. Further, undue influence was neither alleged nor proved, and it has been held that the mere fact that the rate of interest is excessive is no ground for relief unless it is shown that the lender was in a position to dominate the will of the borrower. In the absence of any proof to that effect I must hold that the parties are bound by the contract, and that the plaintiffs must pay the amount found due upon the strength of the deed. No objection has been taken before me to the calculations made by the Court of first instance, and I accordingly accept the appeal and setting aside the decree of the lower Appellate Court restore that of the Court of first instance. I direct the parties to bear their own costs in all the Courts.

Appeal accepted.

(1) 19 A. 39; 23 I. A. 138; 1 C. W. N. 52; 6 M. L. J. 214; 7 Sar. P. C. J. 88; 9 Ind. Dec. (N. s.) 25 (P.C.).
(2) 32 Ind. Cas. 821; 5 P. R. 1916; 23 P. W. R. 1916.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 374B OF 1914.
August 22, 1916.
Present:—Mr. Mitra, A. J. C.

BHIMRAO PATEL—PLAINTIFF—APPELLANT
versus
MARTAND—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI,

BHIMRAO PATEL v. MARTAND.

100, 101—*Dispossession from immoveable property—Application for restoration of possession, dismissal of, for applicant's failure to produce evidence—Order, whether under r.* 101—*Suit, regular, brought more than one year after date of order, whether barred—Limitation Act (IX of* 1908*), Sch. I, Art.* 11 (*a*), *applicability of.*

The defendants obtained possession of the fields in suit in execution of a decree for foreclosure. Plaintiff's predecessors applied to the executing Court complaining of their dispossession by the defendants and asking to be restored to possession. The application was dismissed as applicants failed to produce or summon witnesses. More than one year after they instituted a regular suit for possession:

Held, that no order had been passed under Order XXI, rule 101, of the Civil Procedure Code which would be conclusive in the absence of a suit instituted within the period allowed by Article 11 (*a*) of the Limitation Act. [p. 105, col. 1.]

However short and summary the investigation may be, an order under rule 101 of Order XXI of the Civil Procedure Code must be based upon the merits of the application, that is, an opinion on such facts as are before the Court as to whether the applicant was in possession or not. A mere dismissal in default or for non-prosecution is not an order under rule 101. [p. 104, col. 1.]

The test as to whether an order has properly been passed under rule 101, Order XXI, is whether there was an investigation and the order was passed as the result of the investigation. [p. 104, col. 2.]

Appeal from the decree of the Court of the District Judge, East Berar, Amraoti, dated the 25th of June 1914, in Civil Appeal No. 28 of 1914.

Mr. *A. C. Roy*, for the Appellant.

Dr. *H. S. Gour*, for the Respondent.

JUDGMENT.—The plaintiff-appellant filed a suit upon two alternative causes of action in the Court of the Munsif. The Munsif, being of opinion that the trial of the two causes of action would be inconvenient, called upon the plaintiff to elect between the two. The plaintiff elected to sue for possession of certain fields, though he has purchased from two brothers Sadhu and Shanker, of which the defendant obtained possession in execution of a decree for foreclosure against the third brother Bhiwaji. The plaintiff's predecessors Shanker and Sadhu had filed two separate applications under Order XXI, rule 100, complaining to the executing Court of their dispossession by the defendant. Both the applications were apparently tried together. The order sheet of the 26th January 1911 contains the following entry. "Appt. by Mr. Godbole. Non-appt. abs. by Mr. Deshpande. Appt. has again failed to produce or summon witnesses. Appn. dismissed. Costs on Appt.". There is no other order in the body of the proceedings. More than one year after the dismissal of the applications the present suit for possession has been instituted. The defence was that the suit is barred by Article 11 (*i*) of the Limitation Act, 1908.

There are some remarks in the judgment of the District Judge adverse to the plaintiff-appellant on the merits of the alternative case which has not been tried. These must be treated as *obiter*.

The only point for decision is whether the suit is barred by limitation. The answer to it depends upon whether the order above mentioned was an order under Order XXI, rule 101.

The appellant relies upon *Sarat Chandra Bisu* v. *Tarini Prasad Pal Chowdhry* (1), *Kallar Singh* v. *Toril Mahton* (2), and *Kunj Behari Lal* v. *Kandh Prashad Narain Singh* (3).

The respondent relies upon *Gooroo Dass Roy* v. *Sona Monee Dossia* (4), *Sadut Ali* v. *Ram Dhone Misser* (5) and *Rahim Bux* v. *Abdul Kader* (6).

I may at once say that I am unable to distinguish the facts of the present case from those in *Rahim Bux* v. *Abdul Kader* (6), but the correctness of that decision has been doubted by Mookerjee, J., in *Kunj Behari Lal* v. *Kandh Prashad Narain Singh* (3) if not also by Maclean, C. J., in *Sarat Chandra Bisu* v. *Tarini Prasad Pal Chowdhry* (1). The report in the other case does not set out the terms of the order held to be conclusive.

The decisions have been in the past conflicting, but we must now endeavour to apply the law, as laid down by their Lordships of the Privy Council in *Sardhari Lal* v. *Ambika Pershad* (7). At page 525 Lord Hobhouse says:—"The other reason assigned is that section 280 does not contemplate that any order shall be made until after an investigation which is directed by section 278. The answer to that is that in the first place we do not know what took

(1) 34 C. 491; 11 C. W. N. 487.
(2) 1 C. W. N. 24.
(3) 6 C. L. J. 362.
(4) 20 W. R. 345.
(5) 12 C. L. R. 43.
(6) 32 C. 537.
(7) 15 C. 521; 15 I. A. 123; 5 Sar. P. C. J. 172; 12 Ind. Jur. 210; 7 Ind. Dec. (N. S.) 931.

place before the Subordinate Judge who made this order. It may have been that the parties who were before him agreed so far upon facts that he was enabled to deliver his opinion offhand. But besides that, the Code does not prescribe the extent to which the investigation should go; and though in some cases it may be very proper that there should be as full an investigation as if a suit were instituted for the very purpose of trying the question, in other cases it may also be the most prudent and proper course to deliver an opinion on such facts as are before the Subordinate Judge at the time, leaving the aggrieved party to bring the suit which the law allows him." It is clear that, however short and summary the investigation may be, the order must be based upon merits of the application, that is, to quote the words of their Lordships: "An opinion on such facts as are before the Court." The Court under Order XXI, rule 101, must be satisfied as to whether the applicant was in possession or not. A mere dismissal in default or for non-prosecution is not such an order.

It is urged by Dr. Gour that section 141 of the Civil Procedure Code makes Order XVII applicable to proceedings instituted upon an objection to an attachment or other claims made by or against third parties in execution proceedings. The learned Counsel suggests that under Order XVII, rules 2 and 3, a Court is bound, unless it adjourns the hearing, to dismiss an application if the applicant fails to appear and to decide on the merits if the applicant appears but fails to produce evidence. It was argued that as the Court did not adjourn the hearing it must be deemed to have passed an order on the merits of the application. Two of the Calcutta cases cited for the appellant were sought to be distinguished on the ground that the applicants in those cases were not present, and the third on the ground that the applicant though present asked for permission to withdraw.

I cannot accept the argument as sound. The law directs an *investigation* and not a *trial* of the objection. The procedure laid down for suits cannot be properly applied in every respect to such investigations. In *Sreemunto Hajrah* v. *Syud Tajooddeen* (8) it was held that an order under section 246 of the Code of 1859 can be passed in the absence of the claimant. In *Kunj Behari Lal* v. *Kandh Prashad Narain Singh* (3) Mookerjee, J., says:—"It does not follow, however, that merely because the claimant does not advance evidence or is absent, there are no materials before the Court, to enable it to enquire into the matter. If the Court does enquire into it and dismisses the application, the order must be taken to have been made upon investigation." From this, it follows that, if the Court does not enquire into the matter, the order is not conclusive.

The view suggested by the learned Counsel for the respondent would lead to a very anomalous result. It would be open to a claimant to avoid the adverse result of an investigation when complete by absenting himself on the day fixed for the passing of the order. If a plaintiff is absent and the defendant is present, there is a statutory bar to the institution of a fresh suit for the same cause of action (Order IX, rule 9). Apparently this bar will not apply to such an investigation.

Under section 148 of the Code of 1859 the Court was bound to decide a suit on the record if there was a failure to produce evidence, but this has been changed since 1877. Order XVII, rule 3, makes it optional with the Court to decide the suit on merits in such a case. I need not decide whether the section does not impliedly give the Court power to dismiss a suit for non-prosecution. But the cases recognise that the order on the merits need not be passed if there are in the opinion of the Court no materials for an investigation.

The Calcutta cases do not proceed upon the ground suggested, *viz.*, whether the applicant was present or not. They lay down the test to be whether there was an investigation and the order passed as the result of the investigation.

Applying then the law to the facts of this case, I have to see whether there has been an adjudication on the merits. I can find no trace of any such adjudication. The Judge has not even adverted to the question of burden of proof having regard

(8) 21 W. R. 409.

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to the pleadings of the parties, nor has he "delivered an opinion on such facts as were before the Court at the time."

The hasty and abbreviated form in which the order-sheet has been written up does not indicate anything like a judicial determination of the issues about which the Judge had to be satisfied before passing an order. On the contrary it suggests a disposal of the case otherwise than by a decision on the merits. The dismissal should be regarded, in my opinion, as a dismissal for non-prosecution, as was done in *Kallar Singh* v. *Toril Mahton* (2).

I hold that there was no order passed under Order XXI, rule 101, which would be conclusive, in the absence of a suit instituted within the period allowed by Article 11 (*a*) of the Limitation Act. The result is the appeal succeeds, and the decree of the lower Appellate Court is reversed, and the appeal is remanded to the Court for a fresh decision on the merits. The appellant will get a certificate for refund of Court-fees. Other costs will follow the result.

Case remanded.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2279 OF 1916.

June 13, 1917.

Present:—Mr. Justice LeRossignol.

FAKIR AND OTHERS—DEFENDANTS—APPELLANTS

versus

WAZIR KHAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Occupancy tenancy in Punjab, nature of—Forfeiture—Denial of landlord's title, effect of.

The occupancy tenant of the Punjab is more than a mere permanent tenant; he is an individual who in many cases should have been the landlord, and he enjoys a permanent tenancy subject to certain conditions, at a concession rent. [p. 105, col. 2; p. 106, col. 1.]

The English rule of forfeiture on denial of the landlord's title is applied in the Punjab in the case of ordinary tenancies and even in the case of permanent tenancies on a rack rent and when the denial of the landlord's title admits of no other remedy, but the rule is inapplicable in the case of an occupancy tenancy. [p. 106, col. 1.]

Second appeal from the decree of the District Judge, Hoshiarpur, dated the 2nd June 1916.

Mr. *Zia-ud-Din*, for the Appellants.

The Hon'ble Mr. *Fazl-i-Hussain*, for the Respondents.

JUDGMENT.—In Appeals Nos. 2279—2281 the facts are the same.

The plaintiffs, asserting that they were landlords and defendants occupancy tenants, sued in the Revenue Courts for enhancement of rent and were met with the defence that the defendants were of higher status than occupancy tenants, were in fact full owners.

The Revenue Court referred the plaintiffs to a civil suit and the plaintiffs, relying on the denial of the defendants' occupancy status, sued for their ejectment on the ground that they are trespassers.

The first Court found that the defendants had only occupancy right and no proprietary status, (indeed the defendants did not insist in the Civil Court on proprietary status alone) and very rightly gave the plaintiffs a declaratory decree, but the District Judge on appeal decreed the defendants' ejectment on the ground that inconsistent pleas could not be permitted, and he referred to *Shashi Bhusan Mandal* v. *Ram Sebak Mandal* (1). In the face of plaintiffs' admission he held defendants to be mere trespassers.

In support of the decree of the lower Appellate Court respondents' learned Counsel has referred to the following authorities:—*Muhammad Badar Khan* v. *Chiragh Shah* (2), *Bhani* v. *Bhag Mal* (3), *Satyabhama Dasee* v. *Krishna Chunder Chatterjee* (4), *Mozhuruddin* v. *Gobind Chunder Nundi* (5), *Shumsher Ali* v. *Doya Bibi* (6), *Jalal Din* v. *Ramzan* (7), *Khater Mistri* v. *Sadruddi Khan* (8), *Sreemutty Monmohini Dassi* v. *Kalidas Ahiri* (9), *Nilmadhab Bose* v. *Ananta Ram* (10) and *Padmanabaya* v. *Ranga* (11), but none of these authorities is exactly in point, the occupancy tenant of the Punjab is more than a mere permanent tenant, he

(1) 24 Ind. Cas. 181.
(2) 13 Ind. Cas. 32; 43 P. W. R. 1912; 16 P. L. R. 1912.
(3) 65 P. R. 1885.
(4) 6 C. 65; 6 C. L. R. 375; 3 Ind. Dec. (N. S.) 36.
(5) 6 C. 436; 3 Ind. Dec. (N. S.) 284.
(6) 8 C. L. R. 150.
(7) 6 Ind. Cas. 1010; 80 P. W. R. 1910.
(8) 34 C. 922.
(9) 2 C. W. N. 292.
(10) 2 C. W. N. 755.
(11) 6 Ind. Cas. 447; 34 M. 161 at p. 165; 8 M. L. T. 130; (1910) M. W. N. 462, 20 M. L. J. 930.

is an individual who in many cases should have been the landlord and he enjoys a permanent tenancy subject to certain conditions, at *a concession rent.*

The Transfer of Property Act does not apply to this Province and there is no statutory law enjoining forfeiture in cases of this kind. No doubt the English rule of forfeiture is applied in this Province in the case of ordinary tenancies and (even in the case of permanent tenancies on a rack rent and when the denial of the landlord's right admits of no other remedy), but in the case of an ordinary tenancy, the forfeiture involves no loss to the tenant but the loss of notice.

The present case, however, involves much more loss to the tenants than the forfeiture of the right to notice and must be decided in accordance with equity and good conscience.

The action of the defendants was, of course, one of sheer folly, but they appear to have been the victims of worthless legal advice and I note that in the first Court they admitted before judgment that they had only an occupancy status.

In the circumstances the first Court's decree declaring the status of parties was a very proper decree and accepting the appeal I restore that decree, but defendants must pay all costs throughout.

Appeal accepted.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 274 OF 1917.

February 26, 1918.

Present:—Mr. Kotwal, Offg. A. J. C.

SHEORATAN—DEFENDANT—APPELLANT

versus

BIHARILAL SEWARAM MARWADI—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 84—Tender, what amounts to.

A mere readiness and willingness to pay not communicated to the creditor and without the accompanying circumstance of the debtor being in a position to pay immediately if the offer is accepted does not amount to a valid tender. [p. 107, col. 2.]

Shriram Rupram v. *Madangopal Gowardhan*, 30 C. 865, 5 Bom. L. R. 483; 8 C. W. N. 25, distinguished.

Appeal from the decree of the Court of the District Judge, Chhindwara, dated the 17th February 1917, in Appeal No. 11 of 1917.

FACTS of the case will appear from the following extract from the judgment of the lower Appellate Court:—

"This is a suit on a mortgage executed by the father of the defendant No. 1 in favour of the adoptive father of plaintiff. The only contesting defendant is No. 4, who is in possession of the mortgaged property having purchased it in 1910 at a Court-sale. The only point of contest is as to the liability of defendants for interest and costs. Defendant No. 4 alleged that he came to know of the existence of the mortgage after he had purchased the property. Accordingly on the 14th July 1910, he sent a notice by registered post to the mortgagee, Sewaram, asking for an account and expressing his intention of redeeming the mortgage. On the 5th September 1910, Sewaram replied by post-card which has been filed in original (Exhibit 4 D-2). The reply was to the effect that defendant No. 4 must pay the amount due under the mortgage either by money order or personally, otherwise he will have to pay the interest till realization. The amount due under the mortgage was not stated but it was mentioned that the mortgage was registered. Defendant No. 4 alleges that he sent a further notice to Sewaram on the 7th September 1910. He filed a postal receipt which shows that he did send a registered letter to Sewaram on that date (Exhibit 4 D-4). He has also filed what he states is a copy of the notice (Exhibit 4 D-5). This alleged notice again calls for an account of the mortgage and says that in the absence of such account defendant would not be liable for costs of a suit when brought or for interest from the date of the first notice. A few weeks after sending this notice, as no reply had been received, defendant No. 4 alleges that he sent his brother Asaram, since deceased, to Sewaram's shop with Rs. 100 to pay off the amount due on the mortgage, whatever it might be. Sewa-

ram refused to accept payment. . The plaintiff expressed ignorance of the alleged notices and tender of money. The Munsif found that the notices and tender of money had been duly proved, and that the defendants were not liable for costs of the suit or for interest after the date of tender of the money. He further found that if tender were held to be not proved, defendant should not be liable for interest after the date of the second notice. Upto which date he actually paid interest is not clear. He passed a preliminary decree declaring the amount due on mortgage to be Rs. 80-8-0. The plaintiff has appealed.

It appears to me that the alleged tender of the mortgage money to Sewaram must be regarded as a mere invention. The amount said to have been taken to Sewaram's shop exceeded the sum then due on the mortgage. As Sewaram had in his reply to defendant No. 4's first notice said that the money due should be sent by money order or brought to his shop, his refusal to accept it when offered would appear inexplicable. Defendant No. 4, as D. W. No. 2, admits that he was on bad terms with Sewaram, and that he did not know what amount was due on the mortgage and for all he knew nothing was due, yet he did not enquire particulars of the mortgage from the mortgagor or in the registration office. He merely sent Rs. 100 to Sewaram's shop and was apparently prepared to accept Sewaram's statement as to the amount due without further enquiry. Again if he actually sent the money and the mortgagee refused to accept it, the natural course for him to take was to ascertain the amount due by enquiry in the registration office and from the mortgagor and deposit the sum in Court under section 83 of the Transfer of Property Act, The story of the defendant No. 4 is thus so inherently improbable that the evidence adduced in support of it must be scrutinized with some care. . . . . ."

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

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

JUDGMENT.—The facts of this case are clearly given in the judgment of the lower Appellate Court and need not be here repeated.

It is urged that a presumption should have been made by the lower Appellate Court against the plaintiff on account of his not having produced the notice which his agent, as D. W. No. 1, admitted. The lower Appellate Court refers to this witness and says it finds no admission in his deposition that the alleged notice was received and I fully agree with it. Moreover, the defendant did not ask the plaintiff to produce the notice either before or after the deposition of D. W. No. 1, nor has he produced the plaintiff's postal acknowledgment. The alleged second notice not being proved we are only left with the first notice dated 14th July 1910 and the plaintiff's reply thereto Exhibit 4 D 2. It is urged that the plaintiff's reply is evasive, and amounts to a refusal to render accounts which deprives him of his rights to costs.

The first notice to which Exhibit 4 D 2 is a reply is not on the record and from the reply Exhibit 4 D-2 all that can be gathered regarding the contents of the notice is that it told the plaintiff that the defendant No. 4 had purchased Ithu Manher's house in auction following a simple money-decree. There is no ground for holding that the notice did not ask for an account. As a matter of fact defendant No. 4 seems really to have relied upon the 2nd notice for proof of his demand of an account. No misconduct thus appears to have been proved.

Lastly it is said that no actual offer of money was necessary to constitute a tender but it was sufficient that the defendant No. 4 showed his readiness and willingness to pay, and reliance is placed upon *Shriram Rupram* v. *Madangopal Gowardhan* (1). This was a decision with reference to section 51 of the Indian Contract Act, which has no application to the present case. A mere readiness and willingness to pay, not communicated to the creditor, and without the accompanying circumstance of the debtor being in a position to pay immediately if the offer was accepted, does not amount to a valid tender.

There is, however, no plea that the appellant expressed his readiness and willingness to pay, apart from the alleged tender which has been found not proved.

(1) 30 C. 865 at p. 871; 5 Bom. L. R. 493; 8 C. W. N. 25.

Ground No. 5 is not pressed.

The appeal fails and is dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1930 OF 1916.

July 7, 1917.

Present:—Mr. Shah Din, Chief Judge.

FIRM SURJAN SINGH-BUDH SINGH—DEFENDANT—APPELLANT

versus

FIRM PRAG DAS-MANGAL SAIN—PLAINTIFF AND FIRM ATMA RAM-RAM KISHAN—DEFENDANT—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 73—Rateable distribution—Sale-proceeds of moveables realised by Nazir, whether assets received by Court.

Moveables belonging to a judgment-debtor were sold by auction by the Civil Nazir on different dates, and on each of these dates the Nazir drew up a list of the goods sold and of the prices realised showing the total receipts for each date separately:

Held, that the sale-proceeds realised on each date became assets received by the Court within the meaning of section 73 of the Civil Procedure Code, so that an application for rateable distribution could take effect only in respect of the sale-proceeds realised *after* the date of such application. [p. 108, col. 2]

Second appeal from the decree of the District Judge, Ludhiana, dated the 6th April 1916.

Lala *Durga Das*, for the Appellant.

Lala *Bindraban*, for the Respondents.

JUDGMENT.—The facts of this case are correctly stated by the Senior Subordinate Judge in his judgment, dated the 24th July 1915, and it is unnecessary to repeat them here. The District Judge has confused the two firms Prag Das-Mangal Sain of Delhi and Surjan Singh-Budh Singh of Amritsar, and has in several places in his judgment mentioned the name of the former in place of the latter firm. The suit out of which the present appeal has arisen was brought by the firm of Prag Das-Mangal Sain and not by that of Surjan Singh-Budh Singh, as has been erroneously stated by the District Judge; the Senior Subordinate Judge gave a decree to the plaintiff firm, and an appeal from that decree was preferred to the District Judge, not by Prag Das-Mangal Sain, but by Surjan Singh-Budh Singh. The confusion between the names of the two firms and the wrong statement of some of the facts of the case by the District Judge has not, however, affected the decision of the case on the merits, as the District Judge has concurred with the Senior Subordinate Judge in holding that on the 5th December 1914, when the plaintiff firm Prag Das-Mangal Sain made an application for execution in the Court of the District Judge, Ludhiana, the sale-proceeds of the property of the judgment-debtors (the firm of Atma Ram-Ram Kishan) were not "assets" that had been "received" by the Court within the meaning of section 73, Civil Procedure Code.

The sole question for decision in this appeal is whether the view of the Courts below on this point is correct. A reference to the execution record shows that "moveables" belonging to the judgment-debtors were sold by auction by the Civil Nazir on different dates from the 13th November to 1st December 1914 or, to be more precise, the auction-sales were held on the 13th, 14th, 16th, 18th, 19th, 20th, 21st, 23rd and 30th November and on the 1st December, and on each of these dates the Civil Nazir drew up a list of the goods sold and of the prices realised showing the total receipts for each date separately. Now, it is quite clear that since the property sold consisted exclusively of "moveables," which were sold separately on each of the dates mentioned above and the price realised for each lot was received and entered separately in the lists prepared by the Civil Nazir on each date, the total receipts realised at the auction sales of the 13th November to 1st December 1914 and *before* the 5th December 1914, on which date the firm of Prag Das-Mangal Sain made their application for execution in the Court of the District Judge, Ludhiana, were "assets held by the Court" within the meaning of section 73, Civil Procedure Code. The plaintiff firm is only entitled to a rateable distribution of the assets of the judgment-debtors, if such assets were received by the Court *after* the said plaintiff firm had applied for execution of its decree. The District Judge has held, and held correctly, that the assets in the hands of the Civil Nazir must be re-

garded as assets held by the Court, for the simple reason that the Civil Nazir was in possession of the assets as an officer of the Court and not on his own account ; and upon that view of the case, there can be no question that the total receipts realised by the Nazir before 5th December 1914 were assets to the rateable distribution of which the plaintiff firm can lay no claim *Ramanathan Chettiar* v. *Subramania Sastrial* (1) and *Maharaja of Burdwan* v. *Apruba Krishna Roy* (2), which are relied upon by the Pleader for the plaintiff firm, were cases in which the property sold in the Court-auction was " immoveable property," which, for reasons given in the judgments in those cases, is governed by a different set of considerations from those that would govern moveable property, consisting of shop goods, etc., that was sold in the present case.

I, therefore, hold that the plaintiff firm is not entitled to claim rateable distribution under section 73, Civil Procedure Code, in respect of the sale-proceeds which were in the hands of the Civil Nazir before the 5th December 1914. A reference to the lists prepared by the Civil Nazir from the 13th November to 1st December 1914 shows that on the latter date he had realised the whole of the sale moneys except a sum of Rs. 150; and it follows that the plaintiff firm has a right to a *pro rata* share in that amount only. I accordingly accept this appeal, set aside the judgment and decree of the District Judge and in lieu thereof give the plaintiff firm a decree for a *pro rata* share of Rs. 150. The exact amount due to the plaintiff firm will be calculated in execution. The defendant firm is entitled to costs throughout as it never objected to the plaintiff firm claiming a rateable distribution in regard to the sum of Rs. 150.

Appeal accepted.

(1) 26 M. 179.

(2) 10 Ind. Cas. 527; 14 C. L. J. 50; 15 C. W. N. 872.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 985 OF 1916.

December 15, 1916.

Present:—Mr. Justice Oldfield and Mr. Justice Phillips.

TIRUMALAISAMI NAIDU—PLAINTIFF—APPELLANT

versus

SUBRAMANIAM CHETTIAR—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 93—Auction-purchaser, remedy of, for recovery of purchase-money, on failure of suit for possession—Suit for possession under Act XIV of 1882, dismissal of, after repeal of Act, effect of—Suit for purchase-money, maintainability of—Interpretation of Statutes—Vested rights preserved under repealed enactment, rules relating to—Civil Procedure Code (Act XIV of 1882), ss. 313, 315—General Clauses Act (X of 1897), s. 6 (c) and (e)—Interest, rate of, proper.

A Court-sale purchaser, whose suit for possession of the property put up for sale has failed, is not entitled to recover the purchase-money by suit, but can do so only by petition under Order XXI, rule 93, Civil Procedure Code. [p. 110, col. 2.]

Rustomji v. *Vinayak Gangadhar Bhat*, 7 Ind. Cas. 955; 35 B. 29 at p. 31; 12 Bom. L. R. 723, dissented from.

Dorab Ally Khan v. *Khajah Mohecooddeen*, 5 I. A. 116; 3 C. 806; 2 C. L. R. 529; 3 Suth. P. C. J. 519; 3 Sar. P. C. J. 808; 2 Ind. Jur. 426; 1 Ind. Dec. (N. S.) 1097 (P. C.), *Sundara Gopalan* v. *Venkatavarada Ayyangar*, 17 M. 228; 3 M. L. J. 293; 6 Ind. Dec. (N. S.) 158, distinguished.

Where, however, the suit for possession was instituted while Act XIV of 1882 was in force and was dismissed after its repeal by Act V of 1908, the plaintiff's right to re-payment of his purchase-money must be deemed to have accrued to him before the change in the law and the right having been preserved to him under the new enactment, a suit to enforce that right is maintainable. [p. 111, col. 1.]

The right dates from the purchase of the property and is primarily to the property, and secondarily in the alternative and contingently to re-payment, the latter branch of it becoming enforceable only on failure in respect of the former. The alternative and contingent right is preserved to the purchaser under section 6 (c) of Act X of 1897. [p. 111, col. 2.]

Colonial Sugar Refining Co. v. *Irving*, (1905) A. C. 369; 74 L. J. P. C. 77; 92 L. T. 788; 21 T. L. R. 513, explained.

Kalinga Hebbara v. *Narasinna Hebbara*, 9 Ind. Cas. 937; 21 M. L. J. 631; (1911) 1 M. W. N. 143; 9 M. L. T. 259, *Madurai Pillai* v. *Mutha Chetty*, 22 Ind. Cas. 775; 38 M. 823; 15 M. L. T. 156; (1914) M. W. N. 216; 26 M. L. J. 227; 1 L. W. 172; *Rajah of Pittapur* v. *Gani Venkat Subba Row*, 20 Ind. Cas. 94; 39 M. 645; 29 M. L. J. 1; 18 M. L. T. 67; 2 L. W. 661; (1915) M. W. N. 547 and *Abbott* v. *Minister for Lands*, (1895) A. C. 425; 64 L. J. P. C. 167; 11 R. 466; 72 L. T. 402, considered.

A repealing enactment cannot impose an impossible condition on pain of forfeiture of a vested right or be applied to cases in which its provisions cannot be obeyed. [p. 112, col. 2.]

A new rule of limitation must be read subject to

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an implied exception in cases where its provisions would absolutely destroy the right of suit which was in existence when that rule came into force. [p. 112, col. 2.]

In a suit for recovery, by a Court-sale purchaser, of the purchase-money, the Court should not award a higher rate of interest than six per cent. up to date of suit. [p. 112, col. 2.]

Second appeal against the decree of the Court of the District Judge, Madura, in Appeal Suit No. 180 of 1915, preferred against the decree of the Subordinate Judge, Madura, in Original Suit No. 88 of 1914.

The Hon'ble Mr. *T. Rangachariar* and Mr. *K. Bhashyam Ayyangar*, for the Appellant.

Mr. *C. V. Ananthakrishna Ayyar*, for the Respondent.

JUDGMENT.

OLDFIELD, J.—The question before us is in its most general form, whether the plaintiff, a Court-sale purchaser, whose suit for possession of the property put up for sale has failed, is entitled to recover the purchase money by suit or whether, as the lower Appellate Court held, he can do so only by petition under Order XXI, rule 93, of the Civil Procedure Code.

Such a right of suit, in cases to which the present Code can be applied without reservation, was dismissed in *Mohideen Ibrahim* v. *Mahamed Meera Levvai* (1), one learned Judge being unwilling to negative it, though expressing no decided opinion, and the other negativing it directly, because the purchaser had no longer a substantive right to recover, but only a statutory right to do so by application in special circumstances; and the latter opinion was confirmed *obiter* in *Parvathi Ammal* v. *Govindasmi Pillai* (2). The contrary view, however, has been taken in *Rustomji* v. *Vinayak Gangadhar Bhat* (3), the purchaser's right of suit being based on the existence of a contractual relation between him and the decree-holder and of a warranty by the latter of some saleable interest to be implied from the provisions of the Code. With all respect I cannot follow the reasoning. *Dorab Ally Khan* v. *Khajah Moheeooddeen* (4) and *Sundara Gopalan* v. *Venkatavarada Ayyangar* (5) are referred to in the judgment, but they show that, in the absence of fraud (and none was referred to there or has been in the present case), the doctrine of warranty of title cannot be applied to Court sales or be the basis of proceedings except those which the processual law permits; and, if there is no warranty between the decree-holder and purchaser, there was no other basis for a contractual relation between them, since the former had no ownership of the property sold. In a Court sale nothing passes beyond the right, title and interest of the debtor, and, as there is no guarantee that it exists or is of any particular extent, the purchaser would have no cause of action apart from the Statute. The former Code accordingly conferred on him a special right, which the present Code has restricted and for the enforcement of which it provides special procedure. Taking this view I am against the plaintiff's general contention.

The plaintiff, however, has relied mainly on the special circumstances of his case, that he made his purchase and brought his suit for possession, impleading the defendant when his right was regulated by sections 313 and 315 of the Code then in force. In that suit he asked for delivery of the suit land and profits. It was decided against him in in 1909, after the provisions referred to had been superseded by Order XXI, rule 93, under which, as I have held, his right is only to apply to the Court for refund. It is not disputed that he was originally entitled to sue. The argument for consideration is only that the change in the law did not deprive him of his right to do so.

The effect of the change in the law is to be ascertained, in the absence of special provision, in the new enactment (and section 154 of the present Code preserves only existing rights of appeal—not other remedies), by reference to section 6 (*c*) and (*e*), Act X of 1897, its material portion being that a repeal " shall not (*c*) affect any right or privilege acquired or accrued under the enactment repealed or (*e*) affect any legal proceed-

(1) 17 Ind. Cas. 437; 23 M. L. J. 487; 12 M. L. T. 431; (1912) M. W. N. 1130.

(2) 30 Ind. Cas. 827; 39 M. 808; 2 L. W. 861; 29 M. L. J. 467; (1915) M. W. N. 797.

(3) 7 Ind. Cas. 955; 35 B. 29 at p. 31; 12 Bom. L. R. 723.

(4) 5 I. A. 116; 3 C. 806; 2 C. L. R. 529; 3 Suth. P. C. J. 519; 3 Sar. P. C. J. 818; 2 Ind. Jur. 426; 1 Ind. Dec. (N. S.) 1097 (P. C.).

(5) 17 M. 228; 3 M. L. J. 293; 6 Ind. Dec. (N. S.) 158.

ing or remedy in respect of such right or privilege and any such legal proceeding or remedy may be instituted, continued or enforced as if the repealing Act had not been passed."

The first question then is whether the plaintiff's right to re-payment of his purchase-money had accrued to him before the change in the law. Under the former law, section 315 of the former Code, he would have been entitled to receive back the money, when the sale was set aside under section 312 or 313, the contingency we are concerned with,

"When it was found that the judgment-debtor had no saleable interest in the property and the purchaser (plaintiff) was, for that reason, deprived of it."

Was it so found and was the plaintiff deprived as the defendant contends, only when the former's suit failed in 1909, after the present Code came into force? In that event his right had not accrued and his remedy was affected, or did the right accrue earlier before his suit was filed in 1907?

To support the former view the defendant has relied on the decision in *Nilakanta* v. *Imamsahib* (6) and *Mahideen Ibrahim* v. *Mahamed Meera Levvai* (1), the latter approved in *Sidheswari Prasad Narain Singh* v. *Mayanand Gir* (7), in which it was held that the plaintiff's cause of action for the claim, such as that before us, accrues, when there has been a suit against the person in possession, on its determination against him. But though such determination may be part of plaintiff's cause of action in the sense in which the term is used in *Read* v. *Brown* (8) and subsequent Indian cases,

"Every fact, which it would be necessary for the plaintiff to prove, if traversed, to support his right to the judgment of the Court,"

it does not follow that it is necessary to the accrual of his 'right', the term used in the enactment under consideration. If it did, it would follow further that his right was dependent on and arose only on his becoming conscious of it in consequence of his discovery that the debtor had no saleable interest and of his deprivation of the property by reason thereof, although the title opposed to his own must have existed at the date of his purchase and could not have been affected by any proceedings subsequent to it. It is possible to avoid this anomaly only by holding that his 'right' dates from his purchase and is primarily to the property and secondarily in the alternative and contingently to re-payment, the latter branch of it becoming enforceable only on failure in respect of the former. If this view is correct, the plaintiff's right had accrued before the repeal of section 315 of the former Code. I refer next to authority for the position that such an alternative and contingent right will be preserved under section 6 (*c*).

In *Colonial Sugar Refining Co.* v. *Irving* (9) the question was to the effect on a right of appeal direct to the Privy Council of a change in the law pending the trial of an action, which would have interposed an appeal to the Local High Court. That right of appeal existed at the date of the change in the law, in the sense that it had been conferred by law on every suitor; it was suspended and contingent in the sense that it would be exerciseable only when and if the decision were given against him. It was held not only that the right was not one merely of procedure, but also that it had vested in the suitor, before the change took place. This case was followed in *Kalinga Hebbara* v. *Narasima Hebbara* (10) and *Salimmamma* v. *Valli Hussanabha Beari* (11) with reference to the right of appeal, and in *Madurai Pillai* v. *Muthu Chetty* (12) with reference to another consequential and contingent remedy. In *Rajah of Pittapur* v. *Gani Venkat Subba Rau* (13) it was applied even more generally in a manner to which I return. On the other hand, *Abbott* v. *Minister for Lands* (14) was cited for the defendant,

(6) 16 M. 361; 3 M. L. J. 134; 5 Ind. Dec. (N. S.) 958.

(7) 19 Ind. Cas. 986; 35 A. 419; 11 A. L. J. 606.

(8) (1889) 22 Q. B. D. 128; 58 L. J. Q. B. 120; 60 L. T. 250; 37 W. R. 131.

(9) (1905) A. C. 369; 74 L. J. P. C. 77; 92 L. T. 738; 91 T. L. R. 513.

(10) 9 Ind. Cas. 937; 21 M. L. J. 631; (1911) 1 M. W. N. 143; 9 M. L. T. 259.

(11) 11 Ind. Cas. 653; 21 M. L. J. 764; 10 M. L. T. 78; (1911) 2 M. W. N. 99.

(12) 22 Ind. Cas. 775; 38 M. 823; 15 M. L. J. 156; (1914) M. W. N. 216; 26 M. L. J. 227; 1 L. W. 172.

(13) 30 Ind. Cas. 94; 39 M. 645; 29 M. L. J. 1; 18 M. L. T. 67; 2 L. W. 661; (1915) M. W. N. 547.

(14) (1895) A. C. 425; 64 L. J. P. C. 167; 11 R. 466; 72 L. T. 402.

as deciding that a mere right to take advantage of the provisions of a repealed Statute is not a 'right accrued.' But the judgment runs:—

"The mere right (assuming it to be properly so called) existing in the members of the community or any class of them to take advantage of an enactment, without any act done by an individual towards availing himself of that right, cannot be properly deemed a 'right accrued' within the meaning of the enactment."

And the case can accordingly be distinguished on two grounds.

Firstly, if the doing of an act is necessary, the plaintiff before us had done one towards availing himself of his right, when he sued the person in possession. Secondly, the plaintiff's right differed essentially from the right (if it was properly so called) which the Judicial Committee was considering; for the latter was a mere option to take up land, enforceable against the Minister for the land only after it had been exercised by the making of an application with the necessary formalities and a specification of the land claimed, whilst the former was definite and enforceable from its origin. This case is, therefore, in no way opposed to the conclusion, which is otherwise adequately supported, that plaintiff's right, including the branch of it, which he is now enforcing, had accrued, before the former Code was repealed.

The conclusion has been reached on direct consideration of the law. But it can be supported also by reference to a rule of construction. Although the plaintiff was proceeding in a legal way towards recognition of his right to re-payment and could have been met by no objection, if the law had not changed, in terms the change made his further progress impossible; and in the absence of any specific provision or necessary implication the repealing Statute will, therefore, not be construed against him. His only course under the present Code would have been to move for the setting aside of the sale under Order XXI, rule 91, and Article 166, Schedule I, of the Limitation Act within 30 days of its confirmation and to apply for re-payment under Order XXI, rule 93, and Article 181 within 3 years from its being setaside. This course he could not take since his first application would have been out of time at the date of the repeal. A repealing enactment cannot impose an impossible condition on pain of forfeiture of a vested right or be applied to cases, in which its provisions cannot be obeyed, *Gopeshwar Pal* v. *Jiban Chandra* (15), and similarly it was held by a Full Bench of this Court in *Rajah of Pittapur* v. *Gani Venkat Subba Row* (13) that a new rule of limitation must be read subject to an implied exception in cases where its provisions would absolutely destroy the right of suit, which was in existence when that rule came into force. On this ground also the plaintiff is entitled to succeed.

Two other points have been referred to in argument. Firstly, the defendant contended in his written statement that the judgment-debtor should be made a party. This cannot be considered since it was not pressed at the trial. Secondly, the Sub-Judge awarded interest up to date of suit at 12 per cent., the rate claimed in the plaint. The interest at the usual Court rate is, however, all that plaintiff is entitled to in accordance with the authorities. *Rodger* v. *Comptoir D'Escompte de Paris* (16), *Ayyavayyar* v. *Shastram Ayyar* (17) and *Arunachellam* v. *Arunachellam* (18).

The result is that the Sub-Judge's decree is restored, subject to the modification that the plaintiff will be entitled to interest at 6 per cent. instead of 12 per cent. to date of that decree and subsequent interest at 6 per cent. on the amount so decreed. The parties will give and receive proportionate costs.

PHILLIPS, J.— I agree.

Appeal allowed;
Decree varied.

M. C. P.

(15) 24 Ind. Cas. 37; 41 C. 1125; 19 C. L. J. 549; 18 C. W. N. 804.

(16) (1871) 3 P. C. 465; 40 L. J. P. C. 1; 24 L. T. 111; 19 W. R. 449; 7 Moo. P. C. (N. S.) 314.

(17) 9 M. 506; 3 Ind. Dec. (N. S.) 747.

(18) 15 M. 203; 2 M. L. J. 1; 5 Ind. Dec. (N. S.) 492

PUNJAB CHIEF COURT.
CRIMINAL PETITION No. 1060 OF 1916.
August 9, 1916.
Present:—Mr. Justice Shah Din.
Musammat KANKU—ACCUSED—PETITIONER
versus
MATHRA DAS AND OTHERS—COMPLAINANTS—RESPONDENTS.

Punjab Municipal Act (III of 1911), ss. 152, 153—Brothel and house of public prostitute, distinction between—Notice, necessity of, to constitute offence—Summary trial—Criminal Procedure Code (Act V of 1898), s. 260.

No offence can be said to be committed under section 153 of the Punjab Municipal Act until the owner or tenant of the house summoned by the Magistrate fails to comply within five days with the Magistrate's order to discontinue the use of the house as a brothel, and as no offence can be said to be committed by the owner of a brothel at the time when the complaint is made to the Magistrate, the Magistrate has no jurisdiction to hold a summary trial under section 260 of the Criminal Procedure Code.

In view of the distinction drawn by the Legislature itself in section 152 of the Punjab Municipal Act between a brothel and the house of a public prostitute, the latter does not become a brothel within the meaning of section 153 of the Municipal Act merely because the owner plies the trade of a prostitute therein.

Petition under sections 435 and 439, Criminal Procedure Code, for revision of the order of the Sessions Judge, Ambala, dated the 31st May 1916, affirming that of the Magistrate, 1st class, Simla, dated the 22nd May 1916, directing the petitioner to discontinue the use of her house as a brothel, under section 153, Municipal Act (III of 1911).

FACTS.—On 22nd May 1916, the learned Magistrate passed the following order in a summary trial register kept under section 260, Criminal Procedure Code, 1898:—

"It appears that accused uses house 23/4 as a brothel. That this house is by her own admission 200 feet only from a mosque. I accordingly direct her to discontinue such use."

Mr. *Obbard*, for the Petitioner.

The Government Advocate, for the Repondents.

JUDGMENT.—This revision and Criminal Revision No. 1061 of 1916 are connected and both will be disposed of by one order.

The learned Government Advocate admits that the first ground for revision in each case has force, and must prevail, *viz.*, that the Magistrate erred in law in trying the case summarily, inasmuch as no offence can be said to be committed under section 153 of the Municipal Act until the owner or tenant of the house summoned by the Magistrate should fail to comply within five days with the Magistrate's order to discontinue the use of it as a brothel. It is clear that since no offence was committed by the petitioner in each case at the time when the complaint was made to the Magistrate, the Magistrate had no jurisdiction to hold a summary trial under section 260, Criminal Procedure Code. The Magistrate's order was, therefore, bad in law and is hereby set aside.

Apart from the above flaw in the Magistrate's proceedings, it seems clear that in view of the distinction drawn by the Legislature itself in section 152 of the Municipal Act between a brothel and the house of a public prostitute, the petitioner's house in which she plied the trade of a postitute was not a "brothel" within the meaning of section 153 of the Municipal Act [*Emperor* v. *Versimal Bahagiomal* (1)].

I accept both these revisions and set aside the Magistrate's order in each case.

Revision allowed.

(1) 19 Ind. Cas. 714; 6 S. L. R. 224; 14 Cr. L. J. 282.

CALCUTTA HIGH COURT.
May 5, 1869.
Present:—Sir Barnes Peacock, KT., Chief Justice, and
Mr. Justice Macpherson.
In the matter of BANKS AND FENWICK.

Contempt of Court—High Court, power of, to punish

In the matter of BANKS AND FENWICK.

summarily for contempt—Advertisement for demonstration against Judge, whether contempt—Apology, effect of.

Per *Peacock, C. J.*—An advertisement published in a newspaper for a demonstration against a Judge for acts done in Court may be a contempt of Court as well as defamation, although it cannot be said that in every case a demonstration got up in order to obtain an expression of public opinion concerning the acts of a Judge would be a contempt. [p. 125, col. 1.]

If anonymous letters are sent to the press containing false statements, the press is responsible for them if the name of the author is not given up. [p. 144, col. 2.]

To say that a sentence is "cruel" may be a contempt of Court, though it would be no contempt if the remark is merely that the sentence is a severe one. [p. 142, col 2; p. 143, col. 1.]

Per *Macpherson, J.*—The High Court has power to proceed by way of contempt even when the contempt is not committed in Court or during the pendency of a suit. [p. 145, col. 2.]

Per *Curiam.*—The fact of his making an apology does not entitle the person charged with contempt of Court to his discharge as a matter of right. [p. 137, col. 1.]

Charges of contempt against the Printer and Publisher of the 'Englishman, Calcutta.'

Upon this case being called on—

Mr. *Kennedy* stated that he appeared for Mr. Banks, Printer of the *Englishman*, with Mr. *Evans* and Mr. *Paul*. There was one point in which a little difficulty had occurred with respect to the form in which the affidavit of Mr. Banks was to be drawn up. It was stated that the Court was sitting in its original jurisdiction, but it did not appear which jurisdiction, whether civil or criminal.

[THE CHIEF JUSTICE.—The Court is sitting in its original civil jurisdiction, The matter is not on the Crown side of the Court.]

Mr. *Kennedy* stated he would then proceed to put in the affidavit of Mr. Banks.

[THE CHIEF JUSTICE.—I supposethere is no doubt as to the signature of Mr. Banks to that document.]

I believe the affidavit has been sworn before an officer of the Court. I will read the affidavit.

[THE CHIEF JUSTICE.—An office copy of Mr. Banks' declaration has been put in under the seal of the Court, but there is no evidence to show whose signature it is.]

The first paragraph of the affidavit removes all difficulty about that, wherein he states:—

"I am the printer and publisher of the "Englishman."'

[THE CHIEF JUSTICE.—Very well; but there is one other matter which I wish to mention before going on to the affidavits. I want to see the subscription list which Mr. Clarke has been subpœnaed to produce. I do not wish to see the names of the persons who have subscribed, but I wish to see for what purpose the subscription was raised. If the gentlemen who subscribed preferred that their names should not be known, I have no wish to make them known, but I want to know whether they subscribed to that fund in order to assist Mr. Tayler, or whether it was with the view of denouncing the judgment of the Court.]

Mr. *Kennedy* stated that the subscription list had no particular heading stating for what purpose the subscription was being raised.

[THE CHIEF JUSTICE.—I want to know whether they came in in pursuance to the advertisement or whether they were accompanied by letters stating the reason for which the money was sent.]

In many cases letters accompanied the subscription.

[THE CHIEF JUSTICE.—If the gentlemen who have subscribed will come forward and acknowledge having done so, they may do so with perfect freedom so far as any proceedings against them are concerned. If they like to avow having subscribed, they may do so; if not, I have no wish to enquire into the matter.]

I have a copy of a list headed, "List of subscribers to the Tayler fund who agree to their names being given up." Application was made to the subscribers of the fund, and every one applied to consent to give up his name. I don't know whether there was any particular heading to the list when it was first started, but there are many gentlemen in Court who are prepared to state the circumstances under which they sent in their subscription.

[THE CHIEF JUSTICE.—I do not wish to press for the names of those gentlemen, but if they like to give them up themselves they may do so.]

Captain Fenwick (Editor of the *Englishman*) is in this position. He is not justified in refusing to produce the list of subscribers which he has been required to produce by a subpœna of the

Court, and it could not be any breach of faith on his part, as it was originally intended to publish the names. After, however, the observations of your Lordships, it was considered that to publish their names would be to place them in a somewhat invidious position, and they were accordingly written to and requested to be allowed to give up their names, and to which all who have replied have consented. As I understand, it was not merely their rupees that these gentlemen were sending in, but an expression of the opinion.

[THE CHIEF JUSTICE.—I propose to put in the "Englishman" newspaper of the 21st instant merely to show a report of what took place with regard to Mr. Tayler's case, and merely for the purpose of the proceedings. I do not propose to treat this as a contempt of Court, but merely as explanatory of other parts of the proceedings. There is another paper of April 16, which contains an article with reference to an article which has appeared in the "Pioneer." I do not wish to put this as forming part of the contempt, as I have already expressed in my judgment in Mr. Tayler's case my willingness to allow this to pass, and I will not now go back from what I before stated, and treat it as a contempt. I merely put this paper in for the purpose of showing, with reference to the subsequent articles, what was the object of those subsequent articles. The words: "We suspect that Sir Barnes, if he attempts to carry out his *dictum* too far, will raise a storm not easy to quell. There are many people who do not care for the grievances of Mr. Tayler, but who will not brook an encroachment upon their right of appeal to the press concerning the public acts of public men. A Judge's acts are no more exempt from public criticism than those of a Chairman of the Justices" were merely to be read as introductory to and explanatory of the other articles.]

I will read the affidavit of Mr. Banks in the first instance, and probably after reading it, your Lordships may be induced to take another course in the matter.

Mr. *Kennedy* then read Mr. Banks' affidavit as follows:—

"In the High Court of Judicature at Fort William in Bengal.

(*In the matter of Alexander Banks.*)

I, Alexander Banks, of Hare Street, in Calcutta, Printer, make oath and say:—

First.—I am the printer and publisher of the "Englishman" newspaper.

Second.—That George Roe Fenwick is the Editor of the said newspaper, and without his orders and directions no articles are inserted therein.

Third.—That the said George Roe Fenwick has signified to me his intention to appear before this Hon'ble Court and admit that the articles and advertisements, referred to in the Rule *nisi* herein, were inserted in the said newspaper by his directions.

Fourth.—That I exercise no control whatever over the contents of the said newspaper.

Fifth.—That, although I read some of the said articles when handed to me for publication as aforesaid, I did not in any way consider their meaning or purport, but inserted the same simply on the direction of the said George Roe Fenwick, as is my habit.

Sixth.—That in inserting the said articles, notices and advertisements, I did so *bona fide* not actuated from any improper feeling or motives towards the Hon'ble The Chief Justice or any of the Judges of this Hon'ble Court, nor did I intend by such insertion in any way to excite contempt against the proceedings of this Hon'ble Court.

A. Banks.

Sworn this third day of May 1869 before me.

A. L. Piddington,
Commissioner."

Mr. *Kennedy*.—Captain Fenwick is now present in Court. Of course, if, in the strict principle of law, Mr. Banks has been guilty of contempt in what he has done, I do not put this forward as any ground for his discharge, but Captain Fenwick is in Court, ready to bear the brunt of what was in reality done by him, or by his order, and not leave it to others to bear.

[THE CHIEF JUSTICE.—Captain Fenwick, in doing that, has only done that which every honourable gentleman who fills an editor's chair would do, in not allowing a publisher

of a paper to take the consequence of articles written and published by his orders, by not coming forward to avow the authorship. Sir Barnes went on to state that he was prepared to withdraw the Rule as against the printer, and treat Captain Fenwick as the person against whom the Rule was issued. The argument might go on, however, on the printer's Rule.]

Mr. *Kennedy* said that what he thought the Court might do, would be to make a fresh order returnable immediately in order that there might be no delay. Captain Fenwick was in Court and the case might be allowed to proceed as against him, but there would be this difficulty, that Captain Fenwick wished to explain some matters and had expected to have the opportunity of doing so as he had been called on a subpœna.

[THE CHIEF JUSTICE—Captain Fenwick might put in an affidavit for any purpose he pleased, the arguments might be proceeded with and the affidavit put in at some future time.]

Mr. *Kennedy* remarked that, as he would probably have to occupy the Court for a long time, the affidavit could be sworn in the meantime. Captain Fenwick authorised him to say that he admitted having published the articles in question.

[THE CHIEF JUSTICE.—Then a new order for a Rule can be made out, similar to the one made in the case of Mr. Banks. (To Captain Fenwick) I believe I understand that you admit your responsibility.]

[Captain Fenwick.—Certainly, my Lord.]

Mr. *Kennedy* in proceeding to address the Court against the Rule spoke as follows:—This is a case in which I appear with very great pain and anxiety, because it is hardly possible to conduct it properly without appearing to be guilty of a thing—contempt of your Lordship—which would be the last I should wish.

[THE CHIEF JUSTICE.—I shall, of course, understand all you say, Mr. Kennedy, as only said in the discharge of your duty as an Advocate.]

Thank you, my Lord; but at the same time I would wish it to be understood that in any remarks that may fall from me, I do not desire that they should appear to be addressed to the same Chief Justice as the Chief Justice of whom I speak.

[THE CHIEF JUSTICE.—I think, Mr. Kennedy, that it is a pity to resort to any fiction in the case (a laugh).]

I shall be obliged, then, to criticise the judgment of the Chief Justice, I hope, without exceeding the limits of discretion. The first question is whether, whatever the former state of the law was with respect to contempts of Court or matters of defamation of Judges or their judgment, it now applies, or can be applicable, to your Lordships. I understand this Rule to be issued under the civil jurisdiction of the Court and yet it appears to me that a case of contempt of Court should be tried under the criminal jurisdiction.

[THE CHIEF JUSTICE.—I am quite ready to admit that, if you please; it is quite indifferent and immaterial at which side of the Court the case is tried.]

I submit, my Lord, that you have only the power of committing a prisoner for contempt of Court under the criminal jurisdiction. In the case of *Wellesley* v. *Duke of Beaufort* (1), it is clearly shown that contempts of this class are criminal offences and are so dealt with by the Court. By this, it is quite clear that, by trying contempt under the criminal jurisdiction, your Lordships are only exercising jurisdiction under the Indian Penal Code, Act XLV of 1860. No Court can exercise jurisdiction with respect to contempt, except it is contempt by that Code. Cases, if they amount to infraction of that Code, must be tried and punished by that Code, as is mentioned in the 30th section of the Letters Patent:—"All persons brought for trial before the said High Court of Judicature at Fort William in Bengal, either in the exercise of its original jurisdiction or in the exercise of its jurisdiction as a Court of appeal, reference or revision, under the Indian Penal Code, charged with any offence, for which provision is made by Act XLV of 1860, called the Indian Penal Code, or by any Act amending or extending the said Act which may have been passed prior to the publication of these presents, shall be liable to

(1) (1831) 2 Russ. & M. 639; 39 E. R. 538; 34 R. R. 159.

punishment under the said Act or Acts and not otherwise."

I think, my Lord, this must be a misprint as to the word extended, which should be "excluded". Chapter 10 defines the offences which shall be deemed contempts of Court. As a general rule the heading is not part of an Act, but in this case it is different, inasmuch as the body of the chapter acknowledges and incorporates the different headings as in section 6—"Throughout this Code every definition of an offence, every penal provision, and every illustration of every such definition or penal provision, shall be understood subject to the exceptions contained in the chapter entitled 'general exceptions', though those exceptions are not repeated in such definition, penal provision or illustration." I think that this marks intention to include the headings or titles in legislation as part of the Act. Not the same is the case of the marginal notes, which are added afterwards, subsequently to the Act being passed. Then we find in that chapter certain definitions most important here. In section 21 we find that "public servants" include a Judge, and the whole of Chapter 10 is a code to guide the Court in breaches of duty to public servants, and provides for that class of contempt most generally dealt with by the Courts; that is, for the most part known in Chancery and Common Law. There it is stated that contempt consists in disobedience to the laws of the Court, obstruction of its business or interference with, or prejudice to, its decisions and judgments.

Those are the classes of acts, which are punishable as contempts under the provisions of the Code of Criminal Procedure, and none of these come up to, or in any way near, the matter in respect of which Mr. Fenwick is now charged. There is an additional provision in this matter in the 228th section of the Penal Code, which enacts as follows:—

"Whoever intentionally offers any insult or causes any interruption to any public servant, while such public servant is sitting in any stage of a judicial proceeding, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both."

And in the 499th section of the Code the following words occur:—

"Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person, intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter accepted, to defame that person". Now, as far as I understand it, the accusation which is made against Captain Fenwick—the contempt of Court which he is now called upon to answer—is a contempt of having defamed a person, but there is an exception with respect to that class of defamations.

[THE CHIEF JUSTICE.—You must not understand that we assent to all you are saying, Mr. Kennedy.]

No, my Lord, I don't assume assent from your Lordships' silence. I am grateful for that silence for the case is one of peculiar difficulty, and which might be rendered more so if I were to be interrupted.

[THE CHIEF JUSTICE.—Pray don't understand that because the Court is silent, it agrees with all you are saying.]

No, my Lord. I perfectly understand that.

Mr. *Kennedy* then went on to say that the second exception to the 499th section of the Indian Penal Code was as follows:—

"It is not defamation to express in good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions, or respecting his character, so far as his character appears in that conduct, and no farther."

Now, what I sumbit is this, that a case having occurred, in which certain matter published amounted to defamation—and defamation of acts done in the capacity of a Judge—that defamation, being a defamation on the acts of a Judge, becomes of itself included in the exception which I have just read. It must be defamation within the terms of the Penal Code, and no defamation which was not punishable under the provisions of the Penal Code as defamation is punishable by this Court in any other way; for it is clearly laid down in the 2nd section of the Code, as well as by the 30th clause of the Charter, that

"every person shall be liable to punishment under this Code, and not otherwise, for every act or omission contrary to the provisions thereof, of which he shall be guilty within the said territories on or after the said 1st day of May, 1861."

It is clearly stated in the Penal Code what is punishable as defamation, and with regard to the exception to which I have referred, your Lordships are bound to read it as if the word "Judge" is substituted, for "public servant"; and nothing expressed in good faith on the public functions of a Judge could be punishable as defamation. It seems to me that it is impossible, without destroying the utility of the Penal Code—without making it a trap—to hold that the license of Legislature has been given to the Court, empowering it to say that though this charge against Captain Fenwick may not be tried in the ordinary course of law by an indictment for defamation, yet that it may be dealt with in an extraordinary way, and under a course which does not give him the ordinary protection of a Jury—the protection of the ordinary Tribunals—and a scale of ascending Tribunals, with an appeal from each, but leaves him wholly at the mercy of the person on whom the defamation has been uttered. I do not contend that any defamation which does not come within the 499th section, as explained and limited by the exception to which I have just referred, can be such an offence as to empower the Courts to deal with it either by its ordinary procedure or in an extraordinary way, by treating it as a contempt of Court. That explanation must be given by your Lordships to the language of the Legislature in its description of what it calls and deems to be contempt of a public servant—among whom are included Judges—and that of itself would limit the operation of the Court dealing with such contempts as would come within that part of the Statute, as offences punishable only as defamation under the ordinary provisions of law.

Therefore, my Lord, if jurisdiction can be exercised, it can only be exercised when the Court comes to the conclusion as to the expression. I mean when that expression is not in good faith. Even so I would submit that the power to punish summarily, in a case under the former law, for contempt has been taken away by the express language of the Legislature. Whether that jurisdiction ever existed or whether it be taken away, I contend that it was never imperative for the Court to exercise it, even in those worst of times when newspapers were considered as vermin, to be hunted down as pests, and marks for scorn; instead of, as they are now considered, members of society, important members to be protected instead of arraigned before a Tribunal, considered as the 4th estate of the realm. Even then it was a discretionary matter with the Court how to deal with libels which were likely to bring into contempt the proceedings or judgments of that Court. Your Lordship has recently delivered a judgment [*William Tayler, In the matter of* (2)] in respect of the same question. No doubt that any authority that could be produced from the proceedings of any English Court would not be unknown to your Lordship, yet no exercise of such a power is in that judgment shown to have occurred. I have also carefully searched the reports and text books, but am unable to find a single instance of a Court in England having exercised such a jurisdiction, by way of trying or punishing contempts of Court, which were merely defamatory libels on the Court or the Judges, when no proceedings were pending and which, therefore, could in no way prejudice or influence the Court in such proceedings. The observations with which your Lordship finds fault, were published by Captain Fenwick subsequent to the proceedings against Mr. Tayler. These proceedings were concluded on the 23rd April, Saturday, and, as I understand, your Lordship is not now proceeding against Captain Fenwick for those articles published on or before the 16th April. Even in those, I am sure, you do not attribute to Captain Fenwick the folly of supposing you weak or wicked enough to alter your judgment in the pending case for fear of an article in the newspaper.

[THE CHIEF JUSTICE.—Although it is not so material to the present portion of your argument, I want to call attention to the explanation in section 52. You must, I think, import that explanation of "good faith"

(2) 44 Ind. Cas. 930; 26 C. L. J. 345; 19 Cr.L.J. 402.

into the construction of this exception—where it speaks of opinions in good faith, it must mean, in order to express an opinion in good faith the person who holds it must have taken care and attention in forming it.

I think, my Lord, that if he truly holds the opinion he is justified in expressing it. Care and attention in expressing an opinion are different from the care and attention demanded in forming that opinion, and the words "good faith" are only connected with the expression.

[THE CHIEF JUSTICE.—I understand you to say that a person may express an opinion in good faith, though care and attention have not been taken in forming that opinion.]

That is the only construction which can reasonably be given to the language. The power of proceeding by summary powers for contempt, even if vested in the Court, is a discretionary one. There are other courses, than the one now adopted, open for vindicating the integrity of the Courts and the honour of the Judges, and I submit that the discretion which is vested in your Lordships is not properly exercised by proceeding in a summary way for contempt of Court. The discretion, properly exercised by the Court, would be to fall back on the long list of precedents brought forward in the judgment in *William Tayler's case* (2) and if the dignity of the Court has been in any way brought into contempt, to direct an officer of the Court to file a criminal information. In every case in England which I have been able to discover since the earliest period of any reference respecting contempts of this class, that course has always been adopted. No doubt the Courts in England are vested with a summary power to treat certain cases of contempt, without which, indeed, it would be impossible for the ordinary course of justice to be proceeded with—without which no regularity could be observed—and to shield the officers of the Court in the execution of their duty. The power even went so far that where contemptuous words were used towards the Court, or the writ of the Court, at the time the writ was being served, punishment for contempt was inflicted; but from the earliest time down to the present, I am not aware of one single case where a person has been punished, as for a contempt of Court, for a libel referring not to a suit then pending, but subsequent to its termination. It is stated by Chief Justice Campbell in a well-known book—but I could hardly call it an authority, "Campbell's Lives of the Chief Justices, Vol. II, page 298, note", that "if a prosecution for a libel on Judges be necessary, the preferable course is to proceed by information or indictment so as to avoid placing them in the invidious situation of deciding when they may be supposed to be parties". He says, this is in reference to a judgment written but not delivered, in which Chief Justice Wilmot had laid down the existence of this power. but it would seem that this only states that there may be cases where it may be necessary to exercise this summary jurisdiction in order for the safety of the Courts.

Mr. *Kennedy* then referred to the case of the *King* v. *Faulkner* (3) and continued:—I do so merely to show that there has been, so far as the memory of the Courts at home reaches, no exercise of its jurisdiction in this manner. Baron Park, whose name stands as high as any who have ever worn the ermine in the Courts of Westminster, in the course of the argument in *King* v. *Faulkner* (3), was unable to refer to any case of it save that of *Reg.* v. *Almon* (4), but in that case of *Reg.* v. *Almon* (4) referred to there, no judgment was ever given, and in no case can it be shown that, when the Courts proceeded for contempt against a person subsequent to the termination of the proceedings, they did so summarily; but there are many such cases cited, and they have all been proceeded against by information.

I would submit that there is no analogy between this case and the cases where a person brought himself into contempt by direct communication, whether oral or written, with the Court, or an officer, as in the case of *Mr. Lechmere Charlton's case* (5). I submit there is a great difference between writing outside the Court and coming

(3) (1835) 2 Montague & Ayrton 311 at p. 330.
(4) (1765) Wilm. 243; 97 E. R. 94.
(5) (1837) 2 My & Cr. 316; 40 E. R. 661; 45 R. R. 68.

into the presence of the Court and insulting it, or using improper language, or being guilty of improper behaviour there. There is no case in England where contempt has been noticed after the close of the proceedings. As to the propriety of your Lordships exercising a jurisdiction which Courts in England have never exercised for the last 100 years, I may refer to the case of *Birch* v. *Walsh* (6).

Here was clearly a case of comtempt, yet the Court exercised a discretionary power. There is an enormous difference between proceedings pending in a Court, such as the Court of Chancery, and a Court where a Jury might be influenced, or witnesses deterred, or the course of justice paralysed by the publication of such libels. The jurisdiction is given for the purpose of protecting the Court, parties, and suitors when the ordinary remedy might be too slow. This difference is, as I say, most material, and in the enormous lapse of time there is not one case, like the present, in which the English Courts have proceeded as for a contempt. There have, however, been cases in which the smaller Courts in the Colonies have adopted severe measures with regard to contempts, and in which this summary jurisdiction has been exercised. In a case which came before the Privy Council in 1866 reported as *McDermott, In re* (7), an appeal by one Lawrence Macdermott, the Court which had punished him, gave him leave to appeal against the sentence of six months' imprisonment and a fine, for an article inserted in a local journal. When *McDermott's case* (7) came before the Privy Council, it was held that there was no jurisdiction to interfere with the decision of the Colonial Court, but the permission to appeal marked the disapprobation of the Privy Council.

[THE CHIEF JUSTICE.—I believe another case is reported as *Rainy* v. *Justices of Sierra Leone* (8), where the Privy Council, although deciding that they could not interfere in such a matter, yet reduced the amount of fine from £ 150 to £50, not as an Appeal Court, but as a mere matter of finance. I looked into *McDermott's case* (7) before passing sentence in *William Tayler's case* (2) in order that the fine might be below that which the Court allowed in that case.]

In *McDermott's case* (7) one of the contempts for which he was charged was with reference to matters past and gone. It appears from the report that on the 2nd April an *ex parte* order was obtained against MacDermott for publishing certain scandalous articles reflecting on the administration of justice in the Colony of British Guiana. On the 5th April another article appeared which was also treated as a contempt which might be held to refer to a pending proceeding, but the first article, which appeared to be one of a highly defamatory nature, wholly referred to past proceedings. The ultimate decision of the Privy Council on appeal was that it had no power to interfere. The mere fact that there is no appeal to the Privy Council against an order for contempt, ought to itself make your Lordships feel that it is not exercising a proper discretion on your part in proceeding in the matter of an article defamatory of your Lordship the Chief Justice himself by a summary jurisdiction in a Court from whose decision there is no appeal, and in a Court in which the Chief Justice's opinion, even if differing from the rest of the Court, must prevail. Unless it appeared that there was likely to be the gravest possible consequences to the administration of justice, the proper course to be adopted would be, not to have proceeded by a summary process for contempt, but by proceeding, if the Court came to the conclusion that this case is one which calls for animadversion, against Captain Fenwick in a constitutional way, when Captain Fenwick would be brought before a Jury, and if any questions of law arose, they might be reserved for the consideration of a higher Court. That is a point which I have felt in duty bound to bring before your Lordship's notice, and no doubt it would have due weight. Here, in this Court, Captain Fenwick is brought forward to answer a charge of contempt, the nature of which

(6) (1848) 10 Ir. Eq. 93.
(7) (1866) 1 P. C. 260; 4 Moor. P. C. (N. S.) 110; 17 W. R. 352; 16 E. R. 258.
(8) (1853) 8 Moore P. C. 47; 14 E. R. 19; 97 R. R. 26.

is that he is likely to bring the administration of justice in this country into contempt—that he is likely to weaken the faith of the people in the due and true administration of justice. This case is one which must go to the public as a matter of fact. I am unable to see any reasons which lead to the conclusion that a summary proceeding should be used instead of the constitutional one. There may be such reasons, but it will be difficult to induce the mass of the people to believe in them. If the Court were to exercise this jurisdiction, it will go forth to the world that a Court, from whose decision there is no appeal, has held that these articles of Captain Fenwick were not written in good faith. Would that be satisfactory to the public? Will a decision like this strengthen the faith of the public in the administration of justice in the same way as a decision of a Jury will. The Courts of law in this country are held in too high estimation by the people for any newspaper article to have any damaging effect on that estimation. Whether a Jury convicted or acquitted Captain Fenwick of defamation, or of not having written those articles in good faith, would have very little effect upon the public mind, but the case of a Judge, from whose decision there is no appeal, deciding a case in which he is a person interested, must have the effect of shaking the confidence of the public in the Tribunals of the country. I much regret that it should have this effect, but I fear that it is an almost necessary consequence. If no other course was open to the Court, if it was imperatively necessary for the Court to proceed in the manner it had done, I would be the first to say, regardless of any outside opinion which might be entertained outside,—"Go on, and exercise your jurisdiction". The jurisdiction is vested in the Court for the benefit of the mass of the subjects and must be exercised. It is, however, not a necessary jurisdiction, but a discretionary one, and one which should be exercised with the greatest care, especially when in the course of upwards of 100 years not a single case can be cited to show that the Court at Westminster had exercised this jurisdiction. That is the most elementary feeling and principle that has been engrained into the minds of all people which prevents Judges from deciding in cases in which they are directly interested. In the case of *Dimes* v. *Grand Junction Canal* (9) Lord Cottenham's judgment was held by the House of Lords not capable of being supported, merely because he had an infinitesimal interest as a shareholder.

[THE CHIEF JUSTICE.—The same thing would apply if the same were said to the Judge in Court.]

No, my Lord, I think not. I do not think so; for when an insult is offered in Court, it calls for summary proceedings and instant animadversion, in order to preserve order and regularity, but even then discretionary power is used. What can the Judge do but use summary administration; but even then the offender is in general only put in prison until he submits, or until the rising of the Court. Cases of contempt of this character pertain more to disturbance than defamation, as in case of mad people in the presence of the Court who use insulting and defamatory language. They are not cases in which the Judge is seeking to vindicate his own character; they are not personal matters, but are analogous to cases of writ serving, where the served occasionally use bad language. Could the Judge have personal motives there in punishing such an offender? I think not. I would ask now, what reason can there be in not using criminal information or to what reasons will the adoption of this course be attributed. The Court cannot wish to punish Captain Fenwick if he has not done wrong. Has the Court no confidence in the administration of justice by a Jury who have taken an oath of impartiality? Is it impossible to obtain a Jury from among the community of Calcutta, who are to be relied on when they have taken a solemn oath to convict the offender, should they find him guilty? Surely their verdict would be satisfactory to the ends of justice. On the other hand, the fact of the Court trying a case in which the Judges were personally interested, would have a more important effect on the mind of the public

(9) (1852 3 H. L. C. 759; 17 Jur. 73; 10 E. R. 301; 88 R. R. 330.

than could be possibly produced by any newspaper articles or writings. In the case of a great personage in Her Majesty's dominions, which I dare say your Lordships remember, when he tried a person against whom he had brought accusation, the case created a sensation not easily forgotten. I cannot forget the expression of public opinion on that occasion. When your Lordship wishes to preserve the dignity and character of the Court, I conceive that in the wording of the Rule the words "to be dealt with in such other way" mean criminal information and trial by a Jury.

[THE CHIEF JUSTICE.—I did not mean that.]

Mr. *Kennedy* quoted the case of *Dimes* v. *Grand Junction Canal* (9) as to the undesirability of a Judge trying his own case. In the case of the *Rex* v. *Justices of Tyrone* (10) Judge Fitzgerald made some very strong observations as to the impropriety of Judges trying cases in which they had the slightest interest.

This is an undoubted and an unquestioned principle. This is not a case like that of Lord Cottenham and *Grand Junction Company* (9), in which it was supposed that an *animus* existed in the mind of the Judge from the trivial interest he held in the matter as a shareholder in the Company. There are two cases which I have discovered, in which it is laid down that a Judge cannot take part in the trial of any case in which he was an interested party. One of these cases is reported in Coke upon Littleton, page 377*b*, in which a Judge named Richel wished to decide a case in his own favour, but was overruled by three other Judges. And so the case was dismissed "*ex assensu omnium justiciariorum prætor querentem Richel.*" Leaving then this Judge, who had tried his own case, to be a warning to others, as Coke puts it, he came to a very interesting case, if authentic, but he got it from a high authority, (8th Henry VI, page 18). That was an action against one Chase, the Chancellor of Oxford, for trespass, where the defendant pleaded in abatement that he was Chancellor of Oxford, and Clerk of Oxford, and that by Letters Patent the case could only be tried in his own Court. Upon demurrer the plea of abatement was overruled. In that case the Counsel for the defence, being much pressed by the Court to produce a precedent for a man sitting as Judge in his own case and giving judgment against himself, replied he knew of but one. It was that of a Pope, who had committed a grievous crime, and the Cardinals came and said to him "*Peccasti,*" and he answered "*Judicate me*" and they said, "*Non possumus: tu es caput ecclesiæ. Judica teipsum.*" And the Pope gave judgment "*Judico me ipsum cremari et fuit combustus.*" So having sentenced himself to be burnt, he was burnt and became a saint, and so it clearly appears that a man may be a just judge in his own case. In the present case there certainly is that enormous objection—which I have tried to impress upon the Court—that, however it may be, it will be impossible for the public to divest its mind of the fact, that where a course like this has been adopted from the wish that the trial might be withdrawn from that more proper tribunal—the consideration of a Jury.

There was another point of jurisdiction to which he wished to draw the Court's attention, and that was that the whole law of commitment for contempts had arisen antecedent to what he might call the Magna Charta of the English Press. Sometime ago it made little difference whether a person charged with libel was tried by a Judge alone, or by a Judge and Jury, as it was the Judge alone who was to determine whether the article was defamatory or not, and the Jury were obliged to confine themselves to the simple issue as to whether the person charged did or did not publish the defamatory matter. That, however, was not the law now. One must look to the present state of the law with respect to libels, and must consider that the whole jurisdiction has been withdrawn from the Court. To the Jury, and the Jury alone, is submitted the power, but the Court may interfere if the Jury decides to be libel that which is clearly not libel, or it can mitigate, but not increase, the punishment with which the Jury visits such libel. Newspapers are now-a-days looked upon as the natural and proper correctors of those who are high in power. All hold that in England we have one broad principle on which, in a great measure, rests our superiority. I mean the liberty of the press, which does not exist elsewhere. In England the press acts as the hand and eye

(10) (1860) 12 Ir. C. L. R. 91.

to the public and to the executive. I refer now to *Wason* v. *Walter* (11).

Lord Chief Justice Cockburn there says :— "The law of libel has only gradually developed itself into a satisfactory state : for the liberty of a public writer to comment upon the conduct and motives of public men has only recently been recognised. Comments on Government, on Ministers and Officers of State on Members of both Houses of Parliament, on Judges and other public functionaries are now made every day, which, half a century ago, would have been the object of *ex officio* informations, and would have brought down fine and imprisonment on publishers and authors. Yet who can doubt that the public are gainers by the change, and that though injustice may often be done, and though public men may often have to smart under the keen sense of wrong inflicted by hostile criticism, the nation profits by public opinion being thus freely brought to bear on the discharge of public duties ?"

This shows what a change has taken place in the state of the law and public opinion. Lately the Governor-General or Lieutenant Governor, whose conduct has been subjected to severe and even hostile criticism, especially on the subject of the Orissa famine, took no notice of such criticism. Had they done so, the writers of such criticism would have been equally liable with the present offenders on a criminal information. Is it wise for the High Court to object to criminal information, and to claim for itself a higher prerogative, when it is perfectly clear that other functionaries had not that right? These are all the observations I wish to make on this part of the case, and I will now shortly proceed to call your Lordships' attention to another point, and ask whether there is sufficient authority for saying—especially having regard to the then state of the law with regard to indictments for libels,—that the Court has ever had jurisdiction to treat as contempts of Court matters which have occurred outside the Court after the termination of the case, which brought no one into personal collision with the Court, and which are in no way injurious except in being in some way defamatory. All the cases cited on the point are cases which have been actually decided in England, and in all these cases criminal informations have been issued. I have not been able to discover a case in which an English Judge has exercised this jurisdiction, although there have been cases of Colonial Judges having done so. In the case of *King* v. *Faulkner* (3) alluded to before, and reported in Montague and Ayrton, it is held that, whatever might be the right or the power of attachment, the Judge who professed to exercise the power had not the power. In examining the law in this matter, it strongly recalls to my mind the observation of Lord Denman in the case of *O'Connell* v. *Reg.* (12):—

"That there were three kinds of law: Common Law, Law by Statute, and Law taken for granted and that the amount of accepted legal opinion which fell under the last head far exceeded the amount comprised under the two first heads."

The law could not be better expressed than it was there, in one of the greatest judgments which have ever been delivered by any member of the House of Lords.

[THE CHIEF JUSTICE.— But it was proved that the law taken for granted was not good law.]

It was proved to be irreconcilable to clear legal principles.

The Court then adjourned for a quarter of an hour for refreshment. Upon its re-assembling—

Mr. *Kennedy* proceeded with his argument.- I refer the Court to the judgment of the Lord Chancellor in *St. James's Evening Post case* (13) and will now ask your Lordships to direct your attention to the case of *Birch* v. *Walsh* (6), in which the Master of the Rolls in Ireland adopted the language of Lord Hardwicke and went through the whole of the classes of contempts punishable by the Court in its high prerogative power.

Mr. *Kennedy* again quoted the class of contempts referred to, and proceeded to speak with regard to the third point—that of an inference of an intention to obstruct the course of justice. This, I submit, could not be called scandalising the Court. The term

(11) (1868) 4 Q. B. 73; 8 B. & S. 671; 38 L. J. Q. B. 34; 19 L. T. 409; 17 W. R. 169.

(12) (1844) 11 Cl. & Fin. 155 at p. 373; 9 Jur. 25; 1 Cox C. C. 413; 7 Ir. L. R. 261; 5 St. Tr. (N. S.) 1; 8 E. R. 1061; 65 R. R. 59.

(13) (1742) 2 Atk. 469; 26 E. R. 683.

"scandalising," as I understand it, is a part of the class of contempt in which, when the process of the Court was served, opprobrious language of some description was used. It does seem to me that in cases of this description, where the contempt consists of an attack on the Judges, that the Court invariably ought to proceed on criminal information.

Mr. *Kennedy* then quoted the case of the *King* v. *Watson* (14) and went on to say.—I do not think that any Court at this day would proceed against a man for expressing an opinion even if it were expressed without forethought. There are several cases in which criminal informations have been brought against persons for libels upon persons filling high judicial positions, but if a shorter and more simple remedy had been open to them, that course would certainly have been pursued. In your judgment your Lordship starts with that case—*St. James's Evening Post case* (13)—which lays down three different kinds of contempt. That is exhaustive of contempts which are liable to punishment, and yet the Judge is not in favour of public rights to the exclusion of rights of the Court. It is hardly possible to put any other construction on that judgment. I think the only other case having any bearing on the present is *Van Sandan's case* (15)—which is alluded to in the course of *Mr. William Tayler's case* (2)—in which the contempt was actually committed in the presence of the Court, and the summary jurisdiction was resorted to for the purpose of preserving order.

The two cases referred to by Starkie, page 481, are stated to be libels on the Court of the Queen's Bench; whereas it would appear, on looking into them, that they had nothing to do with the Court of the Queen's Bench at all, but it was a libel on Dr. Middleton*. How it occurred that the King's Bench could be mixed up with a Doctor of Divinity I am at a loss to comprehend. We find in Fortescue 201, that the libel was a libel on a Doctor of Divinity, and that the libel was contained in the dedication of a book. I have heard that "divinity doth hedge a King" but here the "King's Bench" seems to hedge a Doctor of Divinity (a laugh). Then the only other case was in Starkie, 582. These are the only two cases which state that such jurisdiction has never existed. In more modern times we find a case in the Queen's Bench. Now in this case it appears on the face of the report, *Crawford's case* (16), that Crawford attended the Court as a spectator and auditor and that he commented in the *Mona* newspaper, and then it appears the Court was adjourned and the man was committed.

[THE CHIEF JUSTICE.—That case appears to be a libel out of Court.]

It does not appear that the suit was not still pending. It appears that the article was contemptuous, and that its publications were calculated to paralyse the proceedings of the Court. I believe your Lordship was personally present, but it appears to me that as it is reported that appears to be the gist of the affair. Next I come to *Wallace's case* (17), which was a letter directed to the Judge for the purpose of influencing him in the discharge of one of the duties of the Court. This letter was most insulting, and accused him of altering minutes of the Court (here Mr. *Kennedy* quoted the case). This was clearly during a pending suit. I forgot to remind your Lordships that in the Moffussil, except in those Courts established by Royal Charter, they would have no power to exercise such a jurisdiction as I mentioned before, as the administration has carefully withdrawn all such power—Act XXV of 1861, section 1863.

No Court except those established by Royal Charter has any jurisdiction, and when so established it has only that power to a similar extent of Rs. 200 fine. Yet they would want it more than this Court, in fact one would have thought it would have been necessary in those Courts. Assuming that your Lordships are not convinced on the points on which I have argued, I will go on to prove that your Lordships cannot treat this case as one of contempt, that is to say, as a case punishable summarily, but that you can only

(14) (1788) 2 T. R. 199; 100 E. R. 108.
(15) (1846) 1 Ph. 665; 41 E. R. 763.

* (1606) 5 Coke 125A.

(16) (1849) 13 Q. B. 613; 18 L. J. Q. B. 225; 13 Jur. 955; 116 E. R. 1397; 78 R. R. 479.
(17) (1866) 1 P. C. 283; 4 Moore P. C. (N. S.) 140; 36 L. J. P. C. 9; 15 W. R. 533; 16 E. R. 269.

try it by Jury as a case of defamation under the Penal Code.

[THE CHIEF JUSTICE.—If the contempt is one which does not come under the provisions of the Penal Code, there is nothing to prevent the Court dealing with it as a contempt and if it is contempt punishable under the Penal Code, the Court can try it itself, but upon the understanding that the punishment to be inflicted will in no case exceed that provided in the Penal Code.]

What is the charge against Captain Fenwick in the present case?

[THE CHIEF JUSTICE.—He is charged with having published certain letters and advertisement in the newspaper, and that in doing so he has been guilty of a contempt of Court.]

What I want to know is whether I am to direct myself to the question as to whether the articles in question were calculated to do harm or to injure the reputation of the Judge.

[THE CHIEF JUSTICE.—Not alone that. The advertisement for a demonstration against a Judge for acts done in Court is, in my view, a contempt.]

[MACPHERSON, J.—I think, Mr. Kennedy, you may argue first as to whether the letters, etc., written come within the meaning of the word defamation according to the Penal Code, and then whether they are a contempt of Court.]

[THE CHIEF JUSTICE.—I put it that the advertisement calls for a demonstration of public opinion, and is a defamation as well.]

With respect to the defamation, I want to understand what your Lordships hold.

[THE CHIEF JUSTICE.—If it is a criticism for which, within the meaning of the Penal Code, he could not be indicted, it is not a contempt. Any fair criticism is justifiable and is not a contempt, if expressed in good faith. According to the 52nd section of the Penal Code, a *bona fide* criticism is not a contempt.]

There may be some difference between the words "expression of opinion" and the word "criticism", although perhaps the simple meaning of the word "criticism" is nothing but an expression of opinion, but if any person were to say, "So and So's judgment was wrong", that could hardly be called a fair criticism.

[THE CHIEF JUSTICE.—I call an expression of opinion in good faith a criticism.]

If writers in the discharge of their public duty were to be obliged to support every portion of what they wrote with reasons, they would be in a hard case.

[THE CHIEF JUSTICE.—I don't mean with their own reasons, but it would not do for a writer, in the case of a man convicted of murder, to say, without giving the evidence, that Judge and Jury had convicted an innocent man.]

Suppose it was not in a newspaper, but an ordinary person had said so.

THE CHIEF JUSTICE.—If he said so in Court that would be a contempt of Court. I am willing to hear you if you wish to argue that would be an expression in good faith on the conduct of a public servant. Suppose in a case in which there was a conflict of evidence, a newspaper was to say that "the Judge and Jury have convicted an innocent man; the man has been hanged and it is a cruel injustice", would that be justifiable?]

If made in good faith, it would. Suppose the case of a person who had been in Court and paid great attention to the case and came to that conclusion, or suppose that one of a minority of a Jury, as in the Moffussil, where a unanimous verdict is not required, differed from the other jurors, and the man tried was condemned to death, could it be said that, although he did not give his reasons, yet that if he said, "in my opinion that man is as innocent as any in Court, and yet he has been sentenced to death," that the statement was not made in good faith?

Mr. *Kennedy* continued.—The offences charged against Captain Fenwick are two; first, in having consented to act as treasurer to the fund, and in having given notice of the formation of a fund, intended to offer an opportunity to people who entertained an adverse opinion to the Court in *William Tayler, In the matter of* (2) of giving an expression of their opinion by paying their rupee. Possibly the law of conspiracy still prevails in the country, and after the case of *O'Connell* v. *Reg.* (12) it is hard to say what is not conspiracy.

In the matter of BANKS AND FENWICK.

[THE CHIEF JUSTICE.—But those counts were held to be bad.]

I will not state what is and what is not of the nature of a conspiracy, as that is an offence not triable under this particular jurisdiction; and since the introduction of the Penal Code I doubt whether it is triable at all in India. The paragraph which I presume to take as the contempt of Court was this :—

"During the whole of Sunday and yesterday great excitement prevailed throughout Calcutta at the severe sentence pronounced by the Chief Justice on Mr. W. Tayler. We understand that a public subscription has been opened to pay the amount of the fine, subscriptions being limited to one rupee each. We shall be happy to take charge of any subscriptions to such a fund,—the demonstration not being at all intended to express any justification of Mr. Tayler's conduct, but to show rather the sentiment which exists in the breasts of all Englishmen against a too severe use of power. Precedents in law and the forms of justice may be cited in favour of Sir Barnes Peacock's action in the matter, but the universal shout of indignation with which His Lordship's sentence, sitting as he was as Prosecutor, Judge and Jury upon his own wrong, has been received, sufficiently justifies an appeal to the public. Five hundred men having the pluck to put down their rupee each, in proof of their protest against the cruel sentence awarded by the Chief Justice, and as an earnest of their determination to support their right of appeal to a free press, will be a lesson which Sir Barnes Peacock will not be likely soon to forget."

I confess that I can find nothing there that amounts to a contempt of Court. I find a desire rather to find out what public feeling really was in the matter. In your judgment your Lordship said, "I am a servant of the public. If public opinion is unmistakeably expressed I will bow to it. But I will not take the voice of a few papers for the voice of the public." It really seems difficult to ascertain how public opinion could be better expressed than by this rupee subscription. It was your Lordship's and not Captain Fenwick's suggestion as to the expression. The proposal for subscription did not come from Captain Fenwick, as I learn; on the contrary, he has been led into it. This appears on the face of the notice itself.

From this it is clear that the suggestion was made to him, as he had taken great interest in *William Tayler's case* (2), and surely this could not be taken as a contempt of Court, when his action was merely the result of your Lordship's challenge of the public opinion of the community in Calcutta fortified by a threat.

[THE CHIEF JUSTICE.—I used no threat. I said I shall be happy to lay down.]

Yes, my Lord, it is a threat when you speak of depriving the community of your deep learning and the brilliancy and impartiality so long the brightest ornament of the Bench. This subscription may be regarded as an indication that public opinion thought your Lordship was in error. This public opinion may be very wrong, but still the feeling existed, as it would amongst all Englishmen and I believe it also existed here amongst the members of the Bar, that it would have been better had Mr. Tayler been tried by a Jury. In one word, there was a feeling of dissatisfaction at the proceedings against Mr. Tayler and the severity of his punishment. Your Lordship thought that the sentence of the Court was a fit award, and this judgment had been to some extent challenged by an expression of public opinion on the subject, and it was difficult, under the circumstances, to see how else that expression of public opinion could have been conveyed. Calling a public meeting for the purpose would have been a much graver offence as well as more insulting, and was a course which I would have been very sorry to have seen adopted. The way of enabling the people to come forward and give their opinion as expressed by their rupee was about as mild a form of expressing an opinion as could well be adopted. I have known of many such similar cases, but have never known of one in which any particular proceedings were taken as in this case.

[THE CHIEF JUSTICE.—This subscription was not intended for the purpose of paying off Mr. Tayler's fine.]

Cases of paying off a person's fine for charity are never noticed by the Court, and indeed are very seldom done; but in

most cases where subscriptions are raised for the purpose of paying off fines, it is in order to mark public disapprobation at the course adopted. It will doubtless be remembered that when the *Nil Durpan* prosecution* was successfully carried out, a wealthy native, named Kali Prosunno Singh, actually threw the amount of the fine on the table of the Court. In *McDermott's case* (7) there was also a fine, and this was also raised by subscription.

[MACPHERSON, J., said that it must be remembered that the article in the paper of the 16th April was to be read in connection with the other articles, although there was no charge of contempt in respect of that particular article.]

It appears to me that this is a mere expression of opinion if it has been given *bona fide* and with reasonable care, and if there is no reason why the expression of opinion should not be given in this way, and why persons who really have been challenged to come forward and give an expression of their opinion should not do so, then it would seem a monstrous thing that it should be made a matter of contempt on the part of Mr. Fenwick to give them an opportunity to do so. Another paragraph states as follows:—

"Notwithstanding yesterday having been mail day and a day of considerable business in Calcutta, subscriptions towards the fine imposed upon Mr. Tayler have been pouring in. Our notice yesterday must have been carelessly read by many, as individual subscriptions of 100 rupees and upwards have been offered. The limit proposed was one rupee. Again we have to remark that the demonstration is in no way intended as a vindication or approval of Mr. Tayler's conduct, but as an independent expression of opinion regarding an overexercise of power on the part of Sir Barnes Peacock, and as a legitimate protest against undue interference with the right of appeal to the Press."

[THE CHIEF JUSTICE.—Mr. Tayler's second apology had been put in the day before the second notification.]

Mr. Tayler, in his second apology, admitted himself to be altogether in the wrong, and the article in the *Englishman* does not vindicate Mr. Tayler's conduct, but merely says:—

"There are many people who do not care for the grievances of Mr. Tayler, but who will not brook an encroachment upon their right of appeal to the Press concerning the public acts of public men."

I confess my belief that, on investigation, that these proceedings are an encroachment on the liberty of the Press, the opinion would be discovered to prevail extensively among the members of the Bar. This prevails also among Captain Fenwick and many others who are not at all defective in intelligence, who were present and read the proceedings without reference to Mr. Tayler, whom many think to have acted in a very shabby way. Many also entertained an opinion against Mr. Justice Mitter. I will here read the letters that were sent with these subscriptions.

[THE CHIEF JUSTICE.—Are these all the names, or are they only of those who consented to have their names published?]

These are all the names, my Lord, except those of some ladies and those who are in the Moffussil, and have, therefore, been unable to send in their consent as yet.

[THE CHIEF JUSTICE.—I see here "Inigo or Jingo and three friends, H. B. and 10 others, residents of—"]

Those are all ladies, my Lord (laughter).

Here Mr. *Kennedy* read the letters which caused much amusement. One letter being anonymous and of a libellous nature was not read.

Mr. *Kennedy* continued.—Although, after your Lordship issuing the Rule, Captain Fenwick published a statement to the effect that he would receive no more subscriptions, yet many further subscriptions came in. There were also many other subscribers who have not sent letters, but who are men of high education and strong feelings as to the rights of Englishmen, which they feel in the present case have been infringed and attacked. I don't know how it was that the subscription came to take place. It has been shown that Captain Fenwick was not the originator of it, but merely agreed to act as treasurer, and the part he has taken was done by no means with the intention of committing a contempt of Court. One of the advantages we enjoy

* (1862) 1 Celebrated Trials 86.

from a free press is that the expression of public opinion which it allows, prevents the breaking out of conspiracies. The greatest means of keeping our country free from outbreaks is that every person is able to bring his opinion before the public, when it can be confirmed or refuted by those who have the power and ability to show what is right and what is wrong. The preventing of the expression of public opinion such as this, by the dread of being punished for contempt of Court, appears to me to be about as wise as placing a weight on a safety valve to keep a boiler from explosion. Captain Fenwick has probably high ideas of the press and the duties of an editor, they may be erroneous ideas, and he may perhaps have gone beyond what he ought to have done in the matter of criticism. The first of the incriminated articles seems to me to be one of the 26th April and with regard to the first passage which states:—

"The extraordinary severity of the sentence was much commented on in and out of Court." That I take it, my Lord, is a mere matter of fact. I believe Captain Fenwick in his affidavit states it as such and I will be able to procure other *viva voce* evidence of persons who were present to verify that statement, that there was much comment on the sentence and that the public expected that after what had occurred on Tuesday morning, they understood that Mr. Tayler would be, to use a Police Court phrase, warned and discharged upon his making an apology. The letter went on:—"There was not a listener in Court on Tuesday last to Mr. Tayler's offer of apology, who did not consider, from what fell from the Chief Justice, that his Lordship was prepared to accept his apology, provided it obtained the same publicity as had been afforded to the letters complained of."

The words 'there was not a listener in Court", etc., might be difficult to prove, but what I am prepared to prove, is that a large number of persons in Court did come to the conclusion that your Lordship did not intend to proceed to punish Mr. Tayler in case he published an apology, and included in it a retraction suggested by your Lordship. The article goes on to say that the Ranee of Ticaree's "unprotected position was feelingly dwelt upon, and Mr. Dwarkanath Mitter was extolled in such a manner that he must have blushed, although like Gray's flower, it was 'unseen.' "

That may perhaps be a somewhat irreverent joke at the Hon'ble Mr. Justice Mitter, but I cannot think it amounts to anything like a contempt, or calls for any necessity for measures such as have been adopted.

[THE CHIEF JUSTICE.—No proceedings would have been taken for anything like that.]

Then the letter goes on—

[THE CHIEF JUSTICE.—There is a quotation at the commencement of the articles which you have not read, Mr. Kennedy.]

Mr. *Kennedy* read the following:—

"Calendaro.—Will he be punished?

Bertuccio.—Yes.

Calendaro.—With what? a mulct or an arrest?

Bertuccio—.With both:—

Calendaro.—Now you rave, or must intend revenge."

Slightly altered from Marion Faliero.

I do not see how that can be considered as applying to the Court. I suppose your Lordship remembers the original quotation, and you will see that the alteration is a very slight one. The joke may not be a very good one, but it is hard to see how it could be applied to the Court. The word in the original quotation is "death". I take it that quotation is only meant as a sort of expression of opinion, that the imposition of both fine and imprisonment for such an offence was a singularly severe one. Now surely that is a matter in which a journalist is capable of forming a *bona fide* opinion, having seen Mr. Tayler in Court and heard the proceedings. What he says of your Lordship, if it is not in good faith, then it is not justifiable. Your Lordship's judgment was one of singular power and of deep research, most clearly bringing before the public that which to other Judges would not have occurred. Your Lordship in exercising your real powers did bring an enormous amount of evidence to bear against Mr. Tayler, against whose acts you had formed a very strong opinion. So, surely, there is no dispraise in saying that you had turned every point against Mr. Tayler. The word "bitterness" cannot be construed into

contempt of Court. It merely applies to your Lordship's manner. It may not be fair to criticise your Lordship's manner, nor perhaps in good taste, but really your Lordship's manner is sometimes very forcible, very forcible indeed. You did say that Mr. Tayler's apology did aggravate his offence, for the apology in the affidavit was but an echo of the other. Yet when it was read in Court you did not intimate that it was improper or objectionable. Your Lordship intimated that it was insufficient, because it contained no retractation. The general opinion then was, that your Lordship had no further intention to punish, but that as the affidavit contained no retractation it was insufficient. Yet, surely, pity for Mr. Tayler would not overrule the anxiety in the minds of the public for the honour of the Court.

The case was then adjourned till the following day.

Mr. *Kennedy* resumed his argument on May 4th. He said I shall again draw your Lordship's attention to the exceptions contained in the Penal Code. Your Lordship seemed to think that the expression of opinion was equivalent to criticism. I confess I hardly think that is the true construction. Expression of opinion is a much wider phrase than criticism. The framers of the law evidently held that fair criticism was certainly not libel. When they used such a wide term as expression of opinion, they must have meant something very different from the existing state of the law, or they would not have gone to the trouble of defining what good faith was. I think here that there is an invitation in the Statute for the expression of opinion in good faith, which is totally exempt from punishment, otherwise the Legislature is merely laying a trap. I cannot think this to be the case. In a recent calamity, public opinion ran very strongly against the highest officials; in fact, it was said that they were indifferent about the death of thousands of people at the time of the Orissa famine which was attributed to their negligence and want of knowledge. The same opinions prevailed at home, although I understand that human means would have been totally unavailing to prevent the calamity, but yet a strong opinion was expressed that this was caused by the culpable neglect of the officials. There was even a suggestion that this province should have a separate Governor from home, as the existing Lieutenant Governor was the cause of the evil. I think that was singularly unjust. Yet there was no explanation, no giving of reasons; still it was not punishable because it was in good faith. The case put yesterday of a Judge and Jury finding a man guilty of murder, and thereupon being accused of having condemned an innocent man, would be an expression of opinion. Might not that be perhaps in good faith, although the reasons did not appear? Perhaps they might be very weak. But yet that would not imply a doubt as to the speaker's good faith. The 52nd section does not imply that every one must be completely master of his subject, or that his reasons must be sufficient and good, and that else he is liable to punishment, although such expression was made in good faith. Again, the publication of defamatory words is extended towards words "either spoken, or intended to be spoken or said." It is not at all an unfrequent occurrence to hear defeated Counsel expressing strong opinions against the judgment which has overthrown them. Yet, surely, that cannot be defamation, though perhaps erroneous and not fulfilling such demands as "care and attention." Surely the 52nd section does not say that good faith must be applied in forming opinions, but only in expressing such opinions. Of course, if a man has no opinion, if he knows nothing whatever of the case, what he expresses cannot be in good faith. On the other hand, if he has an opinion, this section gives him the liberty of expressing it. The intention of the Penal Code is to extend this liberty of expression, yet if no opinion may be expressed save after careful study, it only misleads the public and contracts their liberty. I now think it right to read Captain Fenwick's affidavit (Here Mr. *Kennedy* put in and read the affidavit, which stated that the articles complained of were inserted *bona fide*, and as a fair expression of public opinion. Then an article from the *Friend of Indian*, April 29). Here the writer appears to have been in Court and seen the reports, and he says that the opinion was shared by all in Court, that nothing further than the apology, which Mr. Tayler afterwards published in the newspaper, would be required of him.

In the matter of BANKS AND FENWICK.

And now this brings me to a very painful portion of my subject. I must say that your Lordship's language on that occasion would naturally lead to the supposition that if Mr. Tayler made the apology required by your Lordship, your Lordship would be satisfied, and that no further proceedings would be taken against him. Mr. Tayler did make an affidavit which he read to your Lordship and he also read the case of *Fletcher, Ex parte* (18), a very gross contempt, when the Court intimated that they would be satisfied with an apology. This was read to your Lordship, and yet you expressed no dissent from such an opinion. Of course that was a matter for your Lordship's discretion, but still I submit that many would think that, as you expressed no dissent, you consented to the contents of that affidavit. I presume myself that the apology you referred to was that incorporated in the affidavit. The affidavit was then before your Lordship. Any one might think that you meant the apology contained in this affidavit. You further said:—"I leave this remark to Mr. Tayler's consideration."

[THE CHIEF JUSTICE.—I did mean the affidavit.]

Under those circumstances, my Lord, it does seem that it was not natural to presume that upon a retractation published as the letters were published, it would be accepted as sufficient, for although your Lordship did not pledge yourself [having *Van Sandau's case* (15) in your mind] that if Mr. Tayler published his apology and retractation it would be sufficient, yet the supposition was that nothing further would be wanted. Of course you did not say so; and people may be to blame for thinking so: still that was their opinion. This is what Captain Fenwick says in his affidavit, and if that is not sufficient, I can give the evidence of several most respectable gentlemen whose opinions were identically the same, and who will testify that that was the state of public opinion. I mean that if Mr. Tayler published the apology as he had published the offence, he would be visited with no other punishment. I don't myself like to give evidence, but really there was a great discussion here amongst the members of the Bar, and here that was the general opinion as is also in the outside world. The reflections on your Lordship in "Bystander's" letter are very strong, but then what you have to consider is, whether that was the prevalent opinion caused by what you said or by what you did not say. Of course, if it had been brought to your Lordship's notice you would have spoken more fully upon the matter. But with that we have now nothing to do. What did occur did very naturally give rise to the general belief that the publication of the apology was all your Lordship required. I submit, my Lord, that the thing for you to consider is, whether such opinion might not be held *bona fide*. The question is whether the course taken in Court may not have induced people in Court, who had not the same means as we had of forming an opinion of your Lordship's judgment, to have taken such a view perfectly *bona fide*. I can't help impressing upon your Lordship the opinion, which could most naturally occur to the minds of such persons, was that a gentleman of your Lordship's ability would not allow such an impression to arise without intending that it should arise. I know that your Lordship did not intend such an impression to arise, but the question is whether it did not arise *bona fide* and that this letter was the *bona fide* and legitimate expression of the opinion of the person who wrote it. If so, I submit the subsequent remarks were not beyond the limits of free expression, even though the opinion was founded in error. The latter part of the letter is written in a sort of flourishing style and is to me quite unintelligible and I am unable to put any construction upon it. In that part of the letter he says:—"there is a marked difference between the dulcet though powerful tones of the British lion and the *arriere pensee* gamut of the Bengal tiger." What the meaning of these words is, or what construction is to be put upon them, I certainly cannot understand. The other inculpated letter is, I take it one published in the *Englishman* of the 28th April, in which a short extract is given from Sutherland's Weekly Reporter, showing that Mr. Justice Dwarkanath Mitter appeared as Counsel for the Ranee in a case against Mr. Tayler, *Ranee Usmut Koowar v. Tayler*

(18) (1841) 2 Mont. D. & De G. 129.

(19), and the last part of the letter stated what was erroneous as well as ungrammatical. The sentence is as follows:—"By this you will perceive that Mr. Justice Dwarkanath Mitter, who held a brief for the Ranee in this case, afterwards sat as a Judge in a cause between the same parties." This is erroneous, because Mr. Justice Mitter did not sit as a Judge in a cause between the same parties. But of what consequence is it? Is it unprofessional or contrary to precedent that a gentleman of the Bar holding a brief should afterwards sit as Judge in a different suit between the same parties? It is only a rule of etiquette and nothing more that where an Advocate taking part in a suit, which afterwards comes before the Court when he is on the Bench, takes no part in the case. Certainly, the suggestion that he sat as Judge in a different suit between the same parties was no imputation on Mr. Justice Dwarkanath Mitter.

MACPHERSON, J.—The whole point of the letter is that Mr. Justice Mitter, having been Counsel for one of the parties, had been guilty of unfair and improper conduct in taking part in the case. That was the innuendo contained in the letter—or why was it published?]

Well, I don't see why it was published.

MACPHERSON, J.—There is a misstatement in the letter, which any one may see.]

Yes, and it carries its contradiction on the face of it.

[MACPHERSON, J.—But the letter is nonetheless an offence for all that, when the manifest object with which it was written is considered.]

It is hard to see how the letter can amount to defamation. There had been a great deal of excitement about the matter and —

[MACPHERSON, J.—The letter itself is of no value one way or the other, except that it goes to show the object with which it was written, in imputing improper conduct to Mr. Justice Dwarkanath Mitter.]

There had been a good deal of excitement about this matter, and this letter came to Captain Fenwick's hands, and he published it with a perfectly innocent intention. It is a very foolish letter, but nothing more. It does not implicate Mr. Justice Dwarkanath Mitter or any other person and is perfectly immaterial one way or the other. That there was and is a great deal of excitement about these cases, can hardly be doubted. These cases have excited a great deal of interest, and your Lordships need hardly have looked around the Court yesterday or to-day to see that this is the case. In spite of the heat of the weather the Court has been much crowded during the last two days, and this shows the enormous interest and excitement felt about this case as a sequel to the case of Mr. Tayler. The public of Calcutta, not only Europeans but natives, had become impressed with the value of the principles of English Jurisprudence, and an idea had been engendered that some of these principles were endangered by the action taken by the Court in *Mr. Tayler's case* (2). In times long gone by a very summary course was adopted towards the public in matters which affected the dignity of the Courts. In times long gone by, the person of the Crown was protected with equally stringent prerogatives. The same with regard to Ministers of State, and remarks upon persons holding high offices of State were prosecuted and dealt with almost as treason. He would remind the Court of a case in the reign of Edward IV, where a man's deer was killed, and he wished that the horns of the deer were in the belly of the man who advised the King to do this. That was held to be high treason. Those days, however, have gone by, and the rights of free speech and free discussion have been gradually widened down to the present day. The greatest change is that in the free discussions on the doings of public men public men have now learned to view their safety, and men now see that it is good for the commonwealth and for the good of all that there should be free discussion, and that if it overstepped the proper bounds it should be punished by constitutional means. As I have shown, the discretionary power of exercising a summary jurisdiction in the case of libels upon the Court published out of Court, and after the termination of a case, has never for the last 100 years been exercised in England, it was a power to be exercised with the most guarded discretion—a discretion which has been so guarded in England, that in the whole history of English Law, not one case could be found in which English Judges had used this power. The only cases in which

(19) 2 W. R. 307.

this power is shown to have been used are cases from the Colonies and the Isle of Man. Under these circumstances it is not astonishing that it has caused great public excitement, and it is not astonishing that the Court should have been crowded as it was yesterday and to-day. I have now, my Lords, only to close by repeating what I said before, that I can hardly feel the administration of justice and the respect felt for this Court could receive a heavier blow than they have received by these proceedings of your Lordships, when it is remembered that these proceedings of your Lordships may give rise to an impression that your Lordships consider a Jury cannot be safely entrusted with the administration of the law.

Mr. *Paul* then rose to address the Court. He said:—May it please your Lordships. The duty of showing cause against the Rule made by your Lordships which devolves upon me, imposes on me a task at once painful, delicate, difficult and embarassing.

Painful, because I shall have to offer remarks upon the conduct of the Chief Justice, who is entitled, by his well known services and immense talents, to a respect which is acknowledged and felt by all who know him.

Delicate, because in my duty to the Court and my client I must be careful not to overstep the bounds of propriety on the one hand and must yet push every argument to the utmost limits on the other.

Difficult, because I have to contend against what may be considered to some extent a foregone conclusion in the minds of your Lordships, based upon mature judgment and reflection.

Embarassing, because it is clear that whatever arguments I may take up, have already been considered and weighed beforehand by your Lordships, besides which no specific grounds are laid down against which I have to combat.

The learned Counsel then proceeded to show how greatly indebted the community was and should be to the Chief Justice for having swept aside the cobwebs of confusion, and for having substituted clear grounds of law in laying down the Penal Code, which existed only in this country.

Whatever accusation might be made against Captain Fenwick surely everybody would acquit him of malice, or of deliberately bad intentions. Whatever faults he had committed were errors of judgment. Steady justice was to be considered as much the indication of public liberty as the freedom of the press. From the earliest records of civilisation, authority and liberty had always been in contest. In order that the two may act in conjunction and harmony a line of definement must be drawn, a very difficult problem indeed, if it was to be governed by the precedent of cases which occurred in England 40 or 50 years ago. Some Judges have held very singular opinions on the subject, and, therefore, in that necessary definement one should rather be guided by the principles than the conclusions of those cases. It would, therefore, be better to confine the argument to the question of the law, as to whether the Court had the right to try a case in which it was itself interested. Nothing published after the termination of proceedings could be held practically as contempt. Mr. Justice Wilmot's opinions are often commented on, but they are not sound, because they will not accommodate themselves to the present times. He, however, was not, according to Lord Campbell, a very bright genius, and his opinions must be regarded as speculative opinions.

Whenever cases have come up of libels after the termination of proceedings the Judges have always refrained from exercising their rights of punishing. Sir Samuel Romilly at one time held a strong opinion on the existence of this power, but found he had gone too far, and he afterwards retracted. This retraction is a matter worthy of consideration, considering the eminence of his position, his learning, and the benefit he conferred on society (13, Adolphus and Ellis). No case in England had gone to the extent that a contempt after proceedings could be punished summarily [*Crawford's case* (16)]. In that case it was considered there was no question to go to the Jury, for the publisher had admitted publication, and in those days before Fox's Bill, the question of construction was one for the Judge.

Here was a manner of proceeding in

which the whole argument was one of law. Therefore, trial by a Jury was absurd, as the fact of the publication and authorship was admitted, if the construction to be placed on a libel was for the Court to decide. In the judgment of Mr. Justice Patterson, it was stated that a case might be conceived, which would have the effect of paralysing the proceedings of the Court. I can conceive such a case, but I thought it must be more than mere defamatory matter. If a threat were made that your Lordships would be resisted in going to Court, that would be a proceeding which would be likely to have the effect of paralysing the action of the Court, as it would be actively impending the administration of justice. If the world did believe your Lordship's judgment to be severe, and Captain Fenwick said so, it would have no effect in paralysing the action of the Court, and the equanimity with which your Lordships sat there would not be disturbed in the least. In no case in England had the Judges gone the length contended for. It was said that the Court could not properly punish as contempt anything which would not interfere with the working of the Court, and I can imagine many cases in which the Court might well exercise this power. In the case of the *King* v. *Faulkner* (3) it was held that a Commissioner of Bankruptcy had not the power to punish for contempt. I contend that the letter reflecting upon the sentence of his Lordship as severe was not an obstruction in any way. In the case of *Reg.* v. *Almon* (4), Lord Campbell's Lives of the Chief Justices, Volume 2, page 297, the judgment of the Chief Justice Wilmot begs the question which it proceeds to prove. It says the Court has power because it has the power, but shows no instance of its exercise.

It is for the Court to say if they are satisfied with this judgment. The Judge does not know where the power comes from. Thought is here lost in language. (Here Mr. *Paul* read the note of Lord Campbell, to the effect that it was inexpedient for a Judge to exercise this power, and that the proper way to proceed was by criminal information).

The matters here complained of are not scandalising to the Court. To think so would be to give the words too wide an interpretation. That is a question for a Jury. *Van Sandau's case* (15) does not come within that class. Where the Court sees a direct attempt to obstruct the proceedings, then they are justified, but in Captain Fenwick's case, the supposed obstruction is from some reasoning or some argument; and then the Chief Justice says the Courts had better be shut up, it is the inference of intention.

Times have changed and the severity of the law is now much mitigated. With regard to this, whole pages of legal literature teemed with cases of great injustice done by Judges under colour of law. I need go no farther than to instance the judgment of Sir John Finch in the case of *Hampden* (20), in which everything was exhausted to show that in that case the right way of proceeding had been adopted, and to uphold in the strongest manner the divine rights of Kings. I understand your Lordship to say that if the misrepresentations had been confined to misstatements without anything being based on them, no notice would have been taken of them. I understand that your Lordship considers the letter of "Bystander" to be a contempt as reflecting upon your Lordship's character and also that the advertisement calling for subscriptions was also a contempt of Court, as being intended as a demonstration against the Court. I have already submitted, on the authority of a number of cases, that in cases of libel of this sort on a Judge, after proceedings had ended, the Court had no greater powers than an ordinary individual. There were other ways than the present course of proceedings by which the honour of the Court might be protected, and the mental capacity of a Judge ought to be of such a nature as to prevent him from placing himself in the position of Prosecutor and Judge in the same case. With regard to the animadversions in the letter of "Bystander", no doubt the word "ruse" is one calculated to annoy your Lordship, but I hope to be able to show to the Court, although the word was not one which I can approve of, that it was really intended to express an impression which had gone abroad

(20) (1640) How. St. Tr. 825.

that your Lordship had given Mr. Tayler to understand that his apology would be accepted, and had thus punished him severely without even mentioning the apology.

With regard to what was said to be the grossest libel—the opening of the subscription as demonstration against the Court—Mr. *Paul* mentioned that in olden times, the Judges had very curious ideas upon the liberty of the subject and the firmness of the British constitution. If almost anything was done, it was given out that the constitution was in danger. Even in later times a great deal of unenlightenment clung to Judges of high standing. In Lord Ellenborough's speech on Sir Samuel Romilly's Bill, reported in the 233rd page of the 3rd Volume of Campbell's Lives of the Chief Justices, he strongly recommended that the punishment of death for felony to the amount of five shillings should not be abolished and so late as 1830, Lord Tenterden strongly opposed the abolishment of capital punishment for the offence of forgery. Mr. *Paul* then proceeded to read Sir A. Cockburns's remarks in the case of *Wason* v. *Walter* (11) already cited by Mr. *Kennedy*.

In modern days Judges do not go on the acts of their predecessors, they do not deliver judgments in such and such a manner, because others have been of a similar character (here Mr. *Paul* cited several cases of overruling). The law as it is written is adamantine and immoveable, but the unwritten law is so elastic that it adapts itself to the present time and judgment can, therefore, be guided by proper discretion. If a dissent of opinion be contempt, then it is impossible to know what is not contempt, and one is at a loss to discover what and where the bounds of contempt exist. The Earl of Macclesfield was fined £ 3,000 and because the King dissented from the opinion of the House of Lords, he ordered the fine to be paid from the Privy Purse. Suppose a case of a man who had been fined, and that fine were to be paid off by any one in Court, is this a case of contempt? There is the case of the Corporation of Yarmouth, in Dunsford and East, on which the present case is judged. But surely that is carrying the law too far. When a man expresses his opinion that a verdict is wrong, or declares it to be so, it does not follow that he says it is infamously so or that he even thinks so. In the present case there has been no obstruction of justice, and he was at a loss to conceive how it could be construed into a contempt of Court except by a process of harsh reasoning. There are wrong verdicts every day. In times past perhaps Juries were more subservient to the Judges, and perhaps that was the reason there are so few cases on record of reversal of sentences, but that does not say that they were not unjust. Provided that they are deserved, animadversions on wrong judgments or on any public acts of any public men were of benefit to themselves and useful to the general community. If there were no liberty of the Press, then a Justice could say whatever he liked or pleased.

Even if their Lordships considered that Captain Fenwick ought to be punished, even then they would surely acquit him of any endeavour to sap the administration of justice. But it was submitted that the present case was one for a Jury who were uninterested

(Court adjourned.) Upon the re-assembling of the Court after a short adjournment for tiffin, Mr. *Paul* resumed his argument. He said that in the judgment of Mr. Justice Buller, that learned Judge seemed disposed to consider that all animadversions on the proceedings of Courts should be prevented. He (Mr. *Paul*) submitted that an opinion pronounced adverse to the judgment of a Judge and Jury is perfectly justifiable if not of a calumnious nature.

[MACPHERSON, J.—Surely that is not disputed.]

Mr. *Paul* said that was the decision of Mr. Justice Buller in the case he had referred to. He (Mr. *Paul*) would only say that he was one of those who, when occasion required, expressed himself strongly in cases where he felt strongly. There had been cases of Judges of the High Court expressing themselves in strong language. Mr. *Paul* submitted that if an article was written and published *bona fide*, the reasons ought not to be tested by the severest logic, for if so, the Government of the world would rest in the hands of two or three persons. If that were so, this

Lordship the Chief Justice's decisions could be never assailed, if the reasons of anything which was alleged against them were to be put to the severe test of logic. Mr. *Paul* then quoted the case of *Hurro Chunder Roy Chowdry* v. *Shoorodhonee Debia* (21), where the present Chief Justice had made use of strong language in expressing his opinion, and had said that to come to the conclusion come to by the majority of the Judges in that case would bring discredit upon the law and upon the administration of justice. Mr. *Paul* continued and contended that in cases of this kind it was necessary that not only the words but their intent should be calumnious before it could be made an offence. Mr. *Paul* maintained that these articles did not come wthin the meaning of the word contempt, as the judgment of the Court in the case referred to was gone and final. He would now proceed to interpret the law with regard to the liberties of the press. It was a noble example that Lord Brougham showed when in trying a question relating to the privilege of members of the House of Commons, he did not hesitate to cast aside certain decided cases, when it behoved him to do so. He (Mr. *Paul*) asked their Lordships to do the same. Mr. *Paul* also read some passages from Mill on Liberty defining the right of criticism of public men.

He then summed up this portion of his argument by submitting that he was right in stating that with the exception of two Colonial cases, one of which was *Crawford's case* (16), in which the details led him to believe that although the Court was not sitting, yet the proceedings were still pending, for in that case Mr. Justice Earle said that it was quite possible to conceive cases of contempt calculated to paralyse justice and, therefore, the Court would vindicate its administration, and that it was for the Court in each case to decide whether it amounted to that. If the suit had been terminated these observations would not have been applicable.

Sir Samuel Romilly, a great man and one who had done very much for the good of the country, and who was a great authority, gives an account of certain proceedings before Lord Erskine. They are stated in 6 Lord Campbell's Lives of the Chancellors, page 565. He states the facts and arguments in a case in which he had endeavoured to persuade Lord Erskine to exercise this jurisdiction, but Lord Erskine had declined to commit. Sir Samuel Romilly made some very harsh comments on Lord Erskine's conduct but eventually he had himself retracted his arguments, and said he believed that a contempt of this kind ought to be prosecuted as a libel. And in *McDermott's case* (7), the facts were open when leave to appeal was applied for. Lord Westbury saw the necessity and gave the leave to appeal, thus marking his disapprobation of the committal, and although subsequently that was rescinded, that proved nothing, because it was merely refused as there was no jurisdiction to entertain an appeal in the case.

In the case of *Wallace, In re* (17), gross charges were made against the Chief Justice by letters sent to him, and before the proceedings were terminated, and that of course came within the class of direct contempts, because the letters containing the insults were sent direct to the Chief Justice.

Therefore, the case was narrowed down to the case in Wilmot and a case which occurred in the Isle of Man, which shows that the power was doubtful and did not prove satisfactorily that a man could be punished for remarks made after the conclusion of the proceedings. The question seemed to be an open question, which, if properly considered, would show that no such power really did exist. The next subject was the mode of proceeding to be adopted, supposing this to be a case in which the Court still retains of the opinion that they have a right to punish. In order to show cases where that power clearly existed, *Stockdale* v. *Hansard* (22) shows the general opinion that such cases ought to go before an impartial Jury. Then as regards *Birch* v. *Walsh* (6), no grosser case could be conceived

(21) 9 W. R. 408; B. L. R. Sup. Vol. 985.

(22) (1839) 9 Ad. & Ell. 1; 2 Starkie 204; 2 P. & D. 1; 3 St. Tr. (N. S.) 723; 8 L. J. Q. B. 294; 3 Jur, 905; 112 E. R. 1112; 48 R. R. 326.

than this, and yet the Court thought that the safety of its honour was not impeached, and that the futile attempts would but recoil on the authors. Letters Patent, 1865, section 36, is already before the Court, and here if the offence does not come under the second exception, then it is plainly defamatory and consequently triable under the Penal Code. In *Long Wellesley's case* (1) Lord Brougham considers that the proceedings for contempt are criminal proceedings.

Here in the present case was no specific charge.

[THE CHIEF JUSTICE.—The charge is for publishing those letters and notices which are in themselves contempts of Court.]

Yes, but there is no specific charge.

[THE CHIEF JUSTICE.—Then how would it be in the case of an indictment which would only say:—"That on a certain day he did publish and set forth certain articles?"]

Then, my Lord, there would be an innuendo.

[THE CHIEF JUSTICE.—If you are ignorant as to what I complain of I will tell you.]

In the case of indictment there would be a Prosecuting Counsel.

[THE CHIEF JUSTICE.—But if there were none?]

Then the defendant should be told.

[THE CHIEF JUSTICE.—The substance of the letters and the advertisement was to get up a demonstration to teach the Chief Justice a lesson, and the article stated that the Chief Justice would raise a storm which he would not find it easy to quell. Those were the letters which formed the contempt. Do you wish an adjournment, Mr. Paul, to consider the charges as now explained?]

No, my Lord, but I submit that my client is prejudiced in not knowing the precise charge brought against him, and which he is expected to meet.

Mr. *Paul* went on to state that the course adopted by the Court had prejudiced his client, and was a course which ought not to be resorted to except where it was imperatively necessary. There was a definite punishment provided for defamation in the Penal Code, and a definite way of trial provided for such cases. It was never intended that offences of this description should be dealt with in a summary manner. Mr. *Paul* then referred to the jurisdiction of the Sudder Court in cases of contempt, the punishment for which could not exceed a fine of Rs. 200, or a month's imprisonment where the fine was not paid. In America, it was stated in Kent's Commentaries, Vol. I, page 321, that the Courts could only summarily punish in those cases where the contempt was committed in the face of the Court, or was such as to obstruct the course of justice. This Court was precluded from punishing except by the Penal Code, and the Penal Code can only punish such offences as come under the sections in that Code. The question was whether what was printed as *bona fide* criticism might be a better kind of opinion but not necessarily more *bona fide* than the mere expression of opinion. The well-known case of a Judge in the Colonies who was told to give his opinions but not his reasons for those opinions is a matter of history.

On the 13th April a warrant was issued, and Mr. Tayler appeared in answer and admitted the authorship of those letters. In commenting on *Mr. Tayler's case* (2) his audacity and his carelessness were certainly indefensible. The Chief Justice, therefore, brought a strong artillery of argument to bear against him. On the other hand Mr. Tayler had some reasons for complaining, although not sufficient to justify him, but still he felt mortified against Mr. Justice Mitter. Yet this did not warrant his careless way and the style in which those letters were written. Mr. Justice Mitter might have retracted what he had said as to Mr. Tayler being directly guilty of fraud, a statement which there was not a tittle of evidence to prove so far as it meant personal fraud. Therefore, Mr. Tayler had a grievance which might have been some extenuation of his conduct and have mitigated his offence and on those grounds his sentence might have been less severe, yet not one observation, not one remark, appeared in the long and carefully considered judgment pronounced upon him, to show that there was a single point in his favour. It did not say that he was galled or that he submitted at once—which he did without complaining

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of his arrest. His submission and his apology might have been sufficient and could have been accepted. In the outside world his wrong was supposed to be true. Yet the Chief Justice went to work with all the zeal and labour for which his judgments are conspicuous to turn every point against Mr. Tayler. It would be no compliment were one to say that the Chief Justice had been careful in preparing his judgment. Yet that judgment shows in no way that Mr. Tayler was suffering under irritation which might have given him some cause for his conduct. Mr. *Paul* then proceeded to refer to the 3rd occasion when Mr. Tayler was brought up, when he presented a petition and made a further apology.

[MACPHERSON, J.—The fact of his making an apology did not entitle him to his discharge as a matter of right.]

Mr. *Paul* said that it was a matter of expectation that if he did apologise he would not be subjected to any further punishment. In the case * in which Mr. Piffard and Captain Francis were tried for contempt of Court, the Court was satisfied with an apology expressing sorrow for what had occurred in lieu of all punishment.

[MACPHERSON, J.—All I meant is that a man cannot claim immunity from punishment from the fact of having made an apology for his offences.]

THE CHIEF JUSTICE.—Suppose a man were to knock another person down in the street, and on being arrested, make an apology. Would he be entitled to consider that sufficient amends?]

Mr. *Paul* said that in *Van Sandau's case* (15), which was a very gross one, a simple apology was held to be sufficient and quoted Sir George Rowe's remarks in that case, wherein he said he would be unwilling to inflict punishment if he could find a single expression of regret. Mr. *Paul* said that he considered Mr. Tayler's first apology to have been a sufficient one, and that when he expressed his sorrow, that implied all retractations and he did not think it was necessary for him to retract everything, and say in so many words that what he had said was false That apology appeared to him (Mr. *Paul*) to have been a sufficient and ample one and this formed one of the grounds for the writing of the letter of "Bystander", which had been referred to. When it was pointed out to Mr. Tayler that his apology contained no retractation, he made the only retractation he could. Under the circumstances, nothing had been said to Mr. Tayler but that his letters were a contempt, and his apology was therefore a general one. He was not told of any particular contempt in any of the letters and when he begged to be allowed to retract everything which the Court considered to be a contempt, he (Mr. *Paul*) considered that to be quite sufficient. Another fact was that his Lordship in his judgment on Mr. Tayler did not mention one word of his published apology, but after passing his sentence he said something about it. It might very naturally have happened that in a long and elaborate judgment like that, his Lordship might have forgotten to mention it, but outside people had criticised the omission: and it had been mentioned that although the published apology was one which emanated from the suggestion of the Chief Justice, yet that his Lordship had not once mentioned it in his judgment nor taken it into consideration in mitigation of punishment.

[THE CHIEF JUSTICE said that after the delivery of his judgment he told Mr. Tayler that if he made certain additions to his apology which had been already published, his punishment would be mitigated.]

Mr. *Paul* said that the apology which Mr. Tayler had been required to make was a most abject one, and he was surprised that that gentleman did not consider his reputation to be worth more than a month's imprisonment.

[THE CHIEF JUSTICE.—I do not consider the apology was an abject one.]

Mr. *Paul* said that it appeared to him the apology was a most abject one, as Mr. Tayler stated that what he said was unwarranted and wholly without fundation. He (Mr. *Paul*) would have suffered six months' imprisonment, no matter how much in the wrong he might have been, rather than make such an apology as that. However much sympathy Mr. Tayler might have had at first, he had since altogether lost it by such conduct. He did not blame his Lordship for demanding the apology, as it seemed to have been fixed

* *Mr. Piffard and Captain Francis, In re,* (1863) 1 Hyde 79. 2 Celebrated Trials 1.

in his mind that such an apology was necessary. Mr. *Paul* mentioned the fact that Mr. Tayler's final apology was not to be received till a week after the judgment had been pronounced, so that it was seen that his Lordship had fully made up his mind, no matter what apology was given, to sentence Mr. Tayler to a fine of Rs. 500 and a week's imprisonment. He only referred to this in order to show a reason for the misunderstanding which had arisen. As regards the law of the case of *Wellesley* v. *Duke of Beaufort* (1), that was a case in which upon only an apology being made the order was discharged, which shows that an apology is sufficient sometimes. And further, the Chief Justice expressed no opinion that the affidavit, or rather the apology to the affidavit, was an aggravation of the offence, until he delivered his judgment, yet that affidavit was before him.

[THE CHIEF JUSTICE.—I was not advising Mr. Tayler.]

No, my Lord, but you gave the impression that if the affidavit was rectified and the apology published, Mr. Tayler would be discharged.

He then continued.—There was nothing in the character of the Chief Justice to induce the editor to calumniate and attack him. In fact he only said that in case he carried his dictum too far he would raise a storm. There is surely no contempt in that. The only dictum was that the printer and publisher would be proceeded against; naturally the editor took offence at this. This did not refer to anything the *Pioneer* had said. The *Pioneer* contained no dictum. It was the *Friend of India* that contained the dictum which the editor thought was going too far. Since the Court has signified its disapprobation, the newspaper has been silent on the subject and in no way endeavoured to prejudice proceedings.

[MACPHERSON, J.—The article of the 26th April states or at least imputes that the Chief Justice acted wrongfully and attacked and turned everything against Mr. Tayler that he possibly could, and then protests against the cruelty (not the severity) of the sentence. There is a vast difference between cruelty and severity. The poetry must be taken as part of the article.]

Mr. *Paul* said that this was merely an expression of what the public opinion was. Surely an editor is not responsible for an opinion that prevails or for expressing it. The *Friend of India* had done the same thing. He himself thought that Mr. Tayler would have been discharged. In fact from what the Chief Justice had said on Tuesday, he (Mr. *Paul*) did not attend on Saturday although he was watching the case for Mr. Tayler—for in fact he thought that nothing further would be done. Many people thought that the public apology was not fairly treated and, therefore, they thought the sentence a cruel one. Exception should not be taken at that one word "cruel" here, which merely meant harsh, and nothing more. The editor had never had a wish to impute malice to the Chief Justice, or he would not have paid the tribute he did to the Chief Justice's talents, etc., which he did in the lines directly preceding the word "cruel." Surely the Chief Justice was a little too sensitive. There was not one misstatement, not one hostile criticism even, and could that article be called *mala fide*? It was difficult to convince a Judge who himself had to put what construction he pleased on the sentences he found offensive and to judge of their meaning himself. Did the Chief Justice think that a Judge who thought he had done right should not be told he had delivered a cruel judgment (meaning a harsh judgment) if that judgment had been unnecessarily severe? After all the Chief Justice did go unnecessarily into the past life of Mr. Tayler and the hearers upon that thought the judgment cruel.

THE CHIEF JUSTICE.—The object of that judgment was to justify the Court and not to attack Mr Tayler.]

Mr. *Paul* here mentioned the very strong remarks which had been made on Mr. Justice Shee and the Jury who had tried Toomer when almost every newspaper in England denounced both the verdict and the sentence. He continued: Mr. Tayler had a grievance and in consequence of that he did very unwisely insult Mr. Justice Mitter. The Chief Justice's high and exalted position prevents him from seeing disappointed suitors, and from witnessing what such men feel. Mr. Tayler knew that he was not in the country when the fraud was committed so that at the most he could only be accounted guilty of a constructive fraud, not of any moral fraud. Had Mr. Justice Mitter

said that the fraud was perpetrated by Mr. Tayler's agent all would have been well, but he did not do so.

Mr. *Paul* then proceeded to comment upon the judgment, showing that Mr. Tayler really had been aggrieved. The Chief Justice in his judgment in the case of Zuhooroonissa against Mr. Tayler said that it was unnecessary to consider the question whether there had been any fraud or concealment. To this judgment the Hon'ble Mr. Justice Mitter said, "I entirely concur," and when the Chief Justice said that it was unnecessary to enter into the question, Mr. Justice Mitter held that it was not necessary to decide, for that was part of the Chief Justice's judgment, and then he went on and found that Mr. Tayler had been guilty of both fraud and concealment. There was no evidence before the Court in that case to justify Mr. Justice Mitter in saying that Mr. Tayler had committed fraud. All that could by any means have been said upon the evidence was that a fraud had been constructively committed on behalf of Mr. Tayler, but not by him, because all the transactions with Ahmedoollah were conducted by Enayut Hossein, who was acting as agent for both parties.

The Court then adjourned to the following day.

Mr. *Paul* in resuming his argument the next morning said that when the Court rose the day before he was still on the subject of the article of the 26th April, with reference to that part of it which stated that every possible point had been turned against the accused. He (Mr *Paul*) had also endeavoured to show that Mr. Tayler had good grounds for complaint against the decision of Mr. Justice Dwarkanath Mitter, and concluded by showing that although the Chief Justice had declared it to be unnecessary to decide whether there had been any fraud or concealment on the part of Mr. Tayler, Mr. Justice Dwarkanath Mitter, after declaring his concurrence in the judgment of the Chief Justice, went further, and expressed what he (Mr. *Paul*) could not help thinking was a dissent from the judgment of the Chief Justice, that it was unnecessary to decide that fraud had been committed. Mr. Justice Mitter's judgment was as follows:—"I entirely concur. I feel no hesitation in holding that the plaintiff is entitled to recover both upon the ground that she has paid a debt due from Mr. Tayler to Ranee Usmedh Koer when she was under no obligation to pay it, as also upon the ground that a fraud has been perpetrated against her by Mr. Tayler in concealing from her the fact that the estate sold by him to her was under attachment in execution of a decree of Court. I should have been extremely sorry if the state of the law were otherwise" As to the duty of the Judges, he (Mr. *Paul*) must refer to the Bench as it must know better what its duties were than any of the outside world, but it struck him that it behoved Judges to be particularly careful in the expressions used in their judgments, that the ordinary meaning was to be given to the words used. If a Junior Judge thought that the judgment of his senior required to be made stronger by further remarks, it was his duty to make them and to give his reason for doing so. But in this case no reason was given as to why, when the Chief Justice had declared it was unnecessary to go into the question of whether there had been fraud or not, the Junior Judge should have considered it to be his imperative duty to come to a finding directly opposite, without assigning any reason. He (Mr. *Paul*) would assume, as indeed the judgment showed, that the bargain for the sale of the estate was altogether carried on between Enayut Hossein and Ahmedoollah and that Enayut Hossein acted in the matter as the agent of both parties. Enayut Hossein stated that Ahmedoollah knew of the attachment, and that he had told him of it. Mr. Tayler was at a distance at the time and took no part in the proceedings, and how therefore was he to know that Enayut Hossein, who was acting as agent for both parties, had kept concealed a fact, which was in his knowledge, from his other principal? Justice Dwarkanath Mitter did not say in his judgment that the agent of Mr. Tayler had committed fraud, and that Mr. Tayler was constructively responsible for the acts of his agent, but he said that Mr. Tayler had committed a fraud himself, and he (Mr. *Paul*) contended

that that conclusion was arrived at without there being a tittle of evidence to support it. Mr. Tayler never took any part in the contract with Ahmedoollah from beginning to end, but left it all to his agent, and an amount of moral obloquy had been thrown upon him which there was not a tittle of evidence to support. The Chief Justice in his judgment had expressed his disbelief in the evidence of Enayut Hossein and his belief in that of Ahmedoollah, not from the fact that the evidence of one was preferable to the other by reason of character, but from a chain of circumstances. His Lordship had shown in his judgment that if Enayut Hossein was to be believed, there would have been something done which had not been done. He would ask his Lordship to bear in mind these facts. The judgment on the original case was tantamount—perhaps not to a direct charge of perjury against Enayut Hossein, but sufficiently so for Mr. Tayler to hold and express the opinion that the Court had considered he had been guilty of perjury. He would now refer to Mr. Tayler's petition for a review of judgment. In that petition Mr Tayler said as follows:—"All your petitioner now desires to do is to inform the Court that the statement put in and the evidence given by Enayut Hossein and his creatures are totally false". This was a statement of fact and was nothing more than what the Court had already decided in its judgment. Mr. Tayler's petition went on—"and was made and given without the approval, concurrence or knowledge of your petitioner, and in direct opposition to the instructions given by your petitioner to Enayut Hossein before his departure from India". Mr. Tayler said that the fabric of the defence set up by Enayut Hossein was directly contrary to the instructions he gave him before leaving for India. Mr. Tayler never disputed nor wished to dispute his liability for the money and when the action was brought against him, the defence set up by his agent was directly contrary to the written instructions which he had left behind him. Mr. Tayler, as far as he was aggrieved, was satisfied by the statement that the Chief Justice had not made any imputation of moral fraud against him, and he accordingly bowed to the judgment. The Court allowed the proceedings for review of judgment to go on and Mr. Tayler fully believed that some justice would be done him in that way. He had put in a petition which he had verified by affidavit, praying that the words used in the judgment of the Hon'ble Mr. Justice Dwarkanath Mitter might be in some way retracted or modified. This might have been done without detracting from the gravity of the judgment in any way. The course of justice did not require that the words should be repeated and though the Court was right when it said that it could not go on to a review of judgment in a case where the party applying to the Court did not express himself aggrieved at the decree, the Court might have done something for the reputation of Mr. Tayler by retracting or modifying the remarks which had been made against him. That might be done by stating that the fraud imputed to Mr. Tayler was fraud committed by Mr. Tayler's agent in his absence. In the judgment of Messrs. Norman and Loch, in the Ticaree case, words which were used in the judgment were afterwards modified, and the same might very well have been done in this case. Mr. Tayler could not be considered to be an active party to the perpetration of the fraud as he was absent in England at the time, and when the negotiations were going on with Ahmedoollah, Mr. Tayler was only constructively negotiating with him through his agent Enayut Hossein and not actively. Mr. *Paul* then submitted that in order to correct what was found to be an error in a judgment it was not necessary that there should be a reivew of judgment, and the Court, in the case of an error in a judgment which was admitted in itself to be a correct judgment, had power to rectify the error, by retracting or modifying the expression to which exception had been taken. If a date in judgment was found to be wrong or the names of parties were declared wrongly or a genealogical tree was not properly placed in the judgment, it would not be necessary to apply for a review of judgment in order to correct them. His Lordship the Chief Justice in refusing the application for a review of judgment said: "It appears to me that there is no ground for reviewing the judgment. I have read very carefully the judgment which I delivered in this case, and see nothing in it which I can retract. I did remark upon the judg-

ment of the Subordinate Judge, but abstained from expressing any opinion as to whether there was any fraudulent concealment on the part of Mr. Tayler". In the course of Mr. Justice Mitter's judgment on the same application, he said:—"I wish to add, however, that I should not be justified in withdrawing the remarks in question upon an *ex parte* proceeding of this kind. Enayut Hossein is not before the Court, and so far as the the plaintiff is concerned she is in no way interested in opposing this application, inasmuch as the petitioner is not seeking for any interference with the decree which had been passed in her favour." If this were to be the case, it would be impossible for a person to obtain redress for injuries of this kind, if the other person were out of the jurisdiction of the Court or transported beyond the seas. Why was Mr. Justice Mitter so careful of the reputation of Enayut Hossein? If these proceedings were *ex parte* there were no grounds to affect Enayut Hossein's character; why should he reject the petition? Why should the Court express no opinion on evidence before it? Nobody asked Mr. Justice Mitter to hold Enayut Hossein guilty of the serious offence. How could a prosecution have benefited Tayler when the Chief Justice had already stigmatised Enayut Hossain as guilty of a falsehood, and when Enayut Hossein was at that very time undergoing a sentence of imprisonment for frauds perpetrated against Mr. Tayler? Why should he be put to these great expenses? Surely it would have been sufficient for Mr. Justice Mitter to have said that during Mr. Tayler's absence this fraud was commited by his agent. It does not matter whether Mr. Justice Mitter believed Kelly or not; it is sufficient that Kelly took the responsibility himself; he admitted that Mr. Tayler had had no hand in the fraud; this was evidence *prima facie*. Many European gentlemen had to rely on their agents for native contracts. It was very good advice of Mr. Justice Mitter's that Mr. Kelly should have known what was in the statement, but that advice was impracticable. Mr. Tayler was deeply aggrieved. The reasons of Mr. Justice Mitter were not satisfactory; if it was intended to charge Mr. Tayler with personal fraud, there was not a tittle of evidence to support the accusation. Had he put his grievance in a short, clear, logical way he might have cleared his character; but he went into the hyperboles censured by the Chief Justice. Mr. Tayler was more sensitive on account of the Chief Justice's observations. The Chief Justice had delivered the judgment from an attacking point of view. He felt that a colleague had been attacked. Here is a proof of the evil of the prosecutor being the Judge. The Chief Justice considered Mr. Tayler's insolence and the insult offered to Mr. Justice Mitter, but he forgot Mr. Tayler's grievance. Mr. Tayler, being a man of some historic reputation, perhaps an unfortunate man, but a man of some accomplishments, though from the time he took to being Vakil, he acted very unfortunately, felt deeply the attack on his character, having descended from his high position; there was, therefore, some extenuation for his offence, not perhaps sufficient to stop the Chief Justice's judgment, but sufficient to mitigate the blame and lessen his degradation.

Mr. *Paul* then turned to the subject of the opinion which had been formed as to the severity of his Lordship's sentence, and went on to say that he submitted, with all due respect for Mr. Justice Mitter, and to the Court, that in his view the reasons which had been given for the view which had been expressed of Mr. Tayler's conduct by Mr Justice Mitter were not correct, and that gentleman had every right and reason to complain of having been adjudged guilty of fraud without any evidence to support that view, and he also had a right to complain that when he presented his petition for a review of judgment, the Judge refused to retract or modify one single word which he had used. All these circumstances might be urged in extenuation of the conduct of Mr. Tayler. Mr. Tayler had committed a very foolish act, doubtless, in appealing to the papers, but the Court must look to the provocation he had received. There was no doubt that Mr. Tayler had a grievance, and if he had proceeded to vindicate his character in a proper way, it was not impossible to say that public sympathy might not have gone with him.

With regard to the second point of the same subject, the allegation that the Chief Justice had turned every point that could be turned against Mr. Tayler with great severity and bitterness, Mr.

Paul proceeded to justify these remarks. With regard to the judgment itself if the Chief Justice thinks that the two cases of the Ranee of Tekaree and of Zahoorooonissa had such connection as to make it proper to introduce the point into his judgment respecting the maid, there is some reason, for " Curiosity " in his letter deeming them to be connected cases.

As to the observation made by your Lordship on the statement in the 1st letter and the petition of review and Mr. Tayler's oral explanation, I cannot help thinking your Lordship has misapprehended Mr. Tayler's meaning. I believe Mr. Tayler meant to say that if Mr. Justice Mitter had based his judgment on the hypothetical case of fraud he would have had nothing to say, and not that if the Chief Justice had agreed with Mr. Justice Mitter then he would have had no ground of complaint. The plea as to whether there was a fraud is one thing, that Mr. Tayler was the author of it is quite another. Mr. Tayler did not attack at all the judgment of Judges Norman and Loch. I think the attribution of degraded cowardice conveyed by your Lordship was not founded on the facts of the case. Tayler had no ground of complaint against your Lordship, and that was the reason he did not attack you. It was not because your position rendered you unassailable.

[MACPHERSON, J.—Why are you arguing on Mr. Tayler's case? Is it with the view of showing that the article in the *Englishman* of the 26th April is correct in facts.]

Yes, my Lord.

[MACPHERSON J.—That the judgment of the Chief Justice was a vindictive judgment.]

No, not with that view, but that it was an unnecessarily severe judgment.

[MACPHERSON, J.—The imputation in the article is that the sentence was a vindictive one. The wording of the paragraph is not that the sentence was severe, but that it was cruel.]

[THE CHIEF JUSTICE said that the word "cruel" imputed a wish to cause pain.]

That, I submit, is not the meaning which the word is intended to convey.

[THE CHIEF JUSTICE.—If the remark was merely that the judgment was a severe one, it would be no contempt. That would only be fair criticism.]

Mr. *Paul* said that he was placed in a very peculiar position. There was not the slighest intention to cast an imputation on his Lordship, but the whole case had turned on a misunderstanding which had unfortunately arisen. Where the word "cruel' was used, it only meant to express harshness and severity and nothing more.

[THE CHIEF JUSTICE.—The article says that I knew of Mr. Tayler's bad state of health. That I did not know; all that I did know was that he was suffering from gout, and as I had shortly before that seen him in society and knew that he was able to make a journey to Patna, I did not know he was suffering from anything else than a simple attack of gout. I knew nothing of what was stated in the medical certificate until after the judgment had been delivered.]

Your Lordship comes to the conclusion that this article is intended to charge you with cruelty.

[THE CHIEF JUSTICE.—If the word only means severe I do not complain.]

Mr. *Paul* said that the word "cruel" in the articles must be taken in connection with the words which followed it. In one part of the article the sentence is called a cruel one, in the next paragraph the words "the harshness of the sentence" occur, and a little lower down there are the words "cruel severity". Captain Fenwick never intended that the word "cruel" should be used in the bad sense which had been imputed to the words and he said so now publicly through him (Mr. *Paul*). He hoped the Court would not construe the word 'cruel' in that bad sense.

[MACPHERSON, J.—That is the ordinary meaning of the word.]

[THE CHIEF JUSTICE.—The meaning of the word cruel is a pleasure to inflict pain.]

How could it be imputed that your Lordship would take pleasure in inflicting punishment.?

[MACPHERSON, J.—The question is whether that was not imputed.]

I submit it was not. All that it was meant to express was that the sentence was a severe one—a very severe one.

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[MACPHERSON, J.—There could be no objection to having it said that the sentence passed was a very severe one.]

[THE CHIEF JUSTICE.—If it is said that the word was not intended to be used in any bad sense, I am willing to accept that statement.]

I now state on behalf of Captain Fenwcik that the word was not intended to be so construed.

[THE CHIEF JUSTICE.—I am ready to hear the rest of your argument, and will accept Captain Fenwick's statement. If the charge had been only that my sentence was a severe one, none of these proceedings would have been taken.]

Your Lordship's mind was so imbued with indignation that the other matters did not strike you. If it were not the intention of Captain Fenwick to say that you were guilty of deliberate cruelty, you will be satisfied then? I think I can prove that the use of the word all through the articles would be inconsistent with such an intention. He does not call you cruel, which might have the sense imputed, but calls the sentence cruel when the word could only mean, at the most, extremely harsh and severe.

To go on with Mr. Tayler's case. No charge was made, merely an inference. I don't think the charge is fair that he attempted to put aside former judgments, because it does not arise out of the case, and that after Messrs. Norman and Loch had acquitted him; but to add a sting you urge that the affidavit was irregularly taken. Surely that did not fairly arise. That was very severe and should not have been adverted to. I hope I do not give offence, but I must express my opinion.

[THE CHIEF JUSTICE.—I do not look upon anything you say as an offence. I give you full liberty and I hope you will not restrict yourself from the fear of offending.]

Mr. *Paul* then resumed and again ran over the arguments as to the Chief Justice's judgment having been very severe. In that judgment Mr. Tayler was identified with all the acts of Enayut Hossein: he was actively guilty of fraud and taunted with having tried a new way to pay old debts, though he was absent from the country at the time and denied all knowledge of the matter. He said that no one had ever yet come into Court without one scrap of anything, without one scintilla of extenuation in his favour. Yet none appeared in the judgment, and on those grounds it was very severe. The Chief Justice had no right to go back into Mr. Tayler's previous history which was not in this case. That was another reason why it was severe. The Chief Justice knew Mr. Tayler was suffering from gout, which at his advanced age was very virulent, and that again made the judgment most severe or cruel in its least offensive sense. That word must be taken with the subsequent context, which shows what the *animus* was, "We do not defend what Mr. Tayler wrote, but we do protest," etc. If the editor did not defend Mr. Tayler he could not mean that the judgment was cruel in its worst sense.

[THE CHIEF JUSTICE.—If he meant that the object of the Judge was to give pain and not to administer justice, then I understand the word cruel.]

No, my Lord, Captain Fenwick imputed no facts to show there were private feelings.

[THE CHIEF JUSTICE.—What does "Now you rave or must intend revenge" mean?]

[MACPHERSON, J.—This would appear to be vindictive.]

Inasmuch as the article professes to be *bona fide* the word "cruel" cannot bear that character.

[THE CHIEF JUSTICE.—Then why was the quotation altered in one instance to suit Mr. Tayler's case and not in the word "revenge."]

You see, my Lords, were this case before a Jury then we could see how ordinary minds would construe the word. As to me I do not know what it meant: I would ask how many men would have known what it meant. I will, however, submit that no facts are mentioned from which malice could be imputed. When flattering eulogiums precede, why should such imputations of malice be made? They are wholly inconsistent with such an imputation.

Mr. *Paul* then read the following paragraph from the Chief Justice's judgment: "I am an unflinching advocate of the liberty of the press. I believe that its freedom

is one of the main bulwarks of the rights of the people. I claim no exemption as regards my public acts from the most rigid scrutiny and the most unsparing criticism. All I claim is that there shall be no misrepresentation and no wilful or unfair concealment of facts; and that those who deny infallibility, to the Judges shall not claim infallibility for themselves. I have had no cause to complain of the public press since I have been in this country. Speaking generally, I believe it to be fair, independent and impartial. There has not, I believe, been a single criminal prosecution against a newspapr since I have had the honour to hold the office of Chief Justice, and there have been only one or two private actions for libel. The press in this country ddresses itself for the most part to readers of education and intelligence, men who judge and form opinions for themselves. The press is fair, it is not scurrilous; the public are not captious; and public men do not object to have their public acts freely discussed and fairly criticised. Our Courts, therefore, are generally free from complaints against the press, either civil or criminal, on the ground of defamation".

He continued: Captain Fenwick had not sinned in any way against thatstatement. No false facts had been stated in the article in the newspaper,and the only thing to be regretted was the use of an unfortunate word in it, to which a meaning had been given which it was never intended that word should convey and which it did not and could not properly convey. It was a very gratifying circumstance that, throughout all these proceedings, his Lordship's general opinion of the press was favourable and also, as would be seen from this very article, the general opinion of the press with regard to his Lordship was also favourable. When the press, as his Lordship said, "addressed itself for the most part to readers of education and intelligence, men who judge and form opinions for themselves," it could not be said that his Lordship's reputation would suffer one iota from anything it might contain. He would mention that, since Captain Fenwick had assumed charge of the *Englishman*, a manifest change for the better had been observed in the conduct of the paper. And the scurrility with which some people had charged it had altogether disappeared. It was unfortunate that Mr. Tayler's wrongs should have been ventilated through the newspaper. Mr. *Paul* read other portions of the article of the 26th, and contended that there was nothing which could be objected to. He submitted that if Captain Fenwick was punished for contempt, that would not alter the opinion of the public as to the sentence on Mr. Tayler, but would only serve to cause Captain Fenwick to be considered a martyr in a cause of public benefit.

[THE CHIEF JUSTICE.—My object is not punishment but to vindicate the action taken by the Court. In showing these articles to be a contempt of Court, I do not mean that there is any moral delinquency on the part of Captain Fenwick, as I thought there was in Mr. Tayler's case.]

Mr. *Kennedy*.—Under these circumstances, I don't think we should be justified in further taking up the time of the Court.

[THE CHIEF JUSTICE.—This is not an attack upon the liberty of the press. All I want to show is that, if anonymous letters are sent to the press containing false statements, the press is responsible for them, if the name of the author is not given up.]

Mr. *Kennedy*.—Your Lordship has said that it is not your intention to punish Captain Fenwick.

[THE CHIEF JUSTICE.—No, not after what Mr. *Paul* has said. All I want is to explain my reasons for the course which has been adopted.]

Mr *Paul*.—With regard to the word "ruse" in the letter of 'Bystander"—

[THE CHIEF JUSTICE.—I don't think Captain Fenwick was the author of that anonymous letter.]

Mr. *Paul*.—No, my Lord, he was not.

[THE CHIEF JUSTICE.—He has, however, taken the responsibility upon himself, but the letter is written in a style which I do not think would come from Captain Fenwick.

Captain Fenwick very properly submitted to the Court, when the Court first expressed its opinion that receiving subscriptions was a contempt, by declining to receive any more, and he has now very properly explained that the language which was supposed to cast imputations on the motives of the Chief Justice was not so intended.

All I mean to contend is that false statements published in newspapers are not fair criticisms. I have no intention of interfering with the right of appeal to the press, but no one has a right of appeal to the press by bringing false accusations founded on wilful mis-statements.

Mr. *Kennedy*.—As your Lordship had expressed your intention not to punish, I have no right to take up the time of the Court any longer.

[THE CHIEF JUSTICE.—I will hear you on the point as to whether the articles are contempts. If I had waited to proceed by indictment before proceedings were taken, all the mischief, which I wished to prevent, would have been done; and in Mr. Tayler's case, he would have gone to England if instant and summary measures had not been taken, and would have left the printer and publisher of the paper to be alone responsible.]

Mr. *Paul* asked whether their Lordships held that in any case it would not be right to open a subscription for the purpose of obtaining a demonstration of public opinion.

[MACPHERSON, J.—That depends very much on the way in which it is done. It is just as easy to write pointedly without being defamatory. If, however, you wish to hear the decision of the Court you had better resume your argument.]

[THE CHIEF JUSTICE.—And let everything which has been said be withdrawn.]

Mr. *Paul*.—As I understand, any further argument on the matter would be of no use. If the Court is satisfied that no imputations were intended, I do not see the good of any further argument.

Mr. *Kennedy*.—I don't understand the Court to say that in every case a demonstration, got up in order to obtain an expression of public opinion, would be a contempt.

[THE CHIEF JUSTICE.—No.]

Mr. *Kennedy*.—Suppose in a case of an encroachment on the liberty of a subject by a Judge, it could not be said that it would be unjustifiable, for those who thought their liberties had been encroached upon, to come forward and give a public expression of their opinion or to support it by subscription.

[THE CHIEF JUSTICE.—No; but I hold this to be a contempt as it contained a threat.]

Mr. *Paul* said there was nothing to be gained by going on any further. He begged to thank the Court, on behalf of Mr. Kennedy and himself for the patient hearing that had been given.

[THE CHIEF JUSTICE.—The Court would have been prepared to decide that these articles are a contempt, but under all the circumstances, and as all imputations of motives have been disclaimed, and Captain Fenwick having submitted to the Court when the Rule was issued, the Rule will not be carried any further, but will be discharged.]

MACPHERSON, J.—I also, as far as the case has gone, was prepared to decide that the Court has power to proceed in this matter by way of contempt, and also that there have been two contempts of Court. As regards the power of the Court to proceed by way of contempt, even when the contempt is not committed in Court or during the pendency of a suit, that point was fully settled in the case of *Mr. Piffard and Captain Francis** which was tried before a Bench of eleven Judges. In that case Captain Francis, who was a stranger to the Court, was brought up for contempt which consisted in delivering or attempting to deliver at a Judge's house a message relating to what had occurred in Court between a Judge and Mr. Piffard. In that case Mr. Bell argued that the Court had no power to deal with the matter which took place out of Court, but out of the eleven Judges sitting, nine held that to proceed by way of contempt was a proper way of dealing with the case. A decision of such a number of Judges quite settles the question as far as a Division Bench of two Judges is concerned. Mr. Piffard's case was quite different, as he was an Advocate of the Court.

[THE CHIEF JUSTICE.—I may say that, in my opinion, Captain Fenwick has adopted a very honourable and proper course in this matter by avowing himself to be responsible for the articles which have appeared, and thus taking the responsibility off the shoulders of the printer and publisher who had nothing to

*(1863) 1 Hyde 79; 2 Celebrated Trials 1.

do with it. It would have given me much pain if I had been obliged to proceed against the printer and publisher. I also think that Captain Fenwick has adopted a very proper course in having, through Mr. Paul, withdrawn all imputations of improper motives on the part of the Chief Justice, and in having explained that the word "cruelty" was not intended in any bad sense, but merely as meaning severity. Captain Fenwick not having any such intention, although the word was susceptible of bearing such a meaning, has done himself honour by expressing that he had no such intention. I repeat that the only object I had in taking summary measures against Mr. Tayler, was that he was about to leave for England, and if he had been allowed to go away, the printer and publisher of the paper would have been left responsible for his letters. I have already stated that I am an unflinching Advocate for the liberty of the Press, and I repeat what I said before, that I do not claim for myself any immunity from unsparing criticism for any of my public acts, but all I claim is that there shall be no wilful misrepresentation or concealment of facts which the person criticising knows to be altogether unfounded. It appears to me that the public Press as well as the Judges of the Court are all instruments for the public good, and, in my opinion, the more public men are submitted to public criticism the better for the public, provided that the criticism contains no misrepresentations of facts or undue concealment. With this explanation, I order the Rule to be discharged.

Rule discharged.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 158 OF 1918.

March 16, 1918.

Present:—Mr. Justice Piggott.

EMPEROR—APPELLANT

versus

BHAGWANI ACCUSED—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 423, 438, 439—Trial of two accused for kidnapping—Appeal by one—Conviction set aside and commitment to Sessions ordered—Commitment of non-appealing accused by Trial Magistrate, legality of—Reference to High Court—Revision.

Two persons were tried and convicted by a Magistrate for an offence under section 363 of the Penal Code. On an appeal by one of them, the Sessions Judge set aside the conviction and sentence and ordered the appellant to be committed for trial on a properly framed charge under section 366 of the Penal Code. The case of the other accused was referred to the High Court for the exercise of its revisional jurisdiction. While the reference was pending before the High Court, the Trial Magistrate proceeded to pass an order of commitment against both the accused:

Held, that the Magistrate had no jurisdiction to pass the order of commitment while the conviction and sentence against one of the accused on his trial under section 366 of the Penal Code remained standing, and that the order was, therefore, illegal and must be set aside. [p. 146, col. 2; p. 147, col. 1.]

Criminal revision from an order of the Sessions Judge, Gorakhpur.

JUDGMENT.—The learned Sessions Judge has been quite right to refer this case. The proceedings in the Magistrate's Court have been distinctly irregular. Two persons were sent up for trial, Achuta and *Musammat* Bhagwani, in connection with an alleged offence of kidnapping under section 363 of the Indian Penal Code. The Magistrate framed the charge under that section, convicted both accused and sentenced them to rigorous imprisonment for eighteen months. Achuta appealed against his conviction, but *Musammat* Bhagwani did not. The learned Sessions Judge had jurisdiction to deal with the case of Achuta under section 423 of the Code of Criminal Procedure and he accordingly set aside the conviction and sentence and ordered Achuta to be committed for trial on a properly framed charge under section 366 of the Indian Penal Code; he being of opinion that the offence disclosed by the evidence, if committed, fell under that section and was exclusively triable by the Court of Session. The case of *Musammat* Bhagwani, who had not appealed, could only be referred to this Court for the exercise of its revisional jurisdiction. In the meantime, while the reference of the learned Sessions Judge was pending before this Court, the Magistrate has proceeded to pass an order of commitment against both Achuta and *Musammat* Bhagwani which he had not jurisdiction to do while the conviction and sentence against that accused person on

her trial under section 363 of the Indian Penal Code remained standing. Taking up the matter now in revision I set aside the conviction and sentence against *Musammat* Bhagwani under section 363 of the Indian Penal Code; I also set aside as irregular the commitment order which has been passed against this accused but I direct that, she be committed to the Sessions Court for trial so that she may be tried along with the other accused Achuta on a properly framed charge under section 366 or 366/109 of the Indian Penal Code.

Commitment ordered.

MADRAS HIGH COURT.

CRIMINAL MISCELLANEOUS PETITION No. 466 OF 1917.

February 14, 1918.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Napier.

KOMPELLA ANANTARAMAYYA—COUNTER-PETITIONER

versus

CHIKKATLA TUKKADU—PETITIONER—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 195—Sanction for prosecution for perjury—Appellate Court, power of, to accord sanction as for offence committed before it—'In relation to any proceeding in any Court', meaning of—Penal Code (Act XLV of 1860), s. 193—Sub-Magistrate, Court of, whether 'subordinate' to Court of Joint Magistrate.

A Sub-Magistrate is 'subordinate' to the District Magistrate within the meaning of section 195, Criminal Procedure Code, and is not subordinate to a Joint Magistrate who hears appeals from orders of Sub-Magistrates only in such cases as are made over to him by the District Magistrate. [p. 147, col. 2.]

Eroma Variar v. *Emperor*, 26 M. 656; 2 Weir 202 (F. B.), followed.

An Appellate Court cannot accord sanction for prosecution of a person for false statements made in his deposition before the Trial Court on the ground that the offence of perjury was again committed before the Appellate Court with reference to that very deposition. The offence is complete when the evidence is given and it cannot be said to be repeated afterwards because there is an appeal. [p. 148, col. 2.]

The words 'in relation to any proceeding in any Court' have reference to the original trial of the suit or the criminal case. [p. 148, col. 2.]

Bhadesar Tewari v. *Kamta Prasad*, 18 Ind. Cas. 271; 35 A. 90, 11 A. L. J. 11; 14 Cr. L. J. 47, dissented from.

Petition praying that in the circumstances stated therein, the High Court will be pleased to revise the order of the Court of Session of Godaveri Division at Rajahmundry, in Criminal Miscellaneous Petition No. 23 of 1917, confirming the order of sanction granted by the Joint Magistrate, Rajahmundry, in Miscellaneous Petition No. 1 of 1917 on his file.

Mr. *G. Venkataramiah*, for the Petitioner.

The Public Prosecutor and Mr. *K. Ramanatha Shenai*, for the Crown.

ORDER.

ABDUR RAHIM, J.—It is unnecessary in this matter to repeat the entire history. When the application for sanction for perjury was made to the Sub-Magistrate before whom the petitioners had given evidence, he granted the sanction with reference to a particular statement made by the petitioner. That order was set aside by the Joint Magistrate, as in his opinion, the order granting sanction was wanting in definiteness. But he granted sanction with reference to another statement made by the petitioner before the same-Sub Magistrate. It appears that the respondent had applied for sanction with reference to the very statement with respect to which sanction was ultimately granted by the Joint Magistrate, Mr. Fotheringham; but the Sub-Magistrate instead of granting sanction with reference to that statement, granted sanction with reference to another statement; and Mr. Fotheringham, as already stated, set aside that order on the ground that it was vague.

The question of law arises whether the Joint Magistrate had jurisdiction to grant sanction when he did not try the case himself and whether his Court was a superior Court within the meaning of section 195 of the Criminal Procedure Code. It has been ruled in this Court that a Sub-Magistrate is subordinate to the District Magistrate, and is not subordinate to a Joint Magistrate who hears appeals from orders of Sub-Magistrates only in such cases as are made over to him by the District Magistrate. [*Eroma Variar* v. *Emperor* (1).]

(1) 26 M. 656; 2 Weir 202 (F. B.).

The Joint Magistrate in this case no doubt heard the appeal. The question for decision, however, is whether it could be said that the offence of perjury was committed in his Court or in relation to a proceeding in his Court; for section 195, clause (*b*), Criminal Procedure Code, says: "No Court shall take cognisance of any offence punishable under sections 193, 194 etc., of the Penal Code when such offence is committed in, or in relation to, any proceeding in any Court, except with the previous sanction, or on the complaint of such Court, or of some other Court to which such Court is subordinate." The Joint Magistrate argues that the application was not made to him as "an appellate authority for evidence given before the Sub-Magistrate;" but "as the original authority for evidence in the appeal before his Court." That is practically the view of the law which has been taken by Banerji, J. of the Allahabad High Court in *Bhadesar Tewari* v. *Kamta Prasad* (2). But with all respect to that learned Judge, I am absolutely unable to agree with him. The case before him was not under clause (*b*) but under clause (*c*) which deals with offences of forgery and using forged documents, but its language, so far as the present question is concerned, is not substantially different from that of clause (*b*). Banerji, J., argues that though it could not be said that the document with respect to which sanction was applied for, was produced in the Appellate Court *i.e.*, of the Additional Judge of Basti, it was given in evidence in the proceedings, that is, the appeal—before that Judge. If this interpretation was correct, then the offence of perjury or using a forged document would be committed, first in the Original Court and thereafter again, though the deponent or the party concerned did nothing fresh, excepting that appeal was filed against the judgment of lower Court before the Appellate Court—again in second appeal supposing that a second appeal was preferred in the case. *Prima facie*, dealing with clause (*b*), it seems to me to be straining the language of the Code too far to say that a witness commits perjury not only in the Court where he give his evidence but also in the Appellate Court where he did not give any evidence and where all that could be said, was that the evidence given by him was relied upon by the party interested. Neither he nor the party who called him, might even use that evidence but might impeach the decree of the lower Court on other grounds.

As regards the words "in relation to any proceeding in any Court," a man giving evidence cannot be said to have any proceeding other than the one in which he is giving evidence in contemplation. When a man gives evidence in a suit or in a criminal case, that evidence is given with reference to the original trial of that suit or criminal case. Then, as is pointed out by the learned Pleader for the petitioner, if the intention of the Legislature were that any Court hearing the appeal, whether it is a superior Court or not, could grant sanction because of the words "where such offence is committed in, or in relation to any proceeding in any Court," then it would have been superfluous on the part of the Legislature to add the words 'or to some other Court to which such Court is subordinate'. It seems to me that it would be going much further than the language of the section warrants to say that an offence like that of perjury or using false evidence is committed once in the Court of trial, afterwards in appeal with reference to that very evidence. The offence is complete when the evidence is given or the document is produced or put in evidence. It cannot be said to be repeated afterwards because there has been an appeal. It may be that the person who committed the offence, does not appeal at all. It is difficult to see how an offence committed in the Court of first instance can be said to be multiplied with the number of appeals that are filed.

I would, therefore, dissent from the judgment in *Bhadesar Tewari* v. *Kamta Prasad* (2). In this case the Sub-Magistrate's Court before which the offence is alleged to have been committed, was not a Court subordinate to that of a Joint Magistrate although the latter Court heard the appeal. For these reasons, I set aside the order of the Joint Magistrate dated 2nd June 1917 granting sanction.

(2) 18 Ind. Cas. 271; 35 A. 99; 11 A. L. J. 11; 14 Cr. L. J. 47.

ISHWAR PRASAD v. EMPEROR.

NAPIER, J.—I agree. I think that Banerji, J. in the case of *Bhadesar Tewari* v. *Kamta Prasad* (2) has been misled owing to his not having given due weight to the language of the section. His reasoning is as follows:—'Similarly, the false evidence was given in a proceeding which was pending in the stage of appeal in the Additional Judge's Court'. In a broad sense of the words this is true, because at the hearing of the appeal the false evidence would be read. But this is not what is required by the section. The section requires that such offence should be *committed in, or in relation to, any proceeding in any Court* and that the sanction should be granted by that Court or some other Court to which that Court is subordinate. So that, what is to be ascertained is not whether false evidence was *given* in a proceeding, but whether the offence was *committed* in a proceeding. Now as my learned brother has pointed out, the offence of giving false evidence is complete by the statement on oath or affirmation in a Court of facts which the Court finds to be false. And the fact that subsequently such a statement, having become part of the record, comes before an Appellate Court, cannot make this a second offence. The offence is complete when the evidence has been given and it seems to me impossible to say that however the proceedings came before the Appellate Court, whether by the appeal of the party who has himself given false evidence or by the appeal of a person in whose favour he gave false evidence or by the appeal of the opposite party or whether the person who gave false evidence in his appeal expresses through his Counsel or, it might possibily be, himself has desire to withdraw that story, however it comes and whatever his attitude before the Appellate Court, the offence is re-committed in that Court. It seems to me that this contention must fail on the language of the section and that, therefore, the objection raised by the learned Vakil before us, must prevail. For these reasons I agree with the order proposed by my learned brother.

Sanction revoked.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 898 OF 1917.

March 8, 1918.

Present:—Mr. Justice Tudball.

ISHWAR PRASAD—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 423, cl. (b)—Appeal—Evidence omitted by lower Court—Re-trial, whether should be ordered—Procedure.

Where the only defect in the procedure of the Court of first instance is that certain evidence has not been brought upon the record which ought to have been there, it is quite unnecessary to do anything more than to have that evidence taken and brought upon the record. It is unnecessary to worry all the witnesses a second time and to waste public time in having them re-examined. [p. 149, col. 2; p. 150, col. 1.]

Criminal revision, from an order of the District Magistrate, Allahabad.

Mr. *Satya Chandra Mukerji*, for the Applicant.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—In this case Ishwar Prasad has been convicted of an offence under section 411 of the Indian Penal Code and has been sentenced to a fine of Rs. 100 by a Magistrate of the second Class. He appealed against his conviction to the District Magistrate who has directed the case to be re-tried in another Court in accordance with law. It is within the Magistrate's power to direct a re-trial under section 423, clause (*b*) of the Criminal Procedure Code. The grounds given by the District Magistrate for ordering a re-trial are as follows:—He says "that from its appearance the case would seem to have been hurriedly tried and one in which the evidence is deficient. In particular it is not clear why the evidence of the *ekkawala* who was present at the search, was not taken as he is one of the main witnesses whose evidence is intended by law to be of importance in a case of this type. The procedure adopted is open to criticism. It is necessary that the case should be re-tried." If the only defect in the procedure of the Court of first instance is that certain evidence has not been brought upon the record which ought to have been there, then it seems to me it is quite unnecessary to do any more than to have that evidence taken and brought upon the record. It

would be unnecessary to worry all the witnesses a second time and to waste public time in having them re-examined. It is not clear except for the above in what way the procedure of the first Court is open to criticism. There is no explanation by the District Magistrate in the matter. I, therefore, direct that the record be sent to him in order that he may point out in what way the procedure is open to criticism other than the fact that certain evidence has not been recorded.

[On receipt of the report of the District Magistrate his Lordship passed the following:]

ORDER—I have read the report of the District Magistrate. I do not think it is quite fair to the accused in the present case to direct his re-trial. There is only one witness left for examination and a few questions to be put to the Police Officer who conducted the case. I, therefore, allow the application to this extent that I set aside the order of the District Magistrate directing a re-trial. I direct the District Magistrate to summon the witnesses named by him in his report to examine them and after so doing, to decide the question of the applicant's innocence or guilt.

Application allowed.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 974 OF 1917.

February 19, 1918.

[*Present*:—Sir Henry Rattigan, KT., Chief Judge, and Mr. Justice LeRossignol.

AHAD SHAH—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (*Act XLV of* 1860), *ss.* 21 (9), 161—*'Public servant', meaning of—Quarter Master's clerk, whether public servant—Taking illegal gratification in respect of official act—Offence.*

The mere fact that a person is in the pay or service of Government is not enough to constitute him a public servant within the meaning of section 21 ninthly of the Penal Code. He must also be an "officer" *i. e.*, holder of some office. The office may be of dignity and importance or it may be humble; but whatever its nature, it is essential that the person holding the office should have in some degree delegated to him certain functions of Government. [p. 157, col. 1.]

A Quarter Master's clerk merely as such is not necessarily a public servant within the meaning of section 21 of the Penal Code, but a person who is otherwise an officer in the pay or service of Government, does not lose his status as a public servant if, while still such an officer, he is employed as a Quarter Master's clerk. [p. 157, col. 2.]

For the purposes of section 161 of the Penal Code, it is not necessary that at the time of the bribe-taking the accused person should be actually discharging the functions which constitute him a public servant; it is sufficient that he is a public servant and his act falls under one of the three clauses specified in the section. [p. 157, col. 2.]

Queen-Empress v. *Zaharia*, 9 P. R. 1898 Cr., approved.

Appeal from the order of the Special Magistrate, 1st Class at Ludhiana, dated the 8th November 1917, convicting the appellant.

FACTS of the case appear fully from the judgment.

The Hon'ble Mr. *Fazl-i-Hussian*, for the Appellant.—The appellant is charged with having sent out letters to Quarter Master's clerks offering to give them certain commissions in case they secured orders for his firm. The letter alleged to have been written by him is on the record but there is no proof of the receipt of that letter by the addressee; hence appellant cannot be said to have abetted the offence charged.

Even if the letter be held to have been received, no offence under section 161, Indian Penal Code, has been committed because a Quarter Master's clerk is not a "public servant" within the meaning of that term as defined in the Penal Code. The Quarter Master is given an allowance for getting his work done and employs some body to whom he pays the allowance. *Bhagwati Sahai* v. *Emperor* (1). The contract between the Quarter Master and his servants does not give the latter the status of public servants *qua* that particular office. (Army Regulations (1917) pages 52, 53.)

Mr. *Herbert*, (Assistant Legal Remembrancer), for the Crown—Appellant has been rightly convicted. Quarter Master's clerks are public servants as a matter of fact Failing this appellant has committed an offence under another section. From the evidence it appears that the Quarter

(1) 32 C. 664 at p. 667; 2 Cr. L. J. 512.

Master's clerks are men in regiments and, therefore, public servants.

[RATTIGAN, C. J.—But is a rifleman a public servant within the meaning of the Penal Code?]

Mr. *Herbert.*—Yes, inasmuch as he is paid by Government.

[RATTIGAN, C. J.—Is that sufficient?]

Mr. *Herbert.*—Yes. (Section 21, Indian Penal Code: *Nazamuddin* v. *Queen-Empress* (2), and Army Regulations, Volume II, paragraph 676).

Section 161, Indian Penal Code, can be divided into 3 parts and the offence of the appellant falls within part 3, even if the argument advanced by his learned Counsel is correct. *Queen-Empress* v. *Zaharia* (3).

Bhagwati Sahai v. *Emperor* (1), does not lay down a sound proposition of law. Section 21, Indian Penal Code, does not require that the whole of the pay should be paid by Government.

If I have failed to convince your Lordships on either of these points, then I submit that appellant has committed an offence under section 163, Indian Penal Code, which does not require that the person should be a public servant. The bribe was given to the clerk to induce the Quarter Master who is admittedly a public servant. See section 21 (2) or (9).

The Hon'ble Mr. *Fazl-i-Husain*, in reply.—In order to come within the last 2 lines of section 21 (9), the person must be paid by Government. There should be a priority of contract between him and Government. If there is an intermediary who is employing the servant as his own, that servant would not be a Government servant. Quarter Master's clerks are sometimes designated enrolled clerks or as civilian clerks. The office need not necessarily be held by a soldier. The man is employed only temporarily if he agrees he may be enrolled, otherwise not.

Similar allowances are given to Quarter Masters for shoeing horses, repairs of saddles, etc. Has he in this case to refund the balance?

[RATTIGAN, C. J.—That would depend on the terms in which that allowance is given.]

Hon'ble Mr. *Fazl-i-Husain.*—I submit that on the materials before your Lordships a Quarter Master's clerk cannot be said to be a public servant. He is not entrusted with any public duty.

While a person in the unit draws his pay directly from Government, those men who get allowances do not—these allowances are paid to Adjutants and Quarter Masters who sign acknowledgments for them. *Vide*, Monthly Account Bill Form No. 7. Therefore, a person engaged by the Officer Commanding, is not a public servant. *Modun Mohun, In the matter of the petition of* (4), *Queen* v. *Nachimuttu* (5). *Reg.* v. *Ramajirav Jivbajirav* (6), cited in *Nazamuddin* v. *Queen-Empress.* (2). See *Reg.* v. *Ramajirav Jivbajirav* (6), for definition of "officer."

The learned Government Advocate assumes that Quarter Master's clerks are necessarily sepoys.

[LEROSSIGNOL, J.—Is every sepoy an officer in service or pay of Government?]

Mr. *Fazl-i-Hussain.*—In case it is held that the Quarter Master's clerk is a sepoy, the question is in which capacity was he approached. Was it in his capacity as rifleman or as Quarter Master's clerk? Refers to *Queen Empress* v. *Zaharia* (3).

With regard to the 3rd alternative of the learned Government Advocate I submit that section 163, Indian Penal Code should be read along with section 161. No offence can be committed under section 163 unless by virtue of personal influence. It is essential to specify by whom is this personal influence exercised and on whom: *Queen* v. *Setul Chunder Bagchee* (7). It is not stated who was the particular official whom he wanted to influence who was the person who was asked to exercise the influence. (Dr. Gour's Commentary on the Penal Code, Volume I, paragraphs 1436, 1437.)

[RATTIGAN, C. J.—Supposing the clerk presents the offer to the Quarter Master in

(2) 28 C. 344 at p. 345; 4 C. W. N. 798.
(3) 9 P. R. 1898 Cr.

(4) 4 C. 376 at p. 378; 2 Shome L. R. Cr. 13; 2 Ind. Dec. (N. S.) 238.
(5) 7 M. 18; 1 Weir 27; 2 Ind. Dec. (N. S.) 598.
(6) 12 B. H. C. R. 1 at p. 5.
(7) 3 W. R. Cr. 69.

the best light, would he be using his personal influence ?]

Mr. *Fazl-i-Hussain.*—Personal influence would only come in in the case of a friend as distinguished from official recommendation.

But whom was he influencing? It has been stated that the work of giving contracts is entrusted to the Officer Commanding. The charge must have stated who was the person sought to be influenced.

[LeRossignol, J.—At any rate your client thought the Quarter Master's clerk could influence the Quarter Master.]

Mr. *Fazl-i-Hussain.*—In order to bring the case under section 163 it would be necessary to frame a proper charge.

The Court having reserved judgment on the point, Counsel proceeded to discuss the case on the merits.

JUDGMENT.—Khwaja Ahad Shah, Managing Proprietor of the firm of "Ahad Shaw Muhammad Shaw and Company," described as Military and Police Contractors, Ludhiana, was tried by Mr. D. J. Boyd, Special Magistrate of the First Class at Ludhiana upon charges of abetting offences punishable under section 161, Indian Penal Code. There were three separate trials and each resulted in a conviction of the accused. In trial No. 6/2 he was sentenced under sections 161/116, Indian Penal Code to three months' rigorous imprisonment and a fine of Rs. 500, or in default three months further rigorous imprisonment; in trial No. 7/2 he was sentenced to six months' rigorous imprisonment and a fine of Rs. 1,000 or in default three months' rigorous imprisonment and in trial No. 8/2 he was sentenced on each of the two charges to six months' rigorous imprisonment and a fine of Rs. 1,000, or in default three months' rigorous imprisonment. It was directed by the Magistrate that the substantive terms of imprisonment in this case were to run concurrently and that the substantive term of imprisonment in trial No. 7/2 was to commence on the expiry of the sentence in trial No. 8/2 and that the substantive term of imprisonment in trial No. 6/2 was to commence after the expiry of the sentences in the other two trials.

Ahad Shah appealed from his convictions and sentences to the Sessions Judge of Ludhiana but his appeals were transferred to this Court by order of the Chief Judge and have been heard by this Bench. Mr. Fazl-i-Hussain appearing on behalf of the appellant and Mr. Herbert, Assistant Legal Remembrancer, for the Crown.

The general features of the case for the prosecution are similar and the line of defence is identical in all three cases, and it will be convenient, therefore, in this judgment to dispose of all the appeals.

The principal witness in the case is Lachhman Das, late Head Clerk of the appellant's firm, and according to him, Ahad Shah early in 1917 suggested to him the idea of approaching Quarter Master's clerks in various regiments, with a view to securing from them, by tempting offers of commission orders for supplies of various articles required by the regiments to which they were attached. Lachhman Das says that he himself disapproved of the idea, but Ahad Shah reassured him and undertook to bear all responsibility. The result of this conversation was that about the middle of April a large number of typed circulars (of which Exhibit P. No 1 is a sample) were prepared by Lachhman Das from a vernacular draft given to him by Ahad Shah, were duly signed by the latter and issued broad-cast to Quarter Master's clerks throughout the Punjab and elsewhere. Entries relating to the issue of these notices were made by Lachhman Das in the Despatch Register of the firm under dates 18th, 21st and 22nd April 1917 (Serial Nos. 2940, 2985 and 3009 of the said Register).

The circular letters were typed on paper bearing the name of the firm "Ahmad Shaw-Muhammad Shaw and Company" printed thereon in red ink: and after stating that "owing to the Great War we now consider it our bounden duty, much more compared with the peace time, to supply to the Indian Army all articles such as Water Bottles, Haversacks," etc., proceeded, "we beg to inform you that should you be so kind as to secure for us orders for your and other regiments for the supply of the above with your kind support and help, we shall be glad to pay you a commission of Rs. 2 per cent. in large orders and Rs. 3-2-0 per cent. on small orders, one-half in advance on receipt of

orders and the remaining half on payment of our bill, as we are doing to some of our patrons. Hoping to be favoured with your kind reply which will greately oblige.

"Your sincerely
(Signature said to be 'Ahad Shah')
Managing Proprietor, L. D."

The appellant would not in the Court below admit that the signature on such of these circular letters as were produced at the trial, was his but he admitted that it was "very like" his real signature and that he was not prepared to deny that it was his. There is evidence on the record to prove that he actually signed these letters, and a comparison of the signatures thereon with the signatures admitted by appellants can leave no doubt whatever that the former are not forgeries. At the hearing before us Mr. Fazl-i-Hussain made no attempt to dispute the genuineness of the signatures and his arguments were based on the assumption that the appellant had, in fact, signed the letters but that he had done so in ignorance of the contents of the letters and as a victim of a fraud practised upon him by Lachhman Das. Viewed in the light of these subsequent admissions, the original reluctance of the appellant to admit the genuineness of signatures which he had not the courage to disclaim as forgeries, must be regarded as a fact not without some significance.

The circular letter addressed to all and sundry Quarter Master's clerk, met with varying fortunes. Some reached the hands of the persons for whom they were intended, others fell into the hands of superior officers, with the result that the firm received indignant letters of remonstrance and protest. Thus on the 27th April 1917 Captain J. E. Waller of the 45th Rattray Sikhs, wrote to the firm informing them that he regarded their letter No. 3009, dated 22nd April 1917 and addressed to the Quarter Master's clerk, of his regiment "as an insult," that he retained their letter and intended to put it either into the hands of the Police or better still to send it round to various "Officers Commanding Depots." in order to ensure that any trade the firm had obtained, should be discontinued and that he could assure the firm that they would never obtain any further orders from the 45th Rattray Sikhs, (Exhibit P. 43B).

To this letter a reply in type (and on paper with the name and description of the firm printed on it in red ink) was despatched on the 1st May 1917 (Exhibit P. 43C). It is couched in very apologetic terms and strenuously disclaims any intention on the part of the firm to "bribe" the clerk and explains that as the firm had great difficulty now-a-days in finding out the addresses of various regiments "owing to the non-printing of the Army Lists" the letter in question "was written with a view that if any one requires any articles we can be ordered to supply or furnished with addresses and we shall be glad to pay for such addresses." This and similar letters of apology (see Exhibit P44) purport to bear the signature of appellant, and here again it was not contended before us that the signatures were not genuine. As a matter of fact this contention could hardly be put forward in the face of the evidence given by Lala Mangat Rai (defence witness No. 6) who asserts positively that the signatures on P. 43C and P 44 are the appellant's.

Lachhman Das deposes that the circular letters and the letters of apology were typed by him under the instructions of appellant who supplied him with drafts to a similar purport, in Urdu which he translated into English, typed and placed before appellant for signature. As regards this part of the case, the defence as urged before us, is that appellant was duped into signing these letters by Lachhman Das who was acting in concert with appellant's bitter enemy, one Abdul Hai, a Ludhiana Barrister and Municipal Commissioner for the ruin of appellant and who was able to misrepresent the contents of the letters to appellant whose knowledge of English was of the very slightest. It is argued that appellant relied on the good faith of his Head Clerk and had at the time no one by him who could have been of assistance to him in translating for him the letters which that Head Clerk in betrayal of the confidence reposed in him by appellant, put up for the latter's signature.

So far as regards the general nature of the case for the prosecution and of the

answer on behalf of the appellant. We shall now proceed to deal with the particular facts of each of the three cases to which we have referred at the commencement of our judgment.

(1) *Trial No* 6/2 (*Criminal Appeal No.* 976 *of* 1917.)

In this case the charge against the Appellant was that "in or about the 21st April 1917 at Ludhiana you did send a letter No. 2985, dated 21st April 1917, in which you offered a gratification to the Quarter Master's clerk, 26th Punjabis, a public servant, as a motive or reward for shewing to you favour in the exercise of his official functions and thereby committed an offence punishable under sections 161/116 of the Indian Penal Code."

Letter No. 2985 is Exhibit P. 1 on the record of this trial and is one of the circula typed letters purporting to be signed by appellant to which reference has been made above. It is not proved that this particular letter reached the addressee though it undoubtedly reached the hands of the latter's superior officers (see the evidence of Lieutenant Ravenhill, 25th Punjabis). Reserving for the moment other questions that arise in this and the other cases, we must accordingly hold that in any event the appellant cannot so far, as this case is concerned, be convicted of more than an attempt to commit an offence.

(2) *Trial No.* 7/2 (*Criminal Appeal No.* 974 *of* 1917.)

In this case the charge against the appellant runs as follows:—

"That you on or about the 12th day of May 1917 at Ludhiana did send the sum of rupees forty-one, annas eight to Hira Singh Thapar, Quarter Master's clerk, 2/9th Gurkha Rifles, Dehra Dun, a public servant as a motive or reward for shewing to you favour in the exercise of his official functions and thereby committed an offence punishable under section 161/109 of the Indian Penal Code and within my cognizance."

The sum of Rs. 41-8 was sent by money-order (Exhibit P. 1 of this record) to Hira Singh on the 12th May 1917 and it is proved and not denied, that the amount was duly paid to him on the 14th May 1917. The name of the remitter is given in type as "Ahmed Shaw Muhammad Shaw and Company" and Lachhman Das swears that he sent the money by this money-order under the instructions of the appellant. The latter admits that money-order issued by his firm used not to bear his signature but denies that he gave any instructions for this sum to be sent to Hira Singh. The prosecution allege that the said sum was sent to Hira Singh as a bribe (or commission) at the rate of Rs. 2 per cent. in respect of the order for 700 water-bottle at Rs. 3 each which appellant's firm received on the 19th April 1917 from the 2/9th Gurkha Rifles (Exhibit P. 8).

(3) *Trial No.* 8/2 (*Criminal Appeal No.* 975 *of* 1917.)

Appellant was in this case charged with two offences as follows:—

"*First.*—That you on or about the 11th day of April 1917 at Ludhiana did send the sum of rupees forty by money-order to Babu Piare Lal Sharma, Quarter Master's clerk 1/9th Gurkha Rifles, Dehra Dun, a public servant as a motive or reward for shewing to you favour in the exercise of his official functions and thereby committed an offence punishable under section 161/109 of the Indian Penal Code and within my cognizance.

"*Secondly.*—That you on or about the 12th day of May 1917 at Ludhiana did send the sum of rupees sixty, annas five to Babu Piare Lal Sharma, Quarter Master's clerk, 1st Gurkha Rifles, a public servant as a motive or reward for shewing to you favour in the exercise of his official functions and thereby committed an offence punishable under section 161/109 of the Indian Penal Code and within my cognizance."

Here again it is amply proved and not now contested that these two sums of money were received by money-order by Piare Lal in April and May and that these money-orders bore in type as the name of the remitter the firm's designation "Ahad Shaw Muhammad Shaw and Company." It is alleged that the sum of Rs. 40 received in April was half the commission at 2 per cent. in an order of 1,000 water bottles at Rs. 4 each which had been sent to appellant's firm in January 1917 from 1/9th Gurkha Rifles and that the sum of Rs. 61 received in May represented the balance of the amount due as commission upon the said order and a sum of Rs. 21 due as

commission at 1 per cent. on an order for 700 water bottles at Rs. 3 each received from the 2/9th Gurkha Rifles.

At the hearing before us the defence practically conceded all the facts as alleged by the prosecution and Mr. Fazl-i-Hussain for the appellant based his arguments on the assumption that circulars and letters had been issued to Quarter Master's clerks purporting to come from appellant's firm at Ludhiana and that sums of money had actually been sent by money orders also purporting to have been sent by the said firm to Piare Lal and Hira Singh. It was argued, however, that the appellant was the victim of a conspiracy between Abdul Hai, Lachhman Das, Muhammad Hussan and others whose object was to ruin appellant and his firm, that appellant owing to his ignorance of the English language fell into the trap which had been laid for him that the money order sent on the 12th May 1917 to Hira Singh and Piare Lal had been sent in reality by Abdul Hai through one Muhammadi, a menial servant employed by the Ludhiana Club, that in any event a Quarter Master's clerk is not "a public servant" as defined in section 21, Indian Penal Code, and that consequently no conviction could be had under section 161, Indian Penal Code, and finally that the mere sending of a circular through the post to the Quarter Master's clerk of the 26th Punjabis amounted to no more than a preparation to commit an offence and did not constitute an attempt to commit that offence. We proceed to deal with these points *seriatim*.

It is not denied by the learned Assistant Legal Remembrancer and amply established by the evidence that there has been much rivalry between Mr. Abdul Hai and the appellant and that they have for years past been on the worst possible terms. But the prosecution deny and we fail to find proof of any conspiracy between Abdul Hai and Lachhman Das of the kind suggested by the defence. The evidence adduced in proof of the conspiracy is of the flimsiest kind. It is referred to in detail in the judgment of the learned Magistrate and we have no hesitation in agreeing with him that it is "miserably poor evidence to prove a conspiracy between Abdul Hai and Lachhman Das". So far as we can see, Lachhman Das was well treated by the appellant and had no motive for abetting an elaborate trap intended to ruin a man who had given him employment.

But even if such had been Lachhman Das' intention, we are not satisfied that he could have succeeded in effecting his object. Appellant may not be a man of much education and his knowledge of the English language may be limited, but it is evident that he knows his business and that he is not by any means so absolutely ignorant as not to be able to gather some sort of idea of a typed English letter dealing with matters connected with that business. We cannot, therefore, accept the argument that in the course of three days he affixed his signature to some 80 typed circular letters in blind ignorance of their contents and with simple child like confidence in the good faith of a clerk who (for some unknown reason) had suddenly developed an unusual thirst for correspondence. It is surely putting a premium on our credulity to ask us to believe that he signed these 80 circular letters in honest ignorance of their contents and without taking the trouble to find out the reason for this very unusual voluminous correspondence. As we have said, he is a practical man of business and we cannot believe that he would have signed some 80 letters, of the object of which he know nothing, simply because he had some little difficulty in reading them. He has not pleaded that he asked Lachhman Das what those letters were about and that Lachhman Das misrepresented their contents to him. That might have been a plausible explanation, but it has not been put forward by the appellant and apparently his one hope of escaping responsibility for the issue of the letters lay in the half-hearted attempt he made to disown his signatures. But now that it has been admitted that he actually signed the letters, we have no doubt that he did so with full knowledge of their contents and that Lachhman Das' story is true that the letters were a mere translation into English of an Urdu draft prepared by the appellant. We are also satisfied that he was well aware of the nature and purport of the letters of apologies that were sent to the Commanding Officers who protested against

the circular letters that had been addressed to the Quarter Master's clerks of their regiments.

The Magistrate has entirely disbelieved the evidence of Muhammadi, and the postal clerk, Ghulam Rasul, with regard to the issue of the money-orders to Piare Lal and Hira Singh on the 12th May and in our opinion their evidence was rightly discredited. It is improbable in itself and most unconvincing, and here again we see no reason to doubt the truth of Lachhman Das' statement to the effect that these sums of money (as also the sum of Rs. 40 in April 1917) were sent with the knowledge and under the instructions of the appellant. Upon the merits, then we hold that the appellant authorised the issue of the circular letters to Quarter Master's clerks (including the issue of the letter to the Quarter Master's clerk of the 26th Punjabis) and of the money-orders of Rs. 40 and Rs. 60 5-0 to Piare Lal, and of Rs. 41 8 0 to Hira Singh and that these letters and sums of money were sent with the object of inducing the addressees and payees to do favour or service, or as a reward for having done such favour or service to appellant. But it has not been proved that the letter addressed to the Quarter Master's clerk of the 26th Punjabis ever reached the hands of the addressee or indeed that there is a Quarter Master's clerk attached to, or on the strength of that regiment. In these circumstances, we must hold that in this case the appellant cannot in any event be held guilty of anything more than an attempt to commit an offence. But we are clearly of opinion that by posting the letter to the Quarter Master's clerk of that regiment he did an act that amounted to an attempt to commit an offence and went beyond a mere *preparation* to commit an offence.

The question remains whether upon our findings the appellant has been guilty of any offence, and if so, of what? To answer this question we have first to consider whether a Quarter Master's clerk is a "public servant" within the meaning of section 21, Indian Penal Code. If he is, then undoubtedly the appellant abetted Hira Singh and Piare Lal in the commission of the offence punishable under section 161, Indian Penal Code, but as neither Hira Singh nor Piare Lal committed that offence, appellant would be punishable under sections 161/116, Indian Penal Code, and in respect of each such offence would be liable to nine months' rigorous imprisonment with or without fine in addition. In the third case (that relating to the letter addressed to the Quarter Master's clerk of the 26th Punjabis), the appellant would be guilty of an attempt to abet the offence under section 161, and as that offence was not actually committed, he would be liable under the combined effect of sections 116, 161 and 511, Indian Penal Code, to one-half of nine months' rigorous imprisonment with or without fine.

On the other hand if a Quarter Master's clerk is not a public servant as so defined, appellant would be guilty in the first two cases of offences punishable under sections 116/163, and in the third case of an offence punishable under sections 116/163/511, Indian Penal Code. In this latter event (*i. e.*, if a Quarter Master's clerk is not himself a public servant) we are satisfied that appellant offered (and in the third case attempted to offer) a gratification to the Quarter Master's clerk in question as a motive or reward to him for inducing, by the exercise of the personal influence which he thought such clerk could exercise, a public servant (*i. e.*, the Quarter Master of the particular regiment) in the exercise of official functions as such public servant to show favour to the appellant or to render or attempt to render the appellant any service with any public servant. In other words, he abetted, or (in the third case) attempted to abet the offence punishable under section 163, Indian Penal Code.

In the Magistrate's Court the question whether a Quarter Master's clerk was or was not a public servant, was not raised and it was assumed by the prosecution and the defence no less than by the Magistrate himself that he was a public servant, and we have no doubt that appellant when he authorised the issue of the circulars, regarded the addressees as public servants who were in a position to show him favour or do him a service. Before us, however, Mr. Fazl-i-Husain contends that a Quarter Master's clerk as such is nothing more than a mere personal assistant to the Quarter Master of

the regiment and paid out of an allowance which the Quarter Master receives for the purpose of his office; that their appointment rests entirely with the Quarter Masters of regiments, and that civilians no less than soldiers and non commissioned Officers are eligible for appointment. Further, the learned Counsel has referred us to the evidence of Hira Singh, Piare Lal and Captain Duncan in support of his contention that a Quarter Master's clerk as such has no power to help or show favour to a contractor and that he is (in the word of Captain Duncan) "just a Babu," and has "no executive functions."

We are by no means satisfied that Mr. Fazl-i-Hussain's statement is correct that a Quarter Master's clerk is not paid by Government; that he is a mere supernumerary, not borne on the strength of a regiment and in the service of the Quarter Master rather than of the Government. Paragraph 676 of Volume Ii of the Army Regulations, India, seems to suggest the contrary. It provides that "soldiers will be employed as clerks in native cavalry and infantry regiments. If qualified soldiers are not forthcoming, suitable men to the number of six per regiment may be specially enrolled." But it is not enough that a person should be in the pay or service of Government to constitute him a public servant within the meaning of section 21 (ninthly) of the Indian Penal Code. He must also be an "Officer." That expression is not, of course, to be restricted to its colloquial meaning of a Commissioned or non-Commissioned Officer; it means a functionary or holder of some "*officium*" or office. The office may be one of dignity or importance; it may equally be humble. But whatever its nature, it is essential that the person holding the office, should have in some degree delegated to him certain functions of Government. As observed by West, J., in a case which is frequently cited in this connection, "an Officer is one to whom is delegated, by the supreme authority, some portion of its regulating and co-ercitive powers, or who is appointed to represent the State in its relations to individual subjects. This is the central idea; and applying it to the clause which we have to construe, we think that the word 'Officer' there means some person employed to exercise to some extent and in certain circumstances, a delegated function of Government. He is either himself armed with some authority or representative character, or his duties are immediately auxiliary to those of some one who is so armed." See *Reg.* v. *Ramajirao Jivbajirao* (6).

Can then a Quarter Master's clerk be said to be "an officer" as so defined? Captain Duncan in his evidence emphatically states that he has no executive functions, and Captain Waller, in his letter to appellant's firm (Exhibit P 43 B), asserts that "in no good Punjab Regiment has the Quarter Master's clerk the slightest say in the matter of advising or obtaining orders or contracts from any firm whatever." For the purposes of the case before us, then, we must assume that a Quarter Master's clerk as such, is just a Babu and no more "an officer" than a labourer or menial employed and paid by Government to do public work, see *Queen* v. *Nachimuttu* (5). But while upon the material before us we must hold that a Quarter Master's clerk merely as such is not necessarily a public servant within the meaning of section 21, Indian Penal Code, we are certainly not prepared to go further and hold that a person who is otherwise an officer in the pay or service of Government, loses his status as a public servant if, while still such an officer, he is employed as a Quarter Master's clerk. Hira Singh, for example, is a non-Commissioned Officer in the 2/9th Gurkha Rifles and as such in our opinion a public servant and nonetheless so, because for the time being he is employed as a Quarter Master's clerk. It has been held by this Court and we entirely agree, that for the purposes of section 161, Indian Penal Code, it is not necessary that at the time of the bribe-taking, the accused person should be actually discharging the functions which constitute him a public servant: it is sufficient that he is a public servant and his act falls under one of the three clauses specified in the section. [See *Queen-Empress* v. *Zaharia* (3).] So in the case of Hira Singh, though he was not at the time when the gratification was offered to him discharging the functions that constituted him a public servant he was nevertheless a public servant, whatever may have been the functions he was temporarily discharging at the time when the offence in respect of him was committed. In his case then (Trial No.

7/2, Criminal Appeal No. 974 of 1917) we must hold that the appellant in sending him Rs. 41-8-0 as a motive or reward for inducing him to do the appellant some favour in the exercise of his official functions or some service with a public servant (*e.g.*, the Quarter Master of the Regiment) abetted the offence punishable under section 161, Indian Penal Code. As, however, the offence abetted was not committed, the appellant was guilty of the offence punishable under sections 116/161, Indian Penal Code. It may be urged that appellant was not aware that Hira Singh happened to be a non-Commissioned Officer and as such a public servant, and that he dealt with him merely as a Quarter Master's clerk. But it is to be remembered that appellant himself and his advisers were apparently under the impression that *all* Quarter Master's clerks were public servants, and that the objection that they are not, was not raised until the case came before this Court, and even then was not made one of the grounds of appeal. We cannot agree, therefore, that he has any cause of complaint because in one case his own impressions at the time when he committed the offence, have proved to be correct, though in the other cases the ingenuity of his learned Counsel in this Court has successfully discovered a belated technical plea in his favour. In Criminal Trial No. 8/2 (Criminal Appeal No. 975 of 1917) we must hold for the reasons given that the Quarter Master's clerk Piare Lal was not a public servant and that consequently the two offences which the appellant committed by sending money orders in April and May 1917 to Peare Lal fell within the purview of section 163, Indian Penal Code, and we accordingly convict the appellant under that section read with section 116.

In Criminal Trial No. 6/2 (Criminal Appeal No, 976 of 1917) the offence of which the appellant was guilty was one falling, under section 163 read with sections 116 and 511, Indian Penal Code, and it is under those sections that we convict him in this case.

Then remains the question of sentence. The offences of which the appellant has been found guilty, are exceedingly serious and their gravity is considerably enhanced when they are found to have been committed in critical times such as the present. On the other hand the appellant is an old man and in enfeebled health and though there is reason to belive that offences of this kind are by no means uncommon, it is to be remembered that this is the first case of the kind in which the person guilty of such offence has been prosecuted. Taking all the facts into consideration, we do not think it necessary on this occasion to impose a sentence of imprisonment upon the appellant and we think the ends of justice will be met if we direct as we hereby do that he pay a fine of Rs. 1,000 in respect of each of the four offences of which he has been convicted, *viz.*, one offence in Criminal Appeal No. 974 of 1917; two offences in Criminal Appeal No. 975 of 1917 and one offence in Criminal Appeal No. 976 of 1917; and in default of payment of any one of the said fines, the appellant will have to undergo three months' simple imprisonment.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 209 OF 1917.

November 20, 1917.

Present:—Mr. Batten, A. J. C.

EMPEROR—PROSECUTOR

versus

MAROTI TELI—OPPOSITE PARTY.

Court Fees Act (*VII of* 1870), *s.* 19, *cl.* (xvii)—*Petition of appeal by prisoner presented by his Pleader, whether requires to be stamped.*

A petition of appeal presented by a prisoner not personally but through his Pleader is exempted from Court-fees under clause (*xvii*) of section 19 of the Court Fees Act.

Criminal revision on a report under section 438, Criminal Procedure Code, made by the Sessions Judge, Wardha, dated the 30th October 1917.

JUDGMENT.—This is a reference by the Sessions Judge under section 438, Criminal Procedure Code, questioning the propriety of an order by the District Magistrate returning to the prisoner's Counsel an appeal presented on behalf of a prisoner in jail on the ground that the appeal petition was not stamped with a Court-fee stamp. The District Magistrate was called upon to show cause why his order should not be set aside and why he should not be directed to dispose of the appeal

according to law with reference to clause XVII of section 19 of the Court Fees Act. The section and clause read together provide that "nothing contained in this Act shall render chargeable with any fee a petition by a prisoner or other person in duress or under restraint of any Court or of its officers." The District Magistrate supports his order as follows:—

"Interpreting the clause strictly I am of opinion that a petition by a Counsel on behalf of such a person is not a petition by him but one on his behalf." It is the practice of this Court to accept petitions, whether appeals or other applications, presented by Counsel on behalf of a prisoner without any Court fees stamp; on the authority of clause XVII of section 19 of the Court Fees Act. In *Kali Prosad Banerji* v. *Gisborne and Co.* (1), it was held that the clause applied to a petition presented by a prisoner not personally but by his Vakeel. This supports the practice of this Court, and the order of the District Magistrate was in my view erroneous. The order of the District Magistrate is set aside. He will admit the petition of appeal and dispose of it according to law.

Order set aside.

(1) 10 C. 61; 13 C. L. R. 156; 5 Ind. Dec. (N. S.) 42.

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 1708 OF 1917.

January 26, 1918.

Present:—Mr. Justice LeRossignol.

NIRANJAN LAL—CONVICT —PETITIONER

versus

EMPEROR—RESPONDENT.

Factories Act (XII of 1911), ss. 34, 41, 42—"Occupier," meaning of—Separate sentences of fine on occupier and manager, legality of—Exemption of occupier or manager—Procedure.

An "occupier" of a factory within the meaning of section 41 of the Factories Act is the person entitled to the possession or use of the factory. He is the controller, for the time being, of the factory, the person entitled to use the factory for his own or another's profit. [p. 160, col. 1.]

He may be the owner, on the other hand, he may be only a lessee or a mortgagee with possession, but it is he who decides whether the factory is to work or to close down. The manager merely carries out the occupier's orders to work the factory and if the occupier designates no manager, the occupier himself shall be deemed to be the manager for the purposes of the Act. [p. 160, col. 1.]

Section 41 of the Factories Act authorises a Magistrate to impose on the occupier and manager jointly and severally a fine not exceeding Rs. 200. There can be only one fine and for the whole sum each delinquent is jointly and severally liable. Separate sentences of fine on the occupier and manager, under this section, therefore, are not legal. [p. 159, col. 2.]

Section 42 of the Factories Act provides the remedy for an occupier or manager who is the victim of some other person's neglect, but he must take the prescribed steps to assure the real culprit's conviction and not merely attempt to exculpate himself. [p. 159, col. 2.]

Revision from the order of the Sessions Judge, Hissar, dated the 25th August 1917.

Mr. *Nanak Chand* for the Petitioner.

Mr. *C. Bevan-Petman*, Government Advocate, for the Respondent.

JUDGMENT.—Petitioner, the owner of a factory, was prosecuted with his manager in one trial for failing to send notice to the District Authorities of an accident which occurred to one of his workmen and terminated fatally.

The objections are three:—

1. The petitioner is not an "occupier" of the factory, but one of the owners.

2. He is entitled to the benefit of section 42 of the Factories Act.

3. The Court below was not competent to pass separate fines aggregating a sum in excess of Rs. 200 on petitioner and his manager separately.

The order of fine is clearly not justified by the section which authorizes the Magistrate to impose on the occupier and manager jointly and severally a fine not exceeding Rs. 200. There can be only one fine and for the whole sum, each delinquent shall be liable jointly and severally.

Section 42 is the remedy provided for an occupier or manager who is the victim of some other person's neglect, but he must take a certain step to assure the culprit's conviction and not merely attempt to exculpate himself. That step the petitioner did not take, for he made no formal complaint against any other person; moreover section 42 does not appear to deal with the case of a charge against manager and occupier jointly nor to derogate from

the provisions of section 41, which appear to aim at securing the recovery of the fine from the occupier, if the manager should prove to be a man of straw.

This objection is overruled.

An "occupier" is a person entitled to the possession or use of factory.

An old writ in cases of disseisin was termed "occupavit," and occupier has been used in the Factories Act to indicate the person who has the control of the factory. He may be the owner, on the other hand he may be only a lessee or a mortgagee with possession, but it is he who decides whether the factory is to work or to close down. The manager merely carries out the occupier's orders to work the factory, and if the occupier designates no manager, the occupier himself shall be deemed to be the manager for the purposes of the Act—section 33 (3).

The occupier is clearly the controller for the time being of the factory, the person entitled to use the factory for his own or other's profit, and I hold that petitioner was the occupier of the factory.

On these findings I accept the petition and modify the Magistrate's order by imposing a fine of Rs. two hundred on the petitioner and his manager jointly and severally, which sum, on recovery, shall be paid to *Musammat* Bhagwati.

Revision accepted.

CALCUTTA HIGH COURT.
CRIMINAL REVISION NO. 732 OF 1917.
July 13, 1917.
Present:—Mr. Justice Teunon and Justice Sir Shamsul Huda, KT.
RAKHAL MANDAL AND OTHERS—PETITIONERS
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 107 (2), proceedings under, whether can be transferred by District Magistrate.

Proceedings initiated by the District Magistrate under the special powers conferred upon him by section 107 (2), Criminal Procedure Code, need not be continued to the end in his Court but may be transferred by him to the Court of some subordinate Magistrate otherwise competent to deal with the matter.

Rule against the order of the District Magistrate, Bankura.

Babus *Dasarathi Sanyal* and *Kalikinkar Chakerbutty*, for the Petitioners.

Babu *Surendra Nath Ghosal*, for the Opposite Party.

JUDGMENT.—In these two Rules the only question involved is, whether proceedings initiated by the District Magistrate under the special powers conferred upon him by section 107 (2), Criminal Procedure Code, must be continued to the end in this Court or whether they may be transferred by him to the Court of some subordinate Magistrate otherwise competent to deal with the matter. This question does not now come before this Court for the first time. In the case of *Surjya Kanta Roy Chowdhry* v. *Emperor* (1), the question was argued at the Bar and discussed at length, and the learned Judges who heard that case took the view that it was sufficient that the District Magistrate should initiate the proceedings. In taking that view they further relied upon the case decided in the High Court of Allahabad in *King-Emperor* v. *Munna* (2). In a subsequent case in this Court in 1909 a Divisional Bench took the contrary view. But from the report of that case, *Nirbikar Chandra Mukherji* v. *Emperor* (3), it is clear that that was a case not argued at the Bar and that consequently the prior decision of this Court in *Surjya Kanta Roy Chowdhry* v. *Emperor* (1) was not brought to the attention of the learned Judges. Under these circumstances we think that we ought to follow the earlier case [*Surjya Kanta Roy Chowdhry* v. *Emperor* (1)] decided in this Court in 1904.

For these reasons we discharge these Rules.

Rules discharged.

(1) 31 C. 350; 1 Cr. L. J. 344.
(2) 24 A. 151; A. W. N. (1901) 203.
(3) 1 Ind. Cas. 78; 13 C. W. N. 580; 9 Cr. L. J 148.

PUNJAB CHIEF COURT.
SECOND CIVIL APPEAL No. 1138 OF 1917.
November 21, 1917.
Present:—Mr. Justice LeRossignol.
WAZIRA—PLAINTIFF—APPELLANT
versus
MUHAMMADI AND OTHERS—DEFENDANTS—RESPONDENTS.

Registration Act (XVI of 1908), s. 35—Illiterate executant of sale-deed denying sale of part of property—Denial of execution—Registration.

A sale-deed of certain land with *shamilat* executed by an illiterate vendor was presented for registration and before the Sub-Registrar the vendor stated that he had sold the land but without the *shamilat*:

Held, that the vendor's protest amounted to a denial of execution of the document produced for registration within the meaning of section 35 (3) of the Registration Act.

Second appeal from the decree of the District Judge, Hoshiarpur, dated the 21st March 1917.

Dr. *Muhammad Iqbal*, for the Appellant.

Sheikh *Umar Bakhsh*, for the Respondents.

JUDGMENT.—On 18th June 1896 Wazira plaintiff by written deed sold 9 *kanals* of land with *shamilat* to one Gandu.

The deed was presented for registration on the same day and before the Sub-Registrar Wazira stated that he had sold the land but without the *shamilat*.

The Sub-Registrar noted the statement of Wazira but registered the document.

The present suit is to recover the *shamilat* not from the original purchaser Gandu, but from third persons who are the second transferees from Gandu.

The trial Court decreed for plaintiff, but the District Judge dismissed the suit holding that only the document and not the Sub-Registrar's note could be looked at to determine the terms of the transaction.

Both parties agree that the learned District Judge is wrong in his *ratio decidendi* and has obviously overlooked the provisions of section 92 of the Evidence Act which allow an aggrieved person to establish by oral evidence that a document is invalidated by mistake or fraud.

The outstanding fact in the case is that Wazira as soon as the purport of the deed was explained to him, protested that he had not sold the *shamilat* and there can be no doubt that this protest of his amounted—as he is illiterate—to a denial of execution

of the document produced for registration and the Sub Registrar would have been well advised to refuse registration,

The document, however, was registered and mutation took place according to the document. It is true that *shamilat* was not specially mentioned at the time of mutation, but Wazira although present before the attesting officer did not raise the point Nor did he take any other steps to right the wrong if indeed any had been done him.

The *shamilat* partition proceedings were started in 1910 and even then Wazira did not raise the point; in 1913 possession of the *shamilat* in dispute was given to defendants but it was only in 1916 or nearly three years later that Wazira launched this suit.

Equity aids the vigilant and it would at this stage be quite impossible to find on oral evidence that the *shamilat* was not sold; further the original vendee has disappeared and the present real defendants are *bona fide* purchasers whom Wazira has permitted to believe that their transferors had a good title to convey in the *shamilat*.

For these reasons I think the suit has been properly dismissed and I dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.
REFERRED CASE No. 3 OF 1917.
August 6, 1917.
Present:—Mr. Justice Abdur Rahim and Mr. Justice Bakewell.
RAJAGOPALA AIYAR—PLAINTIFF—PETITIONER
versus
Sheikh DAVOOD ROWTHER—DEFENDANT—RESPONDENT.

Specific Relief Act (I of 1877), ss. 12, 17—Unpaid consideration for mortgage, suit for, whether one for specific performance—Maintainability of suit.

A suit to recover the unpaid consideration for a mortgage is a suit for specific performance of an agreement to lend money on a mortgage, and is not maintainable.

Case stated under Order XLVI, rule 7, of

NAND LAL *v.* DEWAN CHAND.

the Code of Civil Procedure, 1908, by the District Judge of Tanjore, in Original Petition No. 5 of 1917, in Small Cause Suit No. 1300 of 1916 on the file of the Court of the Small Causes, Kumbakonam.

Mr. *P. R. Narayanasami Ayyar*, for the Petitioner.

JUDGMENT.—The plaintiff in the suit executed a usufructuary mortgage in favour of the defendant for Rs. 300 of which he only received Rs. 50 and he has instituted this suit to recover the balance of Rs. 250 on the basis of the mortgage. The question is whether this is a suit for specific performance. The rulings of this Court in *Anakaran Kasmi* v. *Saidamadath Avulla* (1) and of the Calcutta High Court in *Shaik Galim* v. *Sadarijan Bibi* (2) make it clear that this is a suit for specific performance, that is to say, a suit to enforce an agreement to lend money on a mortgage, and such a suit has been held not to lie. This is the law in England and has been followed in this country. The suit will not lie at all and no question of jurisdiction then arises. It is clear, however, that a suit for specific performance can only be instituted on the orignal side and not on the Small Cause side. The reference will be answered accordingly.

Reference answered.

M. C. P.

(1) 2 M. 79; 3 Ind. Jur. 312; 1 Ind. Dec. (N. S.) 326.
(2) 29 Ind. Cas. 621; 43 C. 59; 21 C. L. J. 532; 19 C. W. N. 1332.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 405 OF 1915.

March 14, 1918.

Present:—Mr. Justice LeRossignol and Mr. Justice Wilberforce.

NAND LAL—DEFENDANT—APPELLANT

versus

DEWAN CHAND—PLAINTIFF—RESPONDENT.

Hindu Law—Will—Ancestral property—Manager of joint family, whether can distribute ancestral property by Will.

A Hindu proprietor or the manager of a joint Hindu family cannot make by Will any equal for unequal distribution of his ancestral property. [p. 163, col. 1.]

Kandasami v. *Doraisami Ayyar*, 2 M. 317; 5 Ind. Jur. 352; 1 Ind. Dec. (N. S.) 491, distinguished.

First appeal from the decree of the Senior Subordinate Judge, Lahore, dated the 5th November 1914, decreeing the claim with costs.

Lala *Moti Sagar*, R. S., for the Appellant.

The Hon'ble Pandit *Sheo Narain*, for the Respondent.

JUDGMENT.—Plaintiff in this case is a son of one Shankar Das, and brings this suit against Shankar Das' grandson Nand Lal for a declaration that he (plaintiff) is the sole owner of two houses, according to the terms of his father's Will. The big house in suit was admittedly ancestral property and according to the Will one-half was given to the plaintiff, and the other half to his mother, on condition that it would fall to the share of the heir who incurred expenses in connection with the death of the testator and his wife. The second house which is also ancestral, was set apart for payment of debts of the testator. Plaintiff claims that he paid the funeral and other expenses and debts of his father and asks, therefore, for a declaratory decree in respect of both houses. The pedigree of the parties is shown by the lower Court and the other heirs of Shankar Das shown therein are said to have agreed to the Will. The defendant denied that any Will was executed and pleaded that under any circumstances Shankar Das had no power to devise his ancestral property by Will. He also contested plaintiff's statement regarding the expenses of the plaintiff on the obsequies of Shankar Das and his wife and his payment of debts. The lower Court found that the Will had been executed by Shankar Das and that it was valid. It also found that the plaintiff had spent money as stated by him. Plaintiff was, therefore, given a decree.

As for the execution of the Will by Shankar Das, some half-hearted arguments were addressed to us. It was suggested that subsequent interpolations had been made and some evidence to this effect was referred to. We need only state that we agree with the lower Court that the whole Will was in the hand of Shankar Das. It was next argued that part of the property being

ancestral, Shankar Das had, at any rate, so far as that property was concerned, no power to distribute it among his descendants. The greater part of his property appears to have been acquired but the property now in suit is admittedly ancestral. We have no hesitation in holding that Shankar Das had no power, under Hindu Law, to make a division of his ancestral property by Will and this general proposition is not contested by the learned Counsel for the respondent. The lower Court, however, held that the manager of the family could make an equal distribution of his ancestral property among his sons and grandsons, and Counsel for the respondent relies on this argument in his favour. He has also quoted *Kandasami* v. *Doraisami Ayyar* (1) as an authority in his favour. There is, we may remark, no proof of the equality of the distribution and the authority quoted does not, in our opinion, assist the respondent's case as in that case a partition had been effected by the manager of the family during his lifetime, and we are not prepared to assent to the proposition that the manager of a Hindu family can make by Will any equal or unequal distribution of his ancestral property. This proposition is opposed to the basic principles of the Hindu Law of survivorship.

Counsel for the respondent also urged that all the descendants of Shankar Das had assented to the Will and that after such ratification of its terms, no objection by the defendant could be heard. There was some evidence of the calling of a Panchayat two years after the death of Shankar Das at which an attempt was made to secure the assent of all the survivors to the Will and to have a document executed to this effect. It is clear, however, specially from the evidence of Lala Bilas Ram, that no definite conclusion was arrived at. We do not consider, therefore, that the defendant ever assented to the terms of the Will.

For the above reasons, although the present litigation appears to be of a somewhat vexatious character, as the share of the defendant in the property is a small one and as before obtaining this share he may have to make some payments to the plaintiff, we have no alternative but to dismiss the plaintiff's suit and leave the parties to make their own arrangements. As, however, the defendant unnecessarily contested the execution of the Will on which the main contest concentrated, and as this point was found against him, we order the parties to bear their own costs throughout.

Appeal accepted.

(1) 2 M. 317; 5 Ind. Jur. 352; 1 Ind. Dec. (N. S.) 491.

PUNJAB CHIEF COURT.

REVISION PETITION No. 857 OF 1917.

March 12, 1918.

Present:—Mr. Justice Shadi Lal.

Musammat KALABATU AND OTHERS —DEFENDANTS—PETITIONERS

versus

PRABH DIAL—PLAINTIFF AND *Musammat* KOKLU—DEFENDANT—RESPONDENTS.

Restitution of conjugal rights, suit for—Discretion of Court—Court, whether can refer entire suit to arbitration.

It is entirely within the discretion of the Court to grant or refuse a decree for restitution of conjugal rights but the Court cannot delegate the decision of the entire suit to arbitrators, although it is open to it to refer any particular matter to arbitration. [p. 163, col. 2; p. 164, col. 1.]

Where, therefore, in a suit for restitution of conjugal rights, the Munsif delegated the entire suit to persons appointed by the parties as their arbitrators:

Held, that the Court could not delegate its function to arbitrators and the case should be tried on its merits. [p. 164, col. 1.]

Petition, under section 44 of Act III of 1914, for revision of the decree of the Munsif, 1st class, Dharmsala, District Kangra, dated the 11th May 1917, decreeing the claim.

Bakhshi *Tek Chand*, for the Petitioners.

Mr. *Beni Parshad Khosla*, for the Respondents.

JUDGMENT.—This application for revision arises out of an action brought by the plaintiff-respondent for the restitution of conjugal rights, and the question for determination is whether the Munsif was right in delegating the decision of the entire suit to the persons appointed by the parties as their arbitrators. Now, the rule of law is firmly established that it is entirely within the discretion of the Court to grant or refuse

a decree for restitution of conjugal rights, and it has been held by a Division Bench in *Hira* v. *Dina* (1) that this function cannot be delegated to arbitrators, who as a Tribunal are not subject to the ordinary rules of procedure, and whose decisions are under the law final. I do not say that it is not open to the Court to refer to arbitration any particular matter, *e.g.*, the factum or the validity of the marriage between the parties, which matter does not involve the exercise of a judicial discretion; but, as pointed out above, in the case before me the whole of the suit was referred to arbitration, and upon the authority cited above, I must hold that the Court was not entitled to make the reference

It is true that in *Hira* v. *Dina* (1) there was this additional fact that both the parties to the suit were minors, but the decision of the Court did not depend entirely upon that peculiar feature. Some of the observations of the learned Judges, at page 156 of the report are fully applicable to a case for the restitution of conjugal rights brought by an adult person against another adult person. Following the rule laid down in that judgment I accept the application for revision, and annulling the reference to arbitration return the case to the Munsif for trial on the merits. The costs incurred by the parties shall be costs in the cause.

Revision allowed.

(1) 37 P. R. 1895.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 367 OF 1917.

November 30, 1917.

Present:—Mr. Justice Bakewell and Mr. Justice Kumaraswami Sastri.

PERUMAL KOUNDAN AND OTHERS—RESPONDENTS—PETITIONERS

versus

THE TIRUMALRAYAPURAM JANANUKOOLA DHANASEKHARA SANKA NIDHI, LTD. THROUGH ITS OFFICIAL LIQUIDATOR A. VENKATASAMI NAYADU PETITIONER—RESPONDENT.

Civil Procedure Code (*Act V of* 1908), *O. XXXIII, rr.* 1, 2, 5—*Companies, right of, to sue* in forma pauperis—*'Person', meaning of—Explanation to rule, scope of—Liquidator of Company, right of, to appear for Company, though personally not a pauper—Commission, payment of, to liquidator, whether disqualification—General Clauses Act* (*X of* 1897), *s.* 3.

Order XXXIII of the Civil Procedure Code applies to suits by Companies and Nidhis and the latter can take advantage of its provisions if they are paupers. [p. 166, col. 1.]

The word 'person' in the Order has the same meaning as in the General Clauses Act unless there is something repugnant in the subject or context and includes any Company or Association or body of individuals, whether incorporated or not. [p. 165, col. 1.]

The explanation to rule 1 of the Order simply allows deduction of the value of wearing apparel where the applicant has such apparel. It cannot be construed to mean that only persons who, in law, can possess wearing apparel, can sue as paupers. [p. 165, col. 1.]

Under rule 3 of the Order, the liquidator can fulfil all the obligations of a pauper petitioner required under the Order and can appear for the Company and present the petition in person. [p. 166, col. 1.]

The real question for the purpose of Order XXXIII being who is the *actual* plaintiff and whether he is a pauper within the meaning of the explanation to rule 1 of the Order, a liquidator can act for a pauper Company though he is not personally a pauper. [p. 166, col. 2.]

The payment of commission to the liquidator does not make him a person interested in the subject-matter of the suit within the meaning of Order XXXIII, rule 5, Civil Procedure Code. The provision only applies to agreements between a pauper and a third person with reference to the subject-matter of the suit. [p. 166, col. 2.]

Petition, under sections 115 of Act V of 1908, and 107 of the Government of India Act, praying the High Court to revise the order of the Court of the Subordinate Judge of Madura in Original Petition No. 303 of 1916.

Mr. *S. Parthsarathy Aiyar*, for the Petitioners.

Messrs. *C. Padmanabha Aiyangar* and Mr. *A. Ramasami Aiyar*, for the Respondent.

JUDGMENT.—The Tirumalrayapuram Jananukoola Dhanasekhara Sanka Nidhi, Ltd., which was a Company registered under the Companies Act went into liquidation and an official liquidator was appointed. He as liquidator, applied under Order XXXIII of the Civil Procedure Code to file a suit on behalf of the Nidhi *in forma pauperis* against the petitioners before us who are alleged to owe the Nidhi about Rs 8,524 under a promissory note. The allegations in the

petition show that the Nidhi was bankrupt and that the only properties it had (except the subject of the suit) were worth Rs. 12. The Subordinate Judge allowed the Nidhi to sue *in forma pauperis* and the respondents have filed this petition against the order.

The chief contention raised before us is that Order XXXIII of the Civil Procedure Code, does not apply to Companies, Corporations or other associations. It is argued that as the explanation to Order XXXIII, rule 1 refers to necessary wearing apparel and rule 3 requires presentation of the petition by the 'applicant in person' the Order necessarily excludes petitioners who are not human beings.

We are unable to accept this contention. The word 'person' is not defined in the Code of Civil Procedure and consequently the definition of the word 'person' as including any Company or Association or body of individuals whether incorporated or not, in the General Clauses Act (X of 1897) would apply unless there is something repugnant to the subject or context. Order XXXIII of the Civil Procedure Code refers to suits by paupers and rule 1 enacts that any suit may, subject to the provisions of the. Order, be instituted by a pauper and does not exclude the official persons. Now a registered Company or any other Association may be unable to pay the Court fee payable like any ordinary person and there is no reason to suppose that the Legislature did not intend Order XXXIII to apply to such cases especially when it is remembered that the effect would be to allow debtors to escape payment and defeat or defraud the creditors and shareholders of the Company. The explanation to rule 1 no doubt states that where no Court-fee is prescribed, the petitioner should not be entitled to property more than Rs 100, 'other than his necessary wearing apparel'. The explanation simply allows deduction of the value of wearing apparel and can only mean that if the applicant has necessary wearing apparel he can deduct its value. We do not think it can be construed to mean that only persons who in law can possess wearing apparel, can sue as paupers. In *Curtis* v. *Kent Water Works Co.* (1), the argument that an enactment (47 Geo. 3, C. 111 did not apply to Corporations as it allowed a person to appeal on entering into a recognizance which a corporation was not competent to do, was negatived by Bayley, J., who observed as follows :— "But assuming that they cannot enter into a recognizance, yet if they are persons capable of being aggrieved by and appealing against a rate, I should say that that part of the clause which gives the appeal applies to all persons capable of appealing, and that the other part of the clause which requires a recognizance to be entered into, applies only to those persons who are capable of entering into a recognizance, but is inapplicable to those who are not."

The word used in the explanation is 'person' and there is nothing repugnant in applying the definition given in the General Clauses Act. Where the applicant is a Company which *ex hypothesi* can have no wearing apparel, then it will not be entitled to deduct anything on account of wearing apparel and will not be a pauper if it has property worth Rs. 100 and the suit is one for which no fee is prescribed.

As regards rule 3 which requires personal presentation of the application to sue *in forma pauperis* it seems to us that where the law in consequence of personal appearance in Courts being impossible either by reason of the party being a Company or an infant or lunatic, allows appearance by somebody else, appearance by such person would be sufficient. For example Order XXXII of the Civil Procedure Code which relates to minors and persons of unsound mind, authorises appearance by the next friend and guardian *ad litem* and it cannot be said that where the minor or lunatic is a pauper, the presentation of a petition to sue *in forma pauperis* by the next friend, would be invalid or contravene the provisions of Order XXXIII, rule 3. So far as Companies are concerned, the Companies Act provides for the mode in which the Company is to be represented. Under section 179 of the Indian Companies Act the liquidator may institute any suit or other legal proceedings in the name

(1) (1827) 7 B. & C. 314; 5 L. J. M. C. (o. s.) 106; 108 E. R. 741.

and on behalf of the Company and under Order XXIX of the Civil Procedure Code the principal officer of the Company may act in legal proceedings on behalf of the Company and may be required to appear when personal appearance is necessary. The liquidator can, therefore, fulfil all the obligations required of a pauper petitioner under Order XXXIII. Rule 3 of Order XXXIII of the Civil Procedure Code in our opinion only prohibits a pauper who is competent in law to appear in person from taking advantage of rule 1, Order III of the Civil Procedure Code and appearing by a Pleader or recognised agent instead of being present personally. It does not cover cases in which from the nature of the case, physical presence is impossible or where the law owing to any disability, directs that all acts required by the Code should be performed by a next friend. We are of opinion that there is nothing in rule 3 to prevent an official liquidator from appearing and presenting the petition. A Company or other Association being a 'person' within the meaning of the definition of the General Clauses Act which applies to the Civil Procedure Code of 1908, could *prima facie* apply for leave to sue *in forma pauperis* and as we see nothing in Order XXXIII, rules 1 and 3, which will be repugnant to the application of the definition, we think a Company can take advantage of the provisions of Order XXXIII if it is a pauper.

It is next argued that as the liquidator is not a pauper though the Company may be so, Order XXXIII would not apply. The suit is really by the Company, and as the liquidator only acts for the Company, being so to say its agent, his financial standing is immaterial. We think the case is covered by *Venkatanarasayya* v *Achemma* (2) where it was held that a next friend who is not a pauper, can sue *in forma pauperis* if the minor is proved to be a pauper. Reference was made to *In the matter of the Will of Dawubai* (3) and *Manaji Rajuji* v. *Khandoo Balco* (4). These were cases of executors suing and without expressing any opinion as to the correctness of these decisions, it is sufficient for the purposes of this case to say that in the case of executors the estate vests in them and they are the real plaintiffs, though they sue not for their own benefit but for the benefit of the beneficiaries. For the purpose of Order XXXIII the real question is who is the *actual* plaintiff; and is he a pauper within the meaning of the explanation to Order XXXII, rule 1, of the Civil Procedure Code.

The last contention is that as the liquidator received by his order of appointment a commission, he is interested in the subject-matter of the suit within the meaning of Order XXXIII, rule 5, of the Civil Procedure Code. The provision only applies to agreements between the pauper and a third person with reference to the subject matter of the suit. Where a Court or a Company appoints a liquidator, he is an officer who is appointed under statutory authority and the fact that he is paid a percentage of the collections, does not bring him within clause (*e*) of Order XXXIII, rule 5. No particular debt is ear-marked with the payment and even if it were so, an agreement in pursuance of the Companies Act to remunerate the liquidator for winding up the Company, would be on the same footing as an agreement by the pauper with his Vakil, to pay him the legal fees for conducting the suit.

We see no reason to interfere and dismiss the petition with costs.

Petition dismissed.

M. C. P.

(2) 3 M. 3; 1 Ind. Dec. (N. S.) 558.
(3) 18 B. 237; 9 Ind. Dec. (N. S.) 666.
(4) 11 Ind. Cas 724; 36 B. 279; 13 Bom. L. R. 577.

PUNJAB CHIEF COURT.

MISCELLANEOUS CIVIL APPEAL No. 973 OF 1917.

March 14, 1918.

Present:—Mr. Justice Scott-Smith.

JOVIND LAL—PLAINTIFF—APPELLANT

versus

MUNI LAL—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), Sch. II, para. 20—Arbitration—Dispute about partition of joint property—Private reference to arbitration—Award settling shares of parties—Application to file award in Court, whether maintainable.

JOVIND LAL v. MUNI LAL.

An award which does not partition agricultural land but merely settles the shares of the parties therein, may be filed in Court;

Where, therefore, a dispute relating to the partition of joint property including agricultural land, was privately referred to arbitration and one of the parties applied under paragraph 20 of the second Schedule of the Civil Procedure Code for the filing of the award in Court:

Held, that inasmuch as the award did not actually partition the agricultural land, there could be no objection to the filing of the award.

Miscellaneous appeal from the order of the Subordinate Judge, 1st Class, Jullundur, dated the 20th January 1917, rejecting the application for filing the award of the arbitrators.

Bakhshi *Tek Chand*, for the Appellant.

Mr. *B. D. Qureshi*, for the Respondents.

JUDGMENT.—This is an appeal from an order of *Bawa* Mihan Singh, Subordinate Judge, Jullundur, rejecting an application under paragraph 20 of the second Schedule of the Civil Procedure Code for the filing of an award in Court. The grounds of the lower Court's refusal to have the award filed, are rather difficult to understand but it appears that the application was rejected because the agreement to refer the dispute between the parties to arbitration, related to the partition of their joint property which included agricultural land, a question relating to the partition of which, is excluded from the jurisdiction of the Civil Courts. Counsel for the plaintiff appellant relied before the Subordinate Judge upon *Sardar Wasawa Singh* v. *Sardar Arur Singh* (1) and *Ram Jawaya Mal* v. *Devi Ditta Mal* (2), which, however, were distinguished by him. Finally Counsel for the appellant argued before the Subordinate Judge that as the award did not actually partition the agricultural land *Ram Jawaya Mal* v. *Devi Ditta Mal* (2) should be followed. The Subordinate Judge, however, said that until the award was filed it could not be looked at by the Court; in other words, the Court refused to look at the award in order to see whether it did partition the agricultural land or not. As a matter of fact the award does not partition the agricultural land but merely settles the shares of the parties therein. In the case reported as *Sardar Wasawa Singh* v. *Sardar Arur Singh* (1), the parties by written agreements appointed an arbitrator to partition between them certain joint property, consisting of land and houses, to equalize and adjust the shares by transfer from one party to the other of land exclusively owned by either party and generally to settle between them all disputes whatsoever relating to their joint or exclusive property. An elaborate and comprehensive award was prepared, and the parties after having heard it read, signed the document in token of their assent. It was held that the claim was not excluded from the cognizance of the Civil Court by section 158, sub-section (2) (*xvii*) Land Revenue Act, 1887, as it was not one which asked the Court to effect a partition, but was for the enforcement of an award by which the partition had already been fully carried out.

In *Ram Jawaya Mal* v. *Devi Ditta Mal* (2) it was held that a Civil Court has jurisdiction to deal with that part of an award which fixes the shares of the parties in agricultural land, as this is not an actual partition of the fields but merely a division of share and only settles title.

These authorities, in my opinion, show that there is no objection to the filing of the present award on the particular ground taken before the lower Court and argued before me. The other objections urged by defendant-respondent have not been disposed of by the lower Court.

I, therefore, accept the appeal and setting aside the order of the lower Court remand the case thereto for re decision under Order XLI, rule 23, Civil Procedure Code. Costs in this Court will be costs in the case.

Appeal accepted.

(1) 62 P. R. 1893.

(2) 34 Ind. Cas. 192; 157 P. R. 1916; 107 P. W. R. 1916; 70 P. L. R. 1917.

MOOSAJI AHMED & CO. *v.* ASIATIC STEAM NAVIGATION CO., LTD.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 189 OF 1916.

May 8, 1917.

Present:—Mr. Hayward A. J. C.

Messrs. MOOSAJI AHMED AND CO.—PLAINTIFFS

versus

THE ASIATIC STEAM NAVIGATION CO., LIMITED AND ANOTHER—DEFENDANTS.

Mercantile Law—Bill of lading—Carrier by sea, right of, to limit liability by bill of lading—Karachi Port Trust Act (Bom. VI of 1886), s. 87—Limitation—Special period of limitation for suits against Karachi Port Trust, whether subject to general provisions of Limitation Act—Limitation Act (IX of 1908), s. 3.

According to English Law it is open to a carrier by sea to limit his liability by a writing such as the bill of lading. Consequently the following conditions in a bill of lading are perfectly valid:

(*a*) that the Company shall not be liable for any damage caused by sweating, fermenting, heat, boilers, or storage, whether arising or not from the negligence of the persons in the service of the company; [p. 168, col. 2.]

(*b*) that the liability of the Company shall absolutely cease when the goods are over or beyond the side of the Company's own ship level with the rail; [p. 168, col. 2.]

(*c*) that the Company shall not be liable for any damage capable of being covered by insurance. [p. 168, col. 2.]

The general provisions of the Limitation Act regarding the exclusion of holidays and Court vacations in computing the period of limitation, have no application to any special period of limitation prescribed by any special or local law *e. g.*, the Karachi Port Trust Act. [p. 170, col. 2, p. 171, col. 1.]

A suit against the Karachi Port Trust filed beyond the period of 6 months allowed by section 87 of the Karachi Port Trust Act, owing to the intervention of Easter holidays and vacation of the Court is barred by limitation. The maxim *lex non cogit ad impossibilia* has no application to such a case as the suit could have been filed earlier. [p. 169, col. 2.]

Mr. *Dipchand T. Ojha*, for the Plaintiffs.

Mr. *Rupchand Bilaram*, for Defendant No. 1.

Mr. *T. G. Elphinstone*, for Defendant No. 2.

JUDGMENT.—The plaintiff firm, Moosaji Ahmed and Company, claims compensation from defendant No. 1, the Asiatic Steam Navigation Company, or from defendant No. 2, the Karachi Port Trust, for damage alleged to have been caused by the negligence of one or other of the defendants to a cargo of molasses shipped from Sourabaya to Karachi.

Defendant No. 1 pleads *inter alia* exemption from liability under the terms of the bill of lading. Defendaat No. 2 pleads *inter alia* the bar of limitation under section 87 of the Karachi Port Trust Act.

With regard to defendant's plea, it appears there are two branches, the one on the assumption that the damage to the cargo was caused by the negligence of the servants of defendant No. 1, and the other on the assumption that the damage was caused subsequently by the negligence of the defendant No. 2. It has been contended in respect of the first branch, that the defendant No. 1's liability is excluded by the condition contained in the bill of lading which has been admitted as Exhibit No. 8, to the following effect: "The Company is not liable for any damage caused by..... sweating ..... fermenting .... heat ..... boilers .... or storage ... whether arising or not from the negligence of the persons in the service of the Company." It has been contended in respect of the 2nd branch that defendant No. 1's liability is excluded by the condition in the bill of lading to the following effect: "The liability of this company shall absolutely cease when the goods are over or beyond the side of the Company's own ship level with the rail".

It has been argued, on the other side, in respect of the first branch, that the condition excluding liability of defendant No. 1 was not clear and that in any case it related only to such negligence as could be covered by insurance in view of the subsequent condition in the bill of lading to this effect.

"The Company is not liable for any damage capable of being covered by insurance." It is difficult to understand how it could seriously be argued that the condition excluding the liability of defendant No. 1 for damage caused by the negligence of their servants, was not sufficiently clear. The terms of the condition could hardly, in my opinion, have been clearer or more comprehensive and it does not appear to me that the condition is in any way limited by the subsequent condition regarding insurances. The plain meaning of the subsequent condition, in my opinion, is that the company is not to be held liable in any case for damages which could be recovered from the Insurance

Company. There is no reasonable doubt that the condition excluding the liability of defendant No. 1 for damage by negligence of their servants, is a perfectly clear and valid condition, as would appear from the remarks on the subject to be found in paragraphs 186, 197, 232 and 234 of Volume XXVI, Halsbury's Laws of England.

It does not appear to me in respect of the second branch that any serious argument has been adduced to show that the condition excluding the liability of defendant No. 1 after the goods had left the ship's tackle was also not a perfectly valid condition, as would appear from the remarks on the subject to be found in paragraphs 364 and 366 of Volume XXVI of Halsbury's Laws of England.

It has not been disputed that the English Law must be applied in this case according to the agreement between the parties contained in the last clause of the bill of lading, and that is also in accordance with the remarks on the subject which will be found in paragraphs 356 and 357, Volume XXVI of Halsbury Laws of England. It, finally, cannot be disputed that, under the English Law, it would be open to the defendant No. 1, as common carriers by sea, to limit their liability by a writing such as the bill of lading, as will appear from the remarks on the subject in paragraph 445 of Volume XXVI, Halsbury's Laws of England.

Defendant No. 1 must, therefore, be held on either branch of the case to have been fully protected from liability for the damage caused by the express conditions of the bill of lading. The suit, therefore, as against defendant No. 1 must be dismissed with costs.

With regard to defendant No. 2's plea, it would appear that the cargo arrived on the 26th October 1915 and it has been alleged that the final failure to deliver the cargo undamaged, occurred in the month of November 1915. Notice was given of suit on the 8th March 1916. The Easter holidays and vacation intervened from 20th April 1916 to the 25th May 1916, and the suit was, consequently, not filed until 26th May 1916. It is clear, therefore, and it was admitted in the plaint, that, whether the proposed action be taken from the 26th October 1915 or from the beginning of November 1915 the suit was filed beyond the period of 6 months' limitation allowed by section 87, Karachi Port Trust Act, 1886, unless the, Easter holidays and vacation could be excluded from the computation under section 4 of the Limitation Act of 1908.

No such right of exclusion was recognised under the Bombay General Clauses Act, of 1886, and, looking to the year of the Karachi Port Trust Act, 1886, recourse cannot be had to the provision of section 11 of the Bombay General Clauses Act, 1904. It was suggested that recourse might be had, failing other remedies, to the general maxim "*Lex non cogit ad impossibilia*" but that maxim cannot, in my opinion, be applied here, because there was no absolute impossibility in filing the suit before the Easter holidays and vacation. There was no doubt increased difficulty in filing it within the period of limitation owing to the intervention of Easter holidays and vacation but their intervention did not render it absolutely impossible. The maxim, therefore, could not properly be applied as observed by Jenkins, C. J. in the case of *Ahad Baksh Molla* v. *Babar Ali* (1).

It has, however, further been argued that recourse could be had to the general provisions of the Limitation Act, 1908. That argument has turned mainly on the question whether the general rules contained in sections 4 to 25 could properly be applied in view of the language of sections 3 and 29 (*b*). These latter sections would appear to imply that the general provisions were intended only to apply to suits falling within the schedule of the Limitation Act, 1908. The main difficulty in answering this question arises not so much from the words used by the Legislature as from the numerous and somewhat conflicting decisions of the Courts. It was held so long ago as 1872 that the Bengal Rent Recovery Act was an Act complete in itself and not subject in the matter of limitation to section 14 of the Limitation Act of 1859. That was a decision by the Privy Council reported as *Unnoda Persaud Mookerjee* v. *Kristo Coomar*

(1) 14 Ind. Cas. 173; 16 C. W. N. 721.

Moitro (2). It was followed after a number of conflicting decisions in respect of the Limitation Act of 1877 by a Full Bench of the Calcutta High Court reported as *Nagendra Nath Mullick* v. *Mathura Mohun Parki* (3). It was held that the Registration Act was an Act complete in itself and not subject to the matter of limitation to section 7 of the Limitation Act of 1877 by a Full Bench of the Madras High Court in *Veeramma* v. *Abbiah* (4). It would appear, however that a number of conflicting decisions were subsequently passed on this subject by different Benches of the Madras High Court. Thus the Forest Act was held not to be subject to the terms of section 12 of the Limitation Act by the Full Bench of the Madras High Court reported as *Abu Baker Sahib* v. *Secretary of State* (5); while the Madras Revenue Recovery Act was held not to contain a complete body of rules of limitation and to be subject to the provisions of section 15 (2) of the Limitation Act by the Full Bench of the Madras High Court in *Srinivasa Aiyangar* v. *Secretary of State* (6). It was similarly held by a Full Bench of the Allahabad High Court that the Provincial Insolvency Act did not contain a complete body of rules of limitation and was subject to the general provisions of the Limitation Act. It was there considered that the general provisions of the Limitation Act could not be said to "affect" the special period of limitation prescribed by the Insolvency Act. The case is reported as *Dropadi* v. *Hira Lal* (7). It is certainly hard to understand how it could be said that the general provisions of the Limitation Act did not at least "affect" the special period prescribed by the Provincial Insolvency Act and it is not surprising, therefore, to find a difference of opinion arising subsequently on the question whether the Provincial Insolvency Act was subject to the general provisions of the Limitation Act in the subsequent case before a Bench of the Madras High Court reported as *Munjuluri Sivaramayya* v. *Singumahanti Bhujanga Rao* (8). The only decisions on this much vexed question on this side, appear to have been those which decided that the Bagdari Act was not subject in the matter of limitation to the Limitation Act. The latest decision upon that point is reported as *Adam Umar Sale* v. *Bapu Bawaji* (9).

It seems to me in this conflict of authority necessary to return to the actual words of the Limitation Act. It will then be seen that section 3 provides that "Every suit instituted after the period of limitation prescribed therefor by the first Schedule shall be dismissed" subject always to the provisions contained in sections 4 to 25. That looks as though these latter sections were intended to apply merely to the periods of limitation prescribed by the first Schedule of the Limitation Act. Then these sections follow and refer in almost all cases expressly to the period of limitation "prescribed". Thus the word "prescribed" occurs in sections 4 and 5 and again in sections 9, 12 to 16, 19 and 20. That surely means "prescribed" in the first Schedule of the Act. The word also occurs in section 6 and where reference is required to something else, it is made clear in that section by express words "prescribed thereby in the 3rd column of the third Schedule" of the Act. So again section 11 refers expressly to periods prescribed by foreign rules of limitation. It is again indicated that all these sections contemplate merely the periods prescribed by the Limitation Act by the provision in section 25 that all instruments shall be interpreted in a particular manner "for the purpose of this Act."

It has finally been made quite clear to my mind that these sections contemplated nothing else by the provisions of section 29 (1) (*b*) where it is stated that "nothing in this Act shall affect or alter any period of limitation specially prescribed .... by any special or local law now or hereafter in force in British India." There may no doubt be weighty considerations in favour of applying to the special periods of limitation prescribed by the various special or

(2) 19 W. R. 5; 15 B. L. R. 60 note (P. C.).
(3) 18 C. 368; 9 Ind. Dec. (N. S.) 246.
(4) 18 M. 99; 6 Ind. Dec. (N. S.) 418 (F. B.).
(5) 5 Ind. Cas. 884; 34 M. 505 at p. 509; 20 M. L. J. 283; 7 M. L. T. 132.
(6) 18 Ind. Cas. 617; 38 M. 92; 24 M. L. J. 41.
(7) 16 Ind. Cas. 149; 34 A. 496; 10 A. L. J. 3.
(8) 30 Ind. Cas. 703; 39 M. 593; 18 M. L. T. 200.
(9) 1 Ind. Cas. 663; 33 B. 116; 10 Bom. L. R. 1128.

local laws the general rules of the Limitation Act. But such application is, in my opinion, a matter for the Legislature and not warranted, with due deference to the views of certain of the Judges of the Madras and Allahabad High Courts by the wording of the Limitation Act. If such application had been intended, it is difficult, moreover, to explain the object of the Legislature in enacting section 10 of the General Clauses Act of 1897 and section 11 of the Bombay General Clauses Act of 1904 and thereby applying generally to all periods of limitation thereafter prescribed the provisions regarding holidays and vacations of Courts contained in the Limitation Act of 1877 and 1908.

This suit, therefore, must also be dismissed as against defendant No. 2 with costs.

Suit dismissed.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 506 OF 1917.

March 13, 1918.

Present:—Mr. Justice Scott-Smith.

THE LAHORE ELECTRIC SUPPLY COMPANY—DEFENDANT—PETITIONER

versus

DURGA DAS—PLAINTIFF—RESPONDENT.

Electricity Act (IX of 1910), s. 24, Sch. cl. vi—Fuse or Cut-out—Service-line, cost of maintenance of—Liability of licensee—Installation, defective—Consumer, whether liable to pay for new cut-out.

A fuse or cut-out is a necessary part of the service-line and is kept under the licensee's seal. [p. 172, col. 1.]

The licensee is bound to bear the cost of the maintenance of the service-line whether or not it has been initially paid for by the consumer. [p. 172, col. 2.]

If the consumer's installation is defective, the licensee is entitled to discontinue the supply of energy to him. [p. 173, col. 1.]

In case of a dispute as to any alleged defect, the licensee can take action under clause VI sub-clause (3) of the Schedule to the Electricity Act and refer the matter to an Electric Inspector who shall decide it. [p. 173, col. 1.]

If the licensee continues to supply energy to a consumer when he knows or has reason to believe that the latter's installation is defective, he does so at his own risk and the consumer is not liable to pay for a new fuse or cut-out if the old one melts owing to a defect in his installation. [p. 173, col. 1.]

Petition, under section 25 of Act IX of 1887, for revision of the decree of the Court of Small Causes, Lahore, dated the 10th April 1917, decreeing plaintiffs' claim.

Mr. *Beechey*, for the Petitioner.

Lala *Moti Sagar*, R. S., for the Respondent.

JUDGMENT.—This is an application for revision of the order of the Judge, Small Causes Court, Lahore, granting plaintiff-respondent, a decree for Rs 108 against the Lahore Electric Supply Company, defendant-petitioner. The brief facts of the case are as follows:—

On the 31st August 1916 the electric current supplied by the defendant Company to plaintiff's house having failed, the plaintiff sent a message asking the company to look into the matter. The Company sent their *Mistri*, who finding that the main fuses had been burnt out, renewed the same. On the 4th September the defendant sent plaintiff a bill in which a charge of Rs. 2 was made for renewal of two main fuses. Plaintiff protested saying that he was not liable for the renewal of the main fuses which were defendants' property and kept under his seal, and which had melted through no fault of the plaintiff. On the 15th September the defendant Company again pressed for payment of the charge of Rs. 2 threatening disconnection in case the bill was not paid within seven days. Plaintiff replied to this repudiating his liability. On the 2nd October the defendant Company disconnected the plaintiff's house from the distributing main. On the 4th October the connection was restored on plaintiff paying under protest a sum of Rs. 8 to the defendant, namely, Rs. 2 for the fuses Rs. 3 as disconnection fee and Rs. 3 as re-connection fee. He then sued the Company for this Rs. 8 together with Rs. 100 on account of damages and the Small Cause Court has decreed the claim.

The lower Courts' findings are that the main fuses were the property of the defendant Company which was, therefore, bound to keep them in order; that it was not shown that they "blew off" or melted through any fault of the plaintiff; that the requirements of law as to notice to plaintiff were not complied with; and that in any case the charge was not one "in respect of the supply of energy" within the meaning of section 24 of the Indian Electricity Act, IX of 1910. The main fuse is technically called a cut-out

and the first question for decision is whether the charge of Rs. 2 for re-placing the cut-outs, was payable by the plaintiff or the defendant. The consumer's premises are connected with the distributing main by means of a service-line which is defined in section 2 of the Indian Electricity Act as "any electric supply line through which energy is, or is intended to be supplied by a licensee to a consumer either from a distributing main or immediately from the licensee's premises." Electric supply-line is defined as "a wire, conductor or other means used for conveying, transmitting or distributing energy together with any casing, coating, covering, tube, pipe or insulator enclosing, surrounding or supporting the same or any part thereof, or any apparatus connected therewith for the purpose of so conveying, transmitting or distributing such energy* * * * * * * * *." The object of the cut out, I understand, is to regulate the supply of electric energy and, therefore, I think it would be an apparatus for the purpose of distributing such energy within the meaning of the definition of electric supply-line; but it is not necessary to labour this point for part of Counsel for petitioner's argument is that the cut out is part of the service-line. In this connection Mr. Beechey refers to rule 37 of the rules framed by the Government of India in the Public Works Department contained in Notification No. 107, dated the 23rd December 1910. The rule in question is as follows:—"A licensee shall insert a suitable cut-out in each service-line within a consumer's premises, in an accessible position as close as possible to the point of entry. Such cut-out shall be contained within an adequately enclosed fire proof receptacle." This shows that the cut-out is a necessary part of the service-line and it is admittedly kept under the licensee's seal, the licensee being in this case the defendant Company.

Now the law as to payment of the cost of the service-line is contained in the Schedule to the Act. Clause VI (1), proviso first (*b*), which is as follows:—"Provided that the licensee shall not be bound to comply with any such requisition (*i.e.*, for a supply of energy) unless and until the person making it, if required by the licensee so to do, pays to the licensee the cost of so much of any service line as may be laid down or placed for the purposes of the supply upon the property in respect of which the requisition is made, and of so much of any service-line as it may be necessary for the said purposes to lay down or place beyond one hundred feet from the licensee's distributing main, although not on that property." This shows that the consumer may be required to pay the initial cost of the service-line or of part thereof. It is common ground that in Lahore a fixed charge of Rs. 20 is made by the Company in respect of the service-line. Sub-clause (2) of clause VI is as follows:—"Any service-line laid for the purpose of supply in pursuance of a requisition under sub clause (1) shall, notwithstanding that a portion of it may have been paid for by the person making the requisition, be maintained by the licensee." This shows that whether a portion of the service line has or has not been initially paid for by the consumer, it shall be maintained thereafter by the licensee; in other words, the licensee has to bear the cost of maintenance of the service line. Mr. Beechey urges that sub-clause (2) is governed by the provisos to sub-clause (1) but I am quite unable to agree with him. The provisos only apply to sub-clause (1), sub clause (2) is obviously quite distinct and its meaning is perfectly clear. It must, therefore, be held that the licensee, in this case, the defendant Company is bound to maintain the cut-outs which are kept under his own seal in proper order.

A good deal was said in arguments as to why the cut-outs fused whether it was due to some fault in the distributing main or in the plaintiff's own installation. On this point Mr. Beechey has referred to the evidence of Mr. Drummond which is to the effect that main fuses "blow off" owing to a defect in the installation, I do not understand this to mean that it can never happen from any other cause. It does not appear that any examination of the plaintiff's installation was made with a view to seeing whether it was in proper order or not. There is no evidence on the record that the main fuses melted owing to any defect in his installation. If a consumer's installation is defective, the licensee has his remedy. Under clause VI (1) proviso second (*c*) of the Schedule to the Act "A

licensee shall be entitled to discontinue the supply if the electric wires, fittings, works and apparatus in such property (*i. e.*, the premises of the consumer) are not in good order and condition, and are consequently likely to affect injuriously the use of energy by the licensee, or by other persons." In other words, if the consumer's installation be defective, the licensee is entitled to discontinue the supply of energy to him. If the licensee has reason to believe that there is any defect in the installation, he can take action under section 20 (1) (*a*) of the Act which lays down that a "licensee or any person duly authorized by a licensee, may at any reasonable time and on informing the occupier of his intention, enter any premises to which energy is or has been supplied by him for the purpose of inspecting and testing the electric supply lines, meters, fittings, works and apparatus for the supply of energy belonging to the licensee."

If there is any dispute as to any alleged defect, he can take action under clause VI sub-clause (3) of the Schedule and refer the matter to an Electric Inspector who shall decide it. If he continues to supply energy to a consumer when he knows or has reason to believe that the latter's installation is defective, he does so at his own risk. I can find nothing in the Act to justify the view that the consumer is liable to pay for a new cut-out if it melts owing to a defect in his installation. It is clear then that the demand of the defendant Company for Rs. 2 on account of the new cut-outs supplied in plaintiff's service-line, was not justified by anything in the Electricity Act. It was argued that this charge was always made by the Company and that consumers complied with the demand without demur. That may be so, but an illegal demand does not become legal merely because it is usually complied with by the public.

Another point argued was whether the charge, if a legal one, was one for non-payment of which the licensee would be entitled to disconnect the plaintiff's premises under the powers conferred by section 24 of the Electricity Act. Mr. Meares in his book on the Law relating to Electrical Energy in India in his notes under this section says that the words "any other sum due" would include the cost of the connection to the house in so far as it is in any case payable by the consumer. If this view is correct, the cost of the service-line would be such a sum, but it is unnecessary to decide the point because, in my opinion, as set forth above, the sum was not due from the plaintiff to the defendant. If is unnecessary to decide whether the requirements of law as to notice were complied with in the present case, as I hold that the defendant was not entitled to disconnect the plaintiff's premises from the distributing main.

Mr. Beechey finally urged that it would have been sufficient to award mere nominal damages as the plaintiff suffered no inconvenience from the disconnection. He has, however, given evidence that some members of his family were residing in the house and that they were put in inconvenience by the disconnection. The amount awarded, namely, Rs. 100, is not a large sum for the Company to have to pay as damages for its illegal act and I am not prepared to interfere with the order of the Small Cause Court in this respect.

The application is accordingly rejected with costs to the plaintiff-respondent.

Revision rejected.

SIND JUDICIAL COMMISSIONER'S COURT.

ORIGINAL CIVIL SUIT No. 327 OF 1914.

April 11, 1917.

Present:—Mr. Hayward, A. J. C.

MESSRS. LOUIS DREYFUS & Co.—PLAINTIFFS

versus

THE SECRETARY OF STATE FOR INDIA—DEFENDANT.

Limitation Act (IX of 1908), Sch. I, Art. 30—Carrier, suit against, for injury to goods carried—Limitation—Civil Procedure Code (Act V of 1908), O. VI, r. 17—Amendment of plaint, whether permissible on verbal suggestion in final reply.

A suit for compensation for injury to goods while in the possession of a carrier, *e. g.*, a Railway Company, falls under Article 30 of the First Schedule of the Limitation Act and must be filed within one year from the date when the injury occurs. [p. 174, col. 2.]

LOUIS DREYFUS & CO. *v.* SECRETARY OF STATE.

An amendment which would have the effect of altering the nature of the suit, cannot be allowed upon a verbal suggestion made in final reply. [p 175, cols. 1 & 2.]

Mr. *Isardas Oedharam*, for the Plaintiffs.

Mr. *T. G. Elphinstone*, for the Defendant.

JUDGMENT.—The plaintiffs sued the defendant for compensation for injury to certain goods which had been carried from Sobhago Station to Karachi by the North Western Railway.

The defendant denied his liability for the injury which he pleaded, had been caused while the goods were under arrest by the Police; and, shortly before the case came on for trial, he pleaded, further, that the claim was barred by the law of limitation.

The plaintiffs, admittedly, received delivery of the goods on the 4th September 1913 and the injury must have occurred before that date, but they did not file their plaint until more than a year after the 5th of September 1914. Their claim was patently for compensation for injury to the goods while in the possession of the defendant, as carrier, and an issue has accordingly been allowed on the defendant's further pleading as to the claim being time-barred under Article 30 of the schedule of the Limitation Act.

The plaintiffs have, in the first place, contended that the apparent bar has been saved by a number of acknowledgments of liability in their favour by the officers of the defendant. They relied, in the first instance, on a letter, dated 3rd August 1913 from the Station Master, Sobhago, stating that the goods had on the evening, before being loaded, been arrested by the Police (Exhibit 25); and on the telegram, dated the 9th September 1913 from the Station Master, Sobhago, informing them that a part of the goods was damaged by rainwater (Exhibit 24). Next upon a letter, dated 28th October 1913, from the Station Superintendent, Keamari, stating that he had written about their claim to the District Traffic Superintendent, (Exhibit 18). Other acknowledgments have been alleged to be contained in a letter, dated the 10th September 1913, also from the Station Superintendent, Keamari, stating that he had referred the matter to the District Traffic Superintendent (Exhibit 19); in a letter, dated 23rd December, from the District Traffic Superintendent, Karachi Port, stating that he had referred the matter to the Traffic Manager, Lahore, (Exhibit 20); in a letter, dated 22nd January 1914, also from the District Traffic Superintendent stating that he was still awaiting orders (Exhibit 22); in a letter, dated 4th April 1914, also from the District Traffic Superintendent stating that he would reply in a few days (Exhibit 21); and finally in a letter, dated 15th April 1914, also from the District Traffic Superintendent, denying all liability on behalf of the Railway Co. (Exhibit 23). It is difficult to understand how any of these letters could possibly be interpreted into acknowledgments of liability of the injury caused to the goods. It has been urged that they were acknowledgments of liability in that they were acknowledgments of liability to deliver the goods. But the goods were delivered and it seems to me impossible to spell out of these letters any acknowledgment whatever for the injury which might have been caused to the goods before their delivery by the defendant.

The plaintiffs have in the next place contended that, in any case, their claim is not barred because the proper article applicable is not Article 30, but either Article 49 or 115 of the Schedule of the Limitation Act. They have relied upon a decision of the Calcutta High Court in the case of *Danmull* v. *British India Steam Navigation Co.* (1), which was approved in the recent case of *Radha Sham Basak* v. *Secretary of State* (2). It appears to me, however, that their claim does clearly come within the meaning of the words "against a carrier for injuring goods" contained in Article 30, and is not governed by the words "for wrongfully injuring other specific moveable property" contained in Article 49 of the Schedule of the Limitation Act. Their claim is equally clearly excluded by the words "not herein specially provided for" from being governed by Article 115 of the Schedule of the Limitation Act. And this has been the view

(1) 12 C. 477; 6 Ind. Dec. (N. S.) 324.
(2) 34 Ind. Cas. 130; 44 C. 16; 23 C. L. J. 547.

of the clear wording of the articles taken in the similar contest between Articles 31 and 115 of the Schedule of the Limitation Act by the Bombay High Court in the cases of the *Great Indian Peninsula Railway Co.* v. *Raisett Chandmull* (3) and *Haji Ajam Goolam Hoosein* v. *Bombay and Persia Steam Navigation Co.* (4). It will be noticed that the ruling of the Calcutta High Court in the case of *Danmull* v. *British India Steam Navigation Co.* (1) was not followed by the Bombay High Court. And it is further to be observed in regard to the more recent ruling of the Calcutta High Court in *Radha Sham Basak* v. *Secretary of State* (2) that there was no proof there as to when the goods ought to have been delivered within the meaning of Article 31 and that was the reason why recourse was had to Article 115 of the Schedule of the Limitation Act.

The plaintiffs have finally contended that, in any case, they are entitled to recover compensation against the defendant if not as carrier then as ordinary bailee, and that in this view at all events they would be entitled to 3 years' limitation either under Article 49 or 115 of the Schedule of the Limitation Act. Their plaint, however, is patently against the defendant as a carrier. It makes no reference whatever to the defendant being liable as an ordinary bailee. Nor has any application for amendment for charging defendant with liability as an ordinary bailee been filed notwithstanding that the basis for such liability, namely, the injury to the goods while under arrest of the Police, was alleged in defendant's written statement so long ago as the 6th October 1914. It is true that the 4th issue deals with the question of injury or no while under arrest of the Police. But it was raised apparently with reference to defendant's liability as a carrier and made no mention of his possible liability as an ordinary bailee. That liability could not, in my opinion, be properly considered without express amendment and it is doubtful if that could, in any case, be allowed as it would have the effect of altering the nature of the suit against the defendant. It certainly could not, in my opinion, be allowed upon a verbal suggestion made only in final reply to the arguments on the issue of limitation.

It follows, therefore, that the suit must be dismissed with costs as barred by Article 30 and that recourse cannot be had, in any case, to Article 49 or 115 of the Schedule of the Limitation Act. It has been brought to my notice that a similar conclusion was arrived at by Fawcett, A. J. C., in Suit No. 248 of 1916 of this Court.

Suit dismissed with costs.

(3) 19 B. 165; 10 Ind. Dec. (N. S.) 112.
(4) 26 B. 562; 4 Bom. L. R. 447.

PUNJAB CHIEF COURT.
FIRST CIVIL APPEAL No. 189 OF 1915.
February 25, 1918.

Present:—Mr. Justice Scott Smith and Mr. Justice LeRossignol.

SALIG RAM AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SABGHAT-ULLAH AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Deed allowing part payment of mortgage money—Tender made after demand by mortgagees, validity of—Interest, rebate of.

Plaintiffs sued to recover a certain amount of money, principal as well as interest, as a charge on property mortgaged to them by the predecessors-in-interest of the defendants. There was no provision in the mortgage deed for piecemeal redemption but it was contemplated that part payment of the principal mortgage money should be allowed. It appeared that a tender of a certain sum was made by some of the defendants on the 14th August 1909, but the plaintiffs refused to take part payment as they had become entitled to the entire mortgage money and did not wish that part of the property should be redeemed. The defendants did nothing till October 1913 when they again tendered the same sum. But on 28th January 1913 the plaintiffs had sent notices to all the mortgagors demanding payment of the full sum due under the mortgage:

Held, that under the circumstances no offer by any of the defendants subsequent to the 28th January 1913 could be a valid tender so as to entitle them to claim rebate of interest on the sums tendered and the plaintiffs were, therefore, entitled to recover the full amount of principal as well as interest. [p. 176, col. 2.]

First appeal from the decree of the District Judge, Delhi, dated the 7th December 1914.

Lala *Moti Sagar*, R. S., for the Appellants.

Dr. *Muhammad Iqbal*, for the Respondents.

JUDGMENT.—In this suit the plaintiffs claimed Rs. 56,275-4-9 principal and interest as a charge on the property mortgaged by a deed dated the 9th August 1897. Defendants are the representatives of the original mortgagors and certain other persons who have purchased portions of the property from them. The lower Court passed a decree for Rs. 55,578 10-0 together with future interest on the principal sum secured by the mortgage. From this order two appeals have been filed, one by three sets of defendants, namely, Sultan Singh and another, defendants Nos. 7 and 8, Nand Kishore, defendant No. 9 and Rahim-ud-Din and others, defendants Nos. 10—12. The other appeal is by the plaintiffs who desire that the decree be increased by a sum of Rs. 450 which represents interest on a sum said to have been tendered to them in payment by Nand Kishore.

When the appeal came on for hearing before us it was found that the defendants-appellants had paid a Court-fee of Rs. 10 on their appeal. Their Counsel expressed his willingness to pay a Court-fee on the amount at which he valued the appeal and he stated this to be Rs. 8,750. Subsequently, however, he said that he only appealed for a reduction of the decree by a sum of Rs. 3,080. In other words, he desired that the decree should be one for the principal sum only, *i.e.*, Rs. 52,500. The question in the defendants' appeal is whether they should be allowed a rebate of the interest on sums tendered by them in payment to the plaintiffs on various dates prior to the institution of the suit. The findings of the first Court so far as they are material to the appeals before us, are as follows:—

(1) That there was no provision in the mortgage deed for piecemeal redemption.

(2) That it was contemplated that part payment of the principal mortgage money should be allowed.

(3) That the tender of Rs. 12,322 made by Rahim-ud-Din and the others in August 1909 was not a valid tender as it was clogged with a claim for partial redemption of the property mortgaged.

(4) That the tender of Sultan Singh and another of part of the mortgage money was for similar reasons not a valid tender.

(5) That the tender by Nand Kishore of Rs. 13,125 on the 23rd October 1913 was a valid tender and that he was not liable for further interest after that date.

First of all we deal with the tender, made by Rahim-ud-Din and others. This was made on the 14th of August 1909 but the actual letter which accompanied the tender, has not been produced. Plaintiffs' letter in reply, dated 16th of August 1909, is printed at page 247 of the paper-book. It shows that plaintiffs refused to take part payment as they had become entitled to the entire mortgage money. They also said that they did not wish that part of the property should be redeemed. This leads to the inference that the defendants' offer was made with a view to partial redemption. If it was not, they should have addressed the plaintiffs again and should have clearly stated that they offered money, in part payment of the principal. They, however, sent no answer to the plaintiffs in reply to this letter and apparently did nothing until October 1913 when they again tendered the same sum. Before that, however, the plaintiffs on the 28th January 1913 had sent notices to all the mortgagors or their representatives-in-interest demanding payment of the full sum due under the mortgage. As more than ten years had expired from the date of the mortgage, plaintiffs were entitled to demand payment of the whole mortgage money and they were certainly not bound after that to accept any sum in part payment. In our opinion, therefore, no offer by any of the defendants-appellants subsequent to the 28th January 1913 was a valid tender so as to entitle them to claim any rebate of interest on the sums tendered. We note that Sultan Singh in his pleas never asked for any reduction of interest on account of the sum tendered by him. He merely said that he had always been willing to pay his share and that he should not be held liable for costs. In our opinion, therefore, it is not proved that any valid tender was made to the plaintiffs prior to the institution of the present suit such as would entitle the defendants to claim any reduction in interest.

We hold accordingly that plaintiffs are not only entitled to the sum decreed by the first Court but to the additional sum of Rs. 450 for which they have appealed.

We, therefore, dismiss the defendants' appeal and accepting that of the plaintiffs, increase the decree to one for Rs. 56,028-10-0 and we further modify the decree of the lower Court to this extent that interest will be calculated at the rate agreed upon, namely, Rs. 0 8 9 per cent. per mensem on the full principal sum Rs. 52,500 from April 27th 1914 until realisation. We further direct that the defendants shall pay the plaintiffs' costs in this Court in both appeals.

Appeal accepted.

PATNA HIGH COURT.

APPEALS FROM ORIGINAL ORDERS NOS. 288 AND 289 OF 1917

CIVIL REVISION No. 320 OF 1917.

January 3, 1918.

Present:—Mr. Justice Chapman and Mr. Justice Atkinson.

INDERDEO NARAIN SINGH—PETITIONER—APPELLANT

versus

GOURI SHANKER—OPPOSITE PARTY—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XL, r. 1—Mortgage decree—Execution—Receiver, appointment of [illegible] objection by person not party to suit rejection of— unless it was satisfied that the claim was not made *bona fide* or was made really on behalf of one of the parties to the case, and (*b*) because the lower Court had not dealt at all with the claim that the objector was entitled to a prior charge. [p. 178, col. 2.]

Appeal against an order of the Subordinate Judge, 2nd Court, Patna, dated the 6th October 1917.

Messrs. *Pugh* and *G. D. Singh*, for the Appellant.

Messrs. *Kulwant Sahai* and *Purnendu Narayan Sinha*, for the Respondent.

JUDGMENT.

CHAPMAN, J.—On the 4th of February 1905 one Rai Bahadur Haribar Prasad Singh obtained a mortgage-decree against Mathura Prasad Singh. In September 1917 the mortgage property was put up to sale and was purchased by one Gouri Shanker. An application was made to have the sale set aside upon the ground of irregularity. The application was made by one Bindeshwari who had purchased the property from one Lokenath who had himself purchased it at a sale in execution of a mortgage decree obtained by him.

On the 19th Novem[illegible] Shanker applied for th[illegible] Receiver. No objection other side, a Receiver that date. On the [illegible] before the Receiver [illegible] of the property and [illegible] of his journey to take [illegible] met by an objection [illegible] Narain

tion was then made by Inderdeo Narayan to have his objection re-heard. The Subordinate Judge re-heard the objection and again overruled it upon the ground that the *ijara* had no existence in the eye of the law, having been made during the pendency of the mortgage suit.

Inderdeo Narayan now appeals to this Court. He has filed two appeals, one against the first order summarily overruling his objection on the 3rd December and the other appeal being against the subsequent order overruling it on the 6th December. There is also an application in revision.

A preliminary objection has been made that no appeal lies. This objection must be given effect to. Inderdeo Narayan was not a party to the suit, and, therefore, he has no right of appeal to this Court. The appeals are, therefore, dismissed.

Inderdeo Narayan has, however, also made an application in revision, and it is that application which we now proceed to consider.

...ital of the facts makes it ...eo Narayan was in ... ...he proceedings in which ...en appointed. The ap... ...eiver was by implica... ...e parties in the case ... to the Receiver and ...ver to comply with the ...t; but it was not by ...wise, any ...

to a prior charge by reason of the fact that he had discharged the prior mortgage and also by reason of the fact that he had discharged a rent decree. I am of opinion that we should interfere upon both grounds; the first ground being that the Subordinate Judge had no jurisdiction to overrule the objection unless he was satisfied that the claim was not made *bona fide* or was made really on behalf of one of the parties to the case: the other ground being that the learned Subordinate Judge has not dealt at all with the claim that Inderdeo was entitled to a prior charge. I am, therefore, of opinion that his order overruling the objection and directing the Receiver to take prompt action, must be set aside, and that Inderdeo Narayan in his application for revision is entitled to succeed. In the course of the argument in this Court, Inderdeo's Counsel drew our attention to the fact that his client had been put in possession under section 171 of the Bengal Tenancy Act. Under that section, he is entitled to remain in possession until his debt is discharged on behalf of the opposite party. It has been contended that if this claim had been made before the Subordinate Judge the opposite party would have been able to show that by reason of his long possession under that section, the debts had been discharged and that he had no present right to remain in possession...

RAGHU NATH *v.* RUKNA.

PUNJAB CHIEF COURT.
SECOND CIVIL APPEAL No. 1922 OF 1916.
March 12, 1918.
Present:—Mr. Justice Scott-Smith.
RAGHU NATH AND OTHERS—PLAINTIFFS—APPELLANTS
versus
RUKNA AND OTHERS—DEFENDANTS—RESPONDENTS.

Regulation XVII of 1806, ss. 7, 8—Mortgage by way of conditional sale—Foreclosure—Notice, defective, effect of.

The mere fact that parts of the seal of the District Judge are not legible, is not a fatal defect in a notice of foreclosure served under sections 7 and 8 of Regulation XVII of 1806. [p. 180, col. 1.]

Mehro v. *Suja*, 84 P. R. 1882; *Bakhtawari* v. *Shibbon Lal*, 13 Ind. Cas. 621; 59 P. R. 1912; 69 P. W. R. 1912; 121 P. L. R. 1912, distinguished.

Nor is an ambiguity in the specification of the date of the mortgage-deed fatal, where it is such that it could not have led to any misconception on the part of the mortgagor. [p. 180, col. 1.]

Nor is an omission of words describing the property mortgaged, fatal; where it could not have caused any misunderstanding. [p. 180, col. 1.]

Second appeal from the decree of the District Judge, Hissar, dated the 2nd May 1916, affirming that of the Munsif 1st Class, Hissar, dated the 6th May 1915, dismissing plaintiff's claim.

Bakhshi *Tek Chand*, for the Appellants.

Mr. *Nanak Chand*, for the Respondents.

JUDGMENT.—The facts of the case out of which the present appeal arises, are as follows. The land in suit belonged to one Nabu who mortgaged it to the plaintiffs by a deed of conditional sale. The mortgagees took proceedings under Regulation XVII of 1806 and got a notice served on the mortgagor. They subsequently sued the heirs of the latter Rukna and Fatta, for possession of the land in dispute and obtained a decree for possession on the 28th of November 1902. At that time Rukna was a minor. The decree-holders obtained possession of the property. On the 13th August 1913 Rukna filed a suit for possession of the land against the present plaintiffs, the original mortgagees, and obtained a decree on the 23rd April 1914, it being held that his guardian was negligent in the previous suit and that the decree passed therein, did not bind him. Plaintiffs filed an appeal against that decree in the Court of the District Judge, Hissar, who in accepting the appeal stated "I set aside the lower Court's decree for possession of land in plaintiff's favour and modify the decree and direct that the plaintiff be put in possession as before the *ex parte* decree, the parties being relegated to their original rights and the defendants-appellants may revive their original suit by applying to the Court concerned, on the basis of this decree and that Court will proceed with the case from the stage of sending a copy of the plaint to the other party and taking the *jawabdawa*." In accordance with this order, the original suit of 1902 was revived and has now been decided *de novo* by the lower Courts. The suit has been dismissed on the ground that the notice issued under Regulation XVII of 1806 was defective inasmuch as, (1) the seal of the Court issuing the notice is illegible; and (2) the specification of the date of the mortgage deed is ambiguous.

Plaintiffs have filed a second appeal to this Court. Counsel for the respondents supported the decree of the lower Appellate Court on the ground that the order of the District Judge of Hissar, dated the 12th October 1914 by which he revived the original suit, was illegal and that the lower Courts had no power to retry the original suit. Now, whether this order of the District Judge was right or wrong, the parties acquiesced in it and I am, therefore, of opinion that the defendants-respondents cannot now contest its legality.

Turning now to the notice, it is a fact that the seal of the District Judge imprinted thereon, is not wholly legible. It is, however, described in the notice as that of the District Judge and the words "Court" and the "District Judge" can be deciphered thereon. The notice is headed "*Ba ilas Sahib District Judge Bahadur, Zillah Hissar*," and is signed at the foot "P. D. Agnew, District Judge." There, therefore, could be no misunderstanding as to the Court from which the notice issued, and the seal should certainly in my opinion be assumed to be what it purports to be. The first Court followed *Mehro* v. *Suja* (1), but in that case no seal had been impressed at all. Moreover, the signature of the District Judge was not upon the notice but only his initials. The ruling is,

(1) 84 P. R. 1882.

therefore, distinguishable from the present case. Similarly in *Bakhtawari* v. *Shibban Lal* (2) it was held that all the conditions prescribed by sections 7 and 8 of Regulation XVII of 1806 had not been duly fulfilled, inasmuch as the notice did not bear the District Judge's seal. That case also is not in point. In my opinion the mere fact that parts of the seal of the District Judge are not legible, is not a fatal defect in the notice.

With reference to the second point, what we find is that the date of the mortgage-deed as shown in the notice, appears to be the 19th of August 1894; the date first appears to have been written 16th but a 9 has been superimposed on the 6. The ambiguity, if any, in the date cannot, in my opinion, have led to any misconception on the part of the mortgagor. In the endorsement on the notice it is stated that a copy of the petition had also been handed to the mortgagor and the petition gives the date of the mortgage-deed clearly in two separate places. I hold that the alleged ambiguity as to the date of the mortgage deed, is not a fatal defect in the notice.

One more defect has been brought to my notice which is not referred to in the lower Courts. In the last line but [illegible] of the notice there is a blank. The sentence reads as follows :— *ikhtayar hoga kch "Aur murtahin ,ra nalish diwani qabza marhuna par,,e."* *malkana* [illegible] *rds* describing the property mortgaged, have been omitted in this place. In my opinion this omission could not have caused any misunderstanding because the property mortgaged is fully described in the petition. Other points arising in the case have not been disposed of by the lower Courts.

I, therefore, accept the appeal and setting aside the order of the lower Courts remand the case to the Court of first instance for re decision in accordance with law. Stamps in this and in the lower Appellate Court will be refunded and other costs will be costs in the cause.

Appeal accepted; Case remanded.

(2) 13 Ind. Cas. 621; 59 P. R. 1912; 69 P. W. R. 1912; 121 P. L. R. 1912.

CALCUTTA HIGH COURT.

APPEALS FROM ORDERS NOS. 516, 574 AND 575 OF 1912.

April 3, 1918.

Present:—Mr. Justice Teunon and Mr. Justice Newbould.

IN M. A. No. 516 OF 1912.

AMINA KHATUN—APPLICANT—APPELLANT

versus

NAFAR CHANDRA PAL CHOWDHURY AND OTHERS—OPPOSITE PARTIES—RESPONDENTS.

IN M. A No. 574 OF 1912.

SRIKUMAR CHATTERJEE—APPELLANT

versus

CHANDRA BHUSAN BHATTACHARJEE—RECEIVER TO THE ESTATE OF INSOLVENT MUNSHI MAHAMMAD KAYEM AND OTHERS—RESPONDENTS.

IN M. A. No. 575 OF 1912

CHANDRA BHUSAN BISWAS—APPELLANT

versus

CHANDRA BHUSAN BHATTACHARJEE RECEIVER AND OTHERS—RESPONDENTS.

Provincial Insolvency Act (III of 1907), s. 36—Jurisdiction of Insolvency Court to decide claims based on transfers made more than two years before [illegible].

Under the Provincial Insolvency Act the Insolvency Court has no jurisdiction finally to decide claims to the insolvent's properties based on transfers made by the insolvent more than two years before his adjudication. [p. 181, col. 1.]

Appeals against the orders of the District Judge, Nadia, dated the 9th of September 1912.

Messrs. *A. K. Fuzlal Huq* and *Wahed Hossain*, for the Appellant.

Babus *Mohendra Nath Roy* and *Amarendra Nath Bose*, for the Respondent.

Babu *Biraj Mohan Mazumdar*, for the Deputy Registrar.

JUDGMENT.—These three appeals are directed against an order, dated 9th September 1912, made by the District Judge of Nadia in the exercise of insolvency jurisdiction.

It appears that one Munshi Mohamed Kayem was adjudicated an insolvent on the 1st of May 1911, and that when the Receiver appointed by the Court proceeded to sell his properties, the three appellants preferred claims to certain items. Their claims having been dismissed, they have preferred the present appeals.

In Appeal No. 516 the appellant is the insolvent's wife Amina Khatun. Her case

is that on the 21st July 1903 and 15th Magh 1310/1904 by two conveyances her husband transferred to her the properties she claims in satisfaction of a certain portion of her dower.

In Appeal No. 574 the appellant is one Srikumar Chatterjee. His claim is based on a purchase at a sale for arrears of cess effected on the 3rd of March 1909.

In Appeal No. 575 the appellant Chandra Bhusan Biswas was also a purchaser at a sale for arrears of cesses. In his case the sale and purchase took place on the 31st January 1906

From the dates we have given, it is apparent that the transfers in question in all three cases were made more than two years before the adjudication. Section 36 of the Provincial Insolvency Act has, therefore, no application. It follows that the Insolvency Court has no jurisdiction finally to determine the questions arising between the claimant appellants and the purchaser from the Receiver of the right, title and interest of the insolvent.

In this view it is unnecessary for us to go into the merits of the claims or to discuss the other contentions advanced by the parties, and we, therefore, dismiss these appeals. We make no orders as to costs.

Appeals dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 657 OF 1916.

March 12, 1918.

Present:—Mr. Justice Scott-Smith.

FOUJOO AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

KARAM DIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Appeal—Right of appeal, when can be exercised.

In order to entitle a person to appeal, he must be a party to the suit in which he seeks to appeal against a decree and he must be a person aggrieved by the decree. [p. 182, col 1.]

Plaintiffs sued for a declaration that an alienation of ancestral land made by their father shall not affect their reversionary rights. It appeared that one *K.* had already brought a suit for pre-emption of the land and on the present suit being filed he was made a defendant at his own request. Both suits were tried together and the plaintiff's suit was decreed and *K's* suit was dismissed. *K.* appealed in both cases and succeeded. The plaintiffs filed a second appeal:

Held, that inasmuch as *K.* was a party to the declaratory suit and had a right of pre-emption which he was seeking to enforce and was aggrieved by the decree granted to the plaintiffs that the sale should not affect their reversionary rights after the death of the vendor, he had a right to appeal. [p. 182, col. 1.]

Second appeal from the decree of the Additional Judge, Amritsar District, at Gurdaspur, dated the 4th December 1915, reversing that of the Honorary Civil Judge, exercising the powers of a Munsif, 1st Class, Amritsar, dated the 9th February 1914, decreeing the claim.

Bakhshi *Bhagat Ram Anand*, for the Appellants.

Bakhshi *Tek Chand*, for the Respondents.

JUDGMENT.—The plaintiffs appellants are the minor sons of Santa who sold certain land to Karam Din, Mela and Nabi Bakhsh on the 22nd May 1912 for Rs. 200. Kishen Singh, defendant-respondent, on the 19th May 1913 brought a suit for pre-emption of the land sold. Fauju and Teju, the present appellants, on the 10th July 1913 brought a suit for a declaration that the sale would not affect their reversionary rights after the death of their father.

Both the suits were heard together; the plaintiffs' suit was decreed and Kishen Singh's suit was dismissed. Kishen Singh was made a defendant in the declaratory suit at his own request. He appealed to the District Judge in both the cases. In his own case he was given a decree for pre-emption, and in the declaratory suit his appeal was accepted and the plaintiffs' suit was dismissed.

The plaintiffs have now filed a second appeal in this Court and it is contended on their behalf that Kishen Singh should not have been made a party in the declaratory suit and that he had no right to appeal from the decree passed in plaintiffs' favour in that suit. Counsel for the appellants cited certain rulings such as *Abdulla* v. *Amir-ud-Din* (1) in which it was laid down that a pre-emptor steps into the shoes of the vendee in respect of all

(1) 76 P. R. 1902; 113 P. L. R. 1902.

his rights. No authority, however, has been cited which is on all fours with the present case. The record of the declaratory suit shows that upon Kishen Singh's application he was made a party and the plaintiffs' Pleader stated that he had no objection. I, therefore, hold that no objection on the ground of misjoinder can be taken now.

In order to entitle a person to appeal, he must be a party to the suit in which he seeks to appeal against a decree and he must be a person aggrieved by the decree. Now Kishen Singh was a party to the declaratory suit and, therefore, the first requisite exists. He had a right of pre-emption and he was seeking to enforce it. He was certainly aggrieved by the decree granted to the plaintiffs that the sale should not affect their reversionary rights after the death of the vendor because if that decree stood and Kishen Singh was granted a decree for pre-emption, the sale in his favour would only enure for the life of the vendor. He was, therefore, interested in getting the declaratory decree set aside, and he had a right to appeal. The present appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

PATNA HIGH COURT.

PRIVY COUNCIL APPEAL No. 77 OF 1917.

March 21, 1918.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Mullick.

JANANDAN PRASAD THAKUR—APPELLANT

versus

Musammat JANABHATI THAKURAIN—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 110—Limitation Act (IX of 1908), s. 10, applicability of, to suit for accounts by minor against Administrator, whether substantial question of law.

In view of the state of authorities in India on the question of the applicability of section 10 of the Limitation Act to a suit by a minor against the administrator of his estate for accounts, the question is a substantial question of law within the meaning of section 110 of the Civil Procedure Code. [p. 183, col. 1.]

Application for leave to appeal to the Privy Council against the decision of Mr. Justice Sharafuddin and Mr. Justice Roe reported as 40 Ind. Cas. 860.

Messrs. *Rajendra Prasad* and *P. N. Singh*, for the Appellant.

Mr. *L. N. Singh*, for the Respondent.

JUDGMENT.—In this case the plaintiffs ask for a certificate under section 110 of the Civil Procedure Code that the case complies with the provisions of the section and is a fit one for appeal to His Majesty in Council. The decision of this Court from which it is sought to appeal, was a decision of affirmance and the question is whether there is a substantial question of law for decision by their Lordships of the Privy Council. The suit was instituted by the plaintiffs who were in the year 1894 minors and their estate to which they were entitled, was at that time put under the administration of the defendant No. 1 who was their uncle, he having been appointed administrator by the Court. In the year 1903 the younger of the two plaintiffs attained his majority but no account appears to have been rendered by the defendant as to his management of the estate and no action was taken by the plaintiffs to obtain an account from him until this suit was instituted on the 3rd September 1910. In the suit the plaintiffs claimed "that an account may be taken from defendant No. 1 of the income and expenditure of the plaintiffs' share of the estate during the management of defendant No. 1 from the year 1894 to the end of Bhado 1315 M. S. and that he may be ordered to pay to the plaintiffs the sum that may be found due by him on taking such accounts," and then there were further prayers in the plaint relating to specific properties in respect of which certain reliefs were claimed and the schedule of the properties was set out. It was found in respect to some of the properties with regard to which relief was claimed that it was not proved that these properties were purchased by the defendant out of the trust fund and as the plaintiffs had no means of ascertaining unless they obtained an account of how the trust fund had been used, it is not surprising that they had no evidence in respect of any particular property to show out of what fund it had been acquired. With regard to these properties the

suit was dismissed. With regard to others, that is to say, with regard to property which admittedly formed part of the trust fund, it was held that under the Limitation Act, Article 120 the period of limitation for suits mentioned in that Article being six years, no suit could be brought in 1910 by the plaintiffs because the period of the defendant's administration ended in the year 1903 and no suit having been brought within six years of that time it was found to be barred by Statute. The plaintiffs on the other hand contended that section 10 of the Limitation Act prevented the operation of Article 120 this being a case within the provisions of section 10. It was decided by a Bench of two Judges of this Court when the case was before them that section 10 had no application to the present case. This matter appears to us to be one which is by no means settled by the decisions in this country although it is claimed that there has been a consensus of opinion for some years with regard to the application of section 10 which would govern the present case. Having looked at the cases in question, it does not appear to us by any means certain that these cases are conclusive of the points which arise in the present case and we think that there does arise in this case a substantial question of law and there being no doubt whatever as to the value of the subject-matter in dispute, we agree that this is a fit case for appeal to His Majesty in Council and both as to value and nature complies with the provisions of section 110. The usual certificate should be granted. This application will, therefore, be allowed. The costs of this application will be costs in the cause. Hearing fee five gold *mohurs*.

Appeal allowed.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 383 OF 1915.

February 27, 1918.

Present:—Mr. Justice Scott-Smith and Mr. Justice Shadi Lal.

NARAIN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat GAINDO AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Succession—Self-acquired property—Banias of Palwal Tahsil, District Gurgaon—Sister versus *collaterals of 4th degree—Will, oral, title based on—Burden of proof.*

Among Banias of Palwal Tahsil, Gurgaon District, a sister has a preferential right of succession to self-acquired property against collaterals of the 4th degree. [p. 184, col. 1.]

Where a person bases his title on an oral Will the onus lies heavily on him of proving the precise words on which he relies [p. 184, col. 1.]

Babee Beer Pertab Sahee v. *Maharajah Rajender Pertab Sahee*, 12 M. I. A. 1 at p. 28; 9 W. R (P. C.) 15; 2 Suth. P. C. J. 114; 2 Sar. P. C. J. 348; 20 E. R. 241 (P. C.), followed.

First appeal from the decree of the Subordinate Judge, 1st Class, Gurgaon, dated the 20th November 1914, dismissing the claim.

Mr. *Roshan Lal*, for the Appellants.

Lala *Moti Sagar*, R. S., for the Respondents.

JUDGMENT.—The dispute in this case relates to the estate of one Tuhi Ram, a Bania of the village of Pirthala in the Palwal Tahsil of the Gurgaon District, and the main question for determination is whether the deceased's sister *Musammat* Gaindo, or the plaintiffs, his collaterals in the fourth degree, are entitled to inherit the property. The Subordinate Judge has recorded his finding in favour of the existence of a custom by which sisters exclude the collaterals of the fourth degree, and has also held that the oral Will in her favour propounded by *Musammat* Gaindo, has been established. We have listened to the arguments advanced by the learned Counsel on both sides and examined the evidence upon the record, and while dissenting from the view of the learned Judge on the *factum* of the Will, we are of opinion that his finding on the question of custom must be upheld.

As regards the Will, the evidence is of the weakest possible character; the only thing deposed to by the witnesses is that the deceased on his death-bed stated that *Musammat* Gaindo's money had been utilized in acquiring the property, and that she would be his heir after his death. This evidence even taken at its face value is hardly sufficient to prove the existence of a nuncupative Will. The learned Subordinate Judge states that the factum of the Will "is supported by *Musammat* Chhito's and Ram Kishen's statements;" but no such statements are to be found upon the record, and Mr. Moti Sagar for the respondents admits that he has been

unable to discover the statements referred to above.

As pointed out by their Lordships of the Privy Council in *Baboo Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee* (1). "He who rests his title on so uncertain a foundation as the spoken words of a man, since deceased, is bound to allege, as well as to prove, with the utmost precision, the words on which he relies, with every circumstance of time and place." The evidence in this case entirely fails to satisfy this test, and we must, therefore, hold that the defendant *Musammat* Gaindo has not succeeded in establishing her title on the strength of the alleged oral Will.

As regards the respective rights of the parties to inherit the estate of the deceased, it must be remembered that the property is admittedly self-acquired and consists of mortgagees' rights in certain plots of agricultural land. Further, it is admitted by the plaintiffs themselves that the parties are governed in the matter of inheritance by custom; and the sole question is whether the custom favours the succession of a sister in preference to collaterals in the fourth degree. Now, the witnesses Bucha (D. W. No. 1) and Ganga (D. W. No. 6) depose to two instances of the succession of a sister in the presence of collaterals, and it is to be observed that no attempt was made to challenge their testimony by cross-examining them with respect to those instances. Further, no fewer than seven cases of the succession of sister's sons are referred to by the witnesses, Chhajju, Badri Parshad and Munshi Ram; and though these instances are not directly applicable to the question of the succession of a sister, they have a material bearing upon the issue. As against this evidence our attention has been drawn to only two instances, one referred to by Ram Saran P. W. No. 7 which appears to be a case of uncles, who were members of a joint Hindu family with their nephew, taking the property by survivorship; and the other is an instance in which the debts exceeded the assets, *vide*, the evidence of Jiwan Lal, P. W. No. 14.

The *rivaj-i-am* of the district recorded at the Settlement of 1879 is against the succession of a sister, but the document purports to govern all the tribes without any discrimination, and cannot, therefore, be regarded as a weighty pronouncement on custom. Further, it is clear that an entry in the *rivaj-i-am* relates ordinarily to succession to ancestral land, unless the self-acquired property is expressly mentioned to be governed by the same rule. No such express mention is to be found in the document in question.

Having regard to the evidence set out above and to the special circumstances of the case, we are of opinion that the custom set up by *Musammat* Gaindo has been established. In this view it is unnecessary to express any opinion upon the title of the defendant, Ram Kishen, the uncle of the deceased, who, on account of his adoption in another family, is said to have lost his right of succession in his natural family.

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

Appeal dismissed.

(1) 12 M. I. A. 1 at p. 28; 9 W. R. (P. C.) 15; 2 Suth. P. C. J. 114; 2 Sar. P. C. J. 348; 20 E. R. 241 (P. C.).

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 510 OF 1916.

March 13, 1918.

Present:—Mr. Findlay, A. J. C.

BHIKAMCHAND GOKULCHAND PROPRIETORS OF THE FIRM OF BISESARDAS —DEFENDANTS—APPELLANTS

versus

HARPRASAD—PLAINTIFF—RESPONDENT.

C. P. Tenancy Act (XI of 1898), s. 94, scope of—Dispossession by non-lambardar-mortgagee—Limitation for suit.

One *K.* who was the owner of a 13-annas 4-pies share in a village mortgaged the share on 18th February 1895 with the defendant who obtained a sale decree and put the mortgaged property to sale and having himself purchased it obtained possession thereof in 1909. The plaintiff who was the owner of the remaining share, had already sold it to *B.* on 7th May 1907. The plaintiff filed the present suit on 4th May 1912 to recover possession of the land on the ground that by the transfer of his 2-annas 8-pies share he became an occupancy tenant of the village *sir* and ordinary tenant of the *khudkasht*. It was contended for the defendant that the right of the plaintiff as an occupancy tenant, if any, had become extinguished under sections 35 (4) and 94 of the C. P. Tenancy Act:

Held, that as the defendant took possession in 1909 *qua* mortgagee and not *qua lambardar*, section

94 of the C. P. Tenancy Act, which has reference only to relations between landlords and tenants, did not apply to the case. [p. 185, col. 2.]

Appeal from the decree of the District Judge, Raipur, dated the 12th July 1916, in Appeal No. 155 of 1913.

FACTS of the case will appear from the following extract from the judgment of the lower Appellate Court:—

The dispute related to 127 and odd acres of *sir* land of Mouza Khamaria. The village was owned by Nagbadia and he transferred a 13-annas 4-pies proprietary share in favour of his brothers Sobhit and others, who sold the share acquired by them to Kesholal, father of the plaintiff on 8th May 1894. Nagbadia on 16th July 1894 mortgaged the entire 16-annas share to Balmukund who assigned the mortgage to Kesholal and who obtained a foreclosure decree on 28th February 1899 and in pursuance of the decree Kesholal obtained possession of the villaga and home farm. Kesholal mortgaged the 13-annas 4-pies share with the appellants on 18th February 1895, who obtained a sale decree and put the mortgaged property to sale and having purchased the share obtained possession on 24th May 1909. The plaintiff who was the owner of the remaining 2-annas 8 pies share of the village, sold the share to Bansilal.

Plaintiff says that by the transfer of the 2-annas 8 pies share of the village, he became an occupancy tenant of the village *sir* and as the defendants took possession of the entire home farm in 1910 he has sued to recover possession of 127·95 acres of *sir* land of which he became an occupancy tenant and of 4·90 acres of *khudkasht* of which he became an ordinary tenant. In fact the plaintiff claimed possession of the entire *sir* and *khudkasht* lands of the entire village alleging that the home farm belonged to the 2 annas 8 pies share which was foreclosed by the father of the plaintiff and that the said lands did not appertain to the 13 annas 4 pies share of the village mortgaged to the defendant and purchased by them and that the said lands were not mortgaged to the defendants.

The first Court decreed the claim of the plaintiff in respect of the entire *sir* lands and so the defendants appealed to this Court. My predecessor reversed the decree of the Court and dismissed the suit of the plaintiff. The plaintiff appealed to the Court of the Judicial Commissioner. The appellant practically gave up his right to claim anything more than 2 annas 8 pies share in the *sir* lands, so his appeal was limited to the share mentioned above. The decree of this Court was reversed and the appeal was remanded for re-trial to this Court.

Dr. *H. S. Gour*, for the Appellant.

Mr. *K. K. Gandhe*, for the Respondents.

JUDGMENT.—The facts leading to this second appeal by the defendants Bhikamchand and Gokulchand are sufficiently clear from the judgment of the District Judge, Raipur, appealed against as well as from the earlier judgments in the case and it is unnecessary to recapitulate them here. I proceed at once, therefore, to a consideration of the matter raised in the second appeal. The first contention urged on behalf of the appellants is that the plaintiff-respondent had no right of suit inasmuch as he had already sold his 2 annas 8 pies share of Mouza Khamaria to Bansilal on 7th May 1907 and that the suit having been filed on 4th May 1912, his right as an occupancy tenant, if any, had become extinguished under sections 35 (4) and 94 of the C. P. Tenancy Act. This matter of limitation is dealt with in paragraph 12 of the lower Appellate Court's judgment and in paragraph 6 of that of the Sub-Judge. It is in particular urged in second appeal that the lower Appellate Court has failed to notice that the defendant appellant No. 1 was a *lambardar* and could, therefore, eject a tenant and thus the shorter period of limitation set up by section 94, would come into operation. This latter provision has obviously reference only to relations between landlord and tenant and it is sufficiently established that when the appellants took possession in 1909 they took possession *qua* mortgagees and not *qua lambardar*. Indeed until the appellants got possession, neither of them could in the nature of things be *lambardar*. Still further, their action in taking possession as mortgagees was in a sense an action adverse to that of the other co-sharers and it took place not for the benefit of the proprietary body as a whole but as

the result of a mortgage in which the other co-sharers had no interest. There seems to be, therefore, no good ground on which the limitation prescribed by section 94 of the Tenancy Act applies to his case.

An attempt has, however, been made to urge on behalf of the appellants that even if the ordinary rule of twelve years' adverse possession were applicable to this case, the present suit was time-barred. I cannot find, however, that this pleading was ever specifically put forward in the lower Courts and if it had been I do not think there was any chance of its success. The sale to Bansilal by plaintiff-respondent in 1907 excluded cultivating rights in *sir* and he remained in possession of at least a 2 annas 8-pies share of the *sir* land until he was dispossessed in 1909. The statement of Mr. Barat, Pleader, recorded on behalf of the plaintiff-respondent at an early state of the case on 26th September 1912 must, I think, be read in the light of the judgment of Batten, Additional Judicial Commissioner, dated 15th April 1915 who pointed out the confusion that had been introduced into the case by the extravagant claim originally put forward by the parties to this litigation to the effect that the whole *sir* land of the village fell into their respective share. In the peculiar circumstances of this case it is impossible to hold that plaintiff was not in juridical possession until 1909 and the presumption necessarily is that he was, I can see no reason, therefore, for holding that the present suit was barred by the ordinary rule of 12 years' adverse possession.

The point of limitation was the only one that has been seriously pressed in this Court. As regards ground 5 of the petition of appeal I need only say that the District Judge's finding that a 13-annas 4-pies share of the *sir* in the village was mortgaged is one for the disturbance of which no good grounds have been shown in this Court. These findings govern the appeal which is dismissed with costs on the appellants.

Appeal dismissed.

MADRAS HIGH COURT,

ORIGINAL SIDE APPEAL No. 3 OF 1917.

December 10, 1917.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Sadasiva Aiyar.

P. V. KOTHANDARAMASWAMI NAIDU —DEFENDANT—APPELLANT

versus

P. M. A. MUTHIA CHETTI—PLAINTIFF —RESPONDENT.

Negotiable Instruments Act (XXVI of 1881), s. 118 (c)—Negotiable instrument, endorsements on—Order of endorsements—Presumption.

In the absence of direct evidence that the endorsements on a negotiable instrument were made in a particular order, the statutory presumption under section 118 (*c*) of the Negotiable Instruments Act that they were made in the order in which they appear on the instrument, will prevail. [p. 187, col. 1.]

Per *Wallis, C. J.—Quære.*—Whether a suit can be filed on an endorsement made by a stranger on the back of a note, who does not satisfy the definition of an endorser [p. 186, col. 2.]

Appeal from the judgment of Mr. Justice Coutts Trotter passed in the exercise of the Original Jurisdiction of this Court, in Civil Suit No. 155 of 1914.

The Hon'ble Mr. *T. Rangachariar* and Mr. *K. C. Desikachariar*, for the Appellant.

Mr. *C. P. Ramasawmy Iyer*, for the Respondent.

JUDGMENT.

WALLIS, C. J.—This appeal raises an interesting question as to whether a suit can be filed on an endorsement made by a stranger on the back of a note, who does not satisfy the definition of an endorser. There is such a usage of law on the continent known as the making of an *aval*, which is recognised by section 56 of the English Bills of Exchange Act, but there is no recognition of it in the Indian Negotiable Instruments Act. It was with reference to the Bills of Exchange Act that we are told in the well-known words of Lord Halsbury in the *Vagliano case* (1) that the essence of a Code is to be exhaustive. We may apply that principle to the Negotiable Instruments Act, and say that we are not prepared to recognise this backing of bills by strangers. That is the view which I am at present disposed to take, but it is not necessary to express a final opinion on the point, because I think the appeal fails upon another ground.

(1) (1891) A. C. 107; 60 L. J. Q. B. 147; 64 L. T. 353; 39 W. R. 657; 55 J. P. 676.

BENODINI DEBYA v. HRIDOY NATH GHOSAL.

Section 118 of the Negotiable Instruments Act provides that the presumption is that the endorsements were made in the same order as the names appear on the back of the bill, and in this case it is the payee's name that appears first and then the name of the alleged indorser. There is evidence also that this was the case, though the evidence is not of a very satisfactory character. On the other hand, the defendants did not go into the box to establish that the endorsements were made in any other order. On the whole, I think that there is no sufficient evidence to rebut the presumption that the endorsements were made in the order in which they occur. If that be so, I think that there is sufficient ground to sue the endorsers of the promissory notes.

In the result, the appeal fails and must be dismissed with costs.

SADASIVA AIYAR, J.—Section 118, clause (*e*) of the Negotiable Instruments Act provides that the presumption shall be made, "that the endorsements appearing upon a negotiable instrument, were made in the order in which they appear thereon." In the present case, the 2nd defendant's (appellants') endorsement-signatures in Exhibit A series appear below the endorsement signatures of the 1st defendant, who is the payee in all the promissory notes. No oral evidence was adduced on the appellants' side to rebut this presumption raised by section 118, clause (*e*).

The appellants' learned Vakil (Mr. T. Rangachariar) relied on a statement in cross examination, made by the plaintiff as to the order in which the defendants made their endorsement-signatures. But the plaintiff has stated also in his deposition that the promissory notes used to be sent by the defendants through the 1st defendant's *gumasta* properly endorsed, and that the plaintiff's *gumasta* would receive from the 1st defendant's *gumasta*. The plaintiff himself evidently does not know much about these matters. Mr. Rangachariar also relied upon an ambiguous statement made by the plaintiff in the plaint Exhibit B in the suit on the mortgage instituted by him against defendants Nos. 1 and 2. The above, however, are wholly insufficient to rebut the statutory presumption that the 1st defendant as payee made the endorsement-signature on the back of the note, before the 2nd defendant and that the 2nd defendant afterwards made himself liable as the next endorser to the ultimate holder in due course, namely, the plaintiff. On these findings of facts, the interesting legal questions strenuously argued by Mr. Rangachariar do not arise.

Therefore I agree with my Lord the Chief Justice that the appeal fails and should be dismissed with costs.

Appeal dismissed.

M. C. P.

CALCUTTA HIGH COURT.

APPEALS FROM ORIGINAL DECREES NOS. 210 AND 347 OF 1915.

May 17, 1917.

Present:—Mr. Justice Fletcher and Mr. Justice Newbould.

IN No. 210 OF 1915

BENODINI DEBYA—OBJECTOR No. 1—APPELLANT

versus

HRIDOY NATH GHOSHAL—PETITIONER, AND DURLAV DAS BASAK—OBJECTOR No. 2—RESPONDENTS

IN No. 347 OF 1915

DURLAV DAS BYSAK—DEFENDANT No. 2—APPELLANT

versus

HRIDOY NATH GHOSAL AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Probate, delay in taking, consequences of.

Although a Will propounded a long time after the death of the testator must give rise to a case in which the Court is bound to scrutinize the evidence very carefully, there is no rule of the law of evidence that a Will propounded so late, is incapable of being proved. [p. 189, col. 1.]

Where an application for Probate of a Will was made 17 years after the death of the testatrix who was an illiterate Hindu lady:

Held, that the prior history of the case was not unworthy of consideration and that the case demanded a careful investigation by the Court. [p. 189, col. 1.]

Appeal against the decree of the District Judge, 24-Pergannas, dated the 10th of May 1915.

Babus *Manmatho Nath Mukherjee, Jogendra Nath Mukherjee, Nanda Gopal Banerjee* and *Panna Lall Chatterjee*, for the Appellant.

BENODINI DEBYA v. HRIDOY NATH GHOSHAL.

Babus *Surendra Chandra Sen*, *Jotindra Nath Bose* and *Surendra Nath Bose*, for the Respondents.

JUDGMENT.—These two appeals are preferred by the objectors in a Probate application. The respondent in the present appeal who is a daughter's son of a deceased Hindu lady Harasundari Debi propounded a document dated the 24th July 1896 as the last Will of Harasundari. The grant of Probate was opposed by the first appellant Benodini Debya who is the widow of the only son of Hara Sundari and also by the second appellant who is a mortgagee.

The case put forward was that Hara Sundari made this Will on the 24th July 1896 and died in the year 1896 or 1897, the state of affairs was that she had three daughters and one son Hari Das. Hari Das died on the 28th November 1913 and the Will was not put forward for proof until after his death. The case was clearly one demanding careful investigation having regard amongst other reasons, to the long time which elapsed between the death of the testatrix and the date on which the document was put forward for Probate and also because Hara Sundari was an illiterate Hindu lady, the case would have to be carefully scrutinized. On that footing the prior history is not unworthy of consideration in this case. I think that if the Will was made there could be little doubt that it was made because the only son of the deceased Hara Sundari was of loose morals and addicted to dissolute and drunken habits. The evidence seems to show that he had early in his career disposed of two gardens or garden houses for the purpose of satisfying his pleasures in these ways. There seems to be no doubt that this property formed the subject of a deed of gift that was given by Hari Das to his mother Hara Sundari and the reason of that deed of gift was to preserve a certain portion of the estate which was the property of Hari Das from being wasted and spent by Hari Das. The case would, therefore, be that unless this lady Hara Sundari had left a Will, in the ordinary course, the property would go back to her son Hari Das and the deed of gift would have been presumably a useless transaction.

Now in a case like this the Judge had before him in the primary Court direct evidence proving the preparation and execution of the Will. It is quite true that that evidence is not without certain discrepancies. But the learned Judge having seen the witnesses and heard them give their evidence and observed their demeanour, has come to the conclusion that these witnesses are witnesses of credit. That is the first point that arises on the present appeal. What has the learned Vakil in support of the appeal been able to place before us to lead us to come to a different conclusion with regard to these witnesses from that of the learned Judge who saw them in the witness-box give their evidence? He has been able to suggest nothing except that the case was one for careful scrutiny and enquiry which it clearly was. But the learned Judge had to come to a conclusion one way or the other. After careful enquiry and having heard the witnesses on both sides, he came to the conclusion that these witnesses are witnesses of credit. Nothing has been shown to us which would entitle us to come to a different conclusion from that of the learned Judge in the Court below.

The witness to whom the learned Judge paid considerable attention was a Brahmin witness named Shamapada Chatterjee who had reached the mature age of 80 years and retired to the city of Benares with a person who is called in the evidence either his relative or *pseudo* relative. The case put forward by the learned Vakil for the appellant which he states on his own knowledge is that many people retire to Benares for some indirect reason or other, that they go there because they may more easily marry their family or for some similar reason. Making every allowance for the personal knowledge of the learned gentleman a Hindu of the mature age of 80 years, would not ordinarily have unmarried children, none of this witness's family went to Benares with him except that woman who cooks his meal and who is described as a relative or *pseudo* relative. The relationship between them appears from the evidence to be a slender one. The line of cross-examination of this witness as to his relationship with this relative, seems to suggest that some more tender relationship

existed between these two persons than what the witness was willing to disclose. That may or may not be so. That is no reason for disbelieving this man. Then it is said that his memory improved as he went through this long and tedious examination and cross-examination before the Commissioner. Well his memory did improve. But it is not unnatural if we find that on the 19th day from the commencement of his examination he was able to repeat the contents of the Will by heart. I expect that not only he but also every Pleader and Commissioner would have known the contents of the Will by that time. The evidence of this witness seems to be substantially in accord with the evidence of the witnesses who appeared before the learned Judge and whom the learned Judge believed. On the other hand, against this evidence which the learned Judge has believed, there is nothing except the witnesses who stated that they did not hear anything of the Will.

The second point put forward against these witnesses is that if their evidence is true why such a long period elapsed between the death of Hara Sundari and the propounding of the Will. There seems to be many reasons for this, one of them being that Wills in this country sometimes, I do not say always, are not propounded until it becomes necessary to propound them. Avoidance of Probate duty is in some cases sufficient reason for keeping the Will back until there is a strong reason for putting forward. Although a Will put forward so late as this one, must give rise to a case in which the Court is bound to scrutinize the evidence very carefully, there is no rule of the law of evidence that a Will propounded 17 years after the death of the testatrix, is incapable of being proved.

Nothing has been shown to us in this case which would entitle us to displace the finding of fact made by the learned Judge in the Court below on the evidence of the attesting witnesses whom he saw give their evidence before him. He came to the conclusion on that testimony that this lady Hara Sundari did in fact execute the Will. That being so, we must accept that the document in fact was the last Will of Hara Sundari. That being so, the present appeals fail and must be dismissed with costs. We assess the hearing fee in these two appeals at Rs. 250.

Appeals dismissed.

PATNA HIGH COURT.

CIVIL REVISION No. 113 OF 1917.

March 22, 1918.

Present:—Mr. Justice Chapman and Mr. Justice Atkinson.

JUGESHAR RAI AND OTHERS—PETITIONERS

versus

RAILAL BAHADUR AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 2 (2), 100, O. IX, r. 8—Decree—Dismissal in presence of one of several plaintiffs, whether decree—Appeal, whether lies—Appeal, second, maintainability of.

On a date fixed for the hearing of a case one of the plaintiffs appeared and made an application for adjournment. The Court rejected the application and on the same day passed the following order "No further step is taken. The case is dismissed with costs":

Held, that as one of the plaintiffs was present the order of dismissal amounted to a decree and was not one of dismissal for default and an appeal lay against it to the District Judge and from the latter's order a second appeal lay to the High Court. [p. 190, col. 1.]

Civil Revision from an order of the District Judge, Mozuffapore.

Mr. *Nirsu Narain Singh*, for the Petitions.

Messrs. *Kulwant Sahay*, *Rai Guru Saran Prasad* and *Murari Prasad*, for the Respondents.

JUDGMENT.—This is an application in revision in respect of an order made by the Munsif of Hajipur dismissing a suit. The suit was brought by a tenant for the recovery of possession of the land from his landlord. It was filed on the 15th of June 1915. Some defect appears to have arisen in the matter of obtaining a proper service of the summons. The written statement was not filed till the 14th of April 1916. Issues were framed on the 18th of April 1916 and an order was recorded in the order-sheet adjourning the case to the 6th of May 1916. The case was, however, in fact taken up on the 5th and not the 6th of May 1916. On that date one of the plaintiffs was present and an application

for adjournment was presented for the purpose of filing a list of witnesses and documentary evidence. The Munsif thereupon passed an order in the following terms: "The case is one year old nearly. Plaintiffs' petition for time is very harassing. Therefore it is rejected". On the same date the learned Munsif made the following order: "No further step is taken. The case is dismissed with costs". From this order an appeal was taken by the plaintiff to the District Judge and the learned Judge held that no appeal lay to him and accordingly dismissed the appeal making, however, no order as to costs. Against the order of the learned District Judge we have been moved in revision. We are of opinion that the learned District Judge fell into an error in holding that no appeal lay to him. One at least of the plaintiffs was present when the case was taken up for hearing, therefore it cannot be held to be a dismissal for default. The learned District Judge should have taken up the appeal and determined whether the application for adjournment was properly refused or not. On behalf of the opposite party it has been pointed out that if we hold that an appeal lay to the District Judge, it must be on the ground that the order of the Munsif was a decree within the meaning of the definition of a decree given in the Civil Procedure Code, and that accordingly the only relief open to the petitioners is by way of second appeal and not by way of revision. This contention appears to us to be correct and we direct that this application in revision be treated as a second appeal. No question of Court-fee arises inasmuch as the applicant has paid more Court-fee than he would be required to pay in the case of a second appeal. There is, however, one matter which we must notice in the order which we shall make. It appears to us from the fact that the application for adjournment was filed upon the 5th of May that the plaintiffs knew that that was the date fixed for the hearing of their case and we do not believe the statement to the effect that they were not aware that that was the date fixed for the disposal of their case. In these circumstances the order which we shall make is this. We set aside the order of the learned District Judge dismissing the appeal and we direct that upon his being satisfied that the appellant has paid to the respondent the costs incurred by the respondent, he do re-admit the appeal and hear and dispose of it on merits. The learned District Judge is further directed to allow a reasonable time for the payment of the costs by the appellant to the respondent and upon his being satisfied that these costs have been paid within that time, he will admit the appeal. If the costs are not paid within such time as the learned District Judge thinks reasonable, he will dismiss the appeal.

Let the record of this case be sent down at once.

Record sent down.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 756 OF 1916.

April 4, 1918.

Present:—Mr. Justice Fletcher and Justice Sir Syed Shamsul Huda, KT.

THE HON'BLE MAHARAJA RANJIT SINHA—DEFENDANT—APPELLANT

versus

ABDUR RAHIM KHAN CHOWDHURY—PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (*VIII B. C. of* 1885), *ss.* 52, 195—Patnidar, *whether can apply for abatement of rent.*

A *patnidar* is entitled to make an application under section 52 of the Bengal Tenancy Act for abatement of rent. Section 195 of the Act does not prevent section 52 from applying to the case of a *patnidar*. [p. 191, col. 2.]

Appeal against the decree of the District Judge, Rajshahye, dated the 25th September 1915, affirming that of the Subordinate Judge of that District, dated the 15th February 1915.

FACTS appear from the judgment.

Babu *Satish Chundra Ghose* (with him Babus *Preo Sunker Mazumdar* and *Phanindro Lal Maitro*), for the Appellants:—The suit was for abatement of rent and cesses by a *patnidar* in respect of land acquired by Government. The Courts below granted the abatement of rent and allowed the plaintiff to withdraw the claim for cesses with liberty to bring a

fresh suit for the same cause of action, My *first* point is that the principle of section 52 of the Bengal Tenancy Act does not apply in the case of a *patni* tenure; *secondly* as to withdrawal, the Judge is wrong in allowing the plaintiff liberty to withdraw a portion of the claim, the present appeal is against the whole decree.

[FLETCHER, J.—The Judge says no appeal lay, but if there was a right of appeal he agreed with the Court of first instance. The only point is whether section 52 of the Bengal Tenancy Act does apply to *patni* tenures, where is the authority that section 52 does not apply?]

I do not find any authority on the point but I rely on the case reported as *Bhobani Nath Chuckerbutty* v. *Land Acquisition Deputy Collector of Bogra* (1).

[SHAMSUL HUDA, J.—It does not affect the patni Regulation. Why should not section 52 apply? The section is very wide.]

The case in *Bhobani Nath Chuckerbutty* v. *Land Acquisition Deputy Collector of Bogra* (1) is in my favour.

[FLETCHER, J.—The case is one of apportionment of compensation money.]

I shall draw your Lordship's attention to clause (*e*) of section 195 of the Bengal Tenancy Act.

[FLETCHER, J.—Section 52 does not affect any enactment relating to *patni* tenure.]

Babu *Gagan Chand Baral*, for the Respondent was not heard in reply.

JUDGMENT.

FLETCHER, J.—This is an appeal by the defendant, the Zemindar, against the decision of the learned District Judge of Rajshahye, affirming the decision of the learned Subordinate Judge of the same place. The suit was brought for abatement of rent by a *patnidar* in respect of 75 *bighas* of land compulsorily acquired by the Government under the provisions of the Land Acquisition Act. The suit was instituted for abatement of rent and also for abatement of cesses. In the course of the proceedings, the plaintiff applied to the learned Subordinate Judge for leave to withdraw his claim for cesses, with liberty to bring a fresh suit on the same cause of action. The first Court allowed that and granted an abatement of the rent. The defendant appealed to the learned District Judge and the learned District Judge decided as follows: First of all, with regard to the lease granted to the plaintiff to withdraw his claim for cesses with liberty to bring a fresh suit on the same cause of action, the learned Judge held that no appeal lay but if there was a right of appeal, he agreed with the view of the learned Subordinate Judge granting liberty to withdraw the suit. On the second point, the learned District Judge came to the same conclusion as the learned Judge of the Court of first instance.

The only point pressed in the present appeal is this. The learned Judges in the lower Courts have proceeded under the provisions of section 52 of the Bengal Tenancy Act and on the principle there defined. Section 52 says that every tenant shall be entitled to apply. A *patnidar* is a tenant and so *prima facie* he is entitled to make an application under section 52. It is said, however, that section 195 of the Act prevents section 52 from applying to the case of a *patnidar* on the ground that clause (*e*) of that section says that nothing contained in the Bengal Tenancy Act shall affect any enactment relating to *patni*-tenures in so far as it relates to those tenures. Section 52 does not affect any enactment relating to *patni*-tenures. It is quite clear, in my view, that the conclusion arrived at by the learned District Judge is right. It is suggested that that view is opposed to the decision of this Court reported as *Bhobani Nath Chuckerbutty* v. *Land Acquisition Deputy Collector of Bogra* (1). There is nothing in that decision to suggest that section 52 does not apply to a tenant who is a *patnidar*. The appeal fails and is dismissed with costs.

SHAMSUL HUDA, J.—I agree.

Appeal dismissed.

(1) 7 C. W. N. 130,

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 16 OF 1917.

January 22, 1918.

Present:—Mr. Batten, A. J. C.

PURANLAL AND ANOTHER—DEFENDANTS—APPELLANTS

versus

VENKATRAO GUJAR—PLAINTIFF—RESPONDENT.

C. P. Courts of Wards Act (XXIV of 1899), s. 16 (2), (b), interpretation of—Contract by guardian, not for benefit of minor, whether can be specifically enforced.

The words "for the preservation and benefit of such property" in section 16 (2) (*b*) of the Court of Wards Act should be interpreted in the light of the usual powers of guardians to bind the estates of minors.

No decree for specific performance of an agreement for transfer made by his guardian should be passed against a minor unless the Court is quite certain that the agreement was for the benefit of the minor and that it would be for his benefit that it should be enforced.

Appeal from the decree of the Additional District Judge, Nagpur, dated the 19th September 1916, in Appeal No. 163 of 1916.

Mr. *Atmaram Bhagwant*, for the Appellants.

Mr. *W. H. Dhabe*, for the Respondent.

JUDGMENT.—In this case while the plaintiff was a minor, the Court of Ward let out the land in suit for a term of ten years in renewal of a previous lease for 20 years. The lease has now expired and the defendants claim to remain in possession on the ground that they had the right specifically to enforce a contract for an unspecified term of years. The main ground of appeal on which the District Judge has dismissed the defendant's appeal is that even if the contract for a renewal of the lease were sufficiently precise to be capable of specific enforcement if the contract had been made between adults, yet the contract is one which cannot be specifically enforced against the minor as it is not for the preservation or benefit of such property that a fresh lease be entered into. The words "for the preservation or benefit of such property" are taken from section 16 (2) (*b*) of the Courts of Wards Act applicable to these Provinces. In interpreting these words regard should be had to the usual powers of guardians to bind the estates of minors. There are a large number of decisions collected together by Trevelyan at page 167 of his "Law relating to Minors",

5th Edition. The effect of these rulings is that the Court will not decree against a minor for specific performance of an agreement for transfer made by his guardian unless it be quite certain that the agreement was for the benefit of the minor and that it would be for his benefit that it should be enforced. It is impossible to hold that it would be for the benefit of the minor that this contract for specific performance should be decreed against him, and it is equally difficult to imagine that there was any necessity for inserting such conditions in the renewal of the lease for 10 years. It is perfectly feasible to get a tenant for 30 years without making any promise to give a fresh lease at the termination of that period. To enforce the contract, if it be a contract, for specific performance against the minor would be to act directly contrary to his interests. It is not necessary to refer to the grounds of appeal which deal with other points.

The appeal is dismissed with costs.

Appeal dismissed.

PATNA HIGH COURT.

PRIVY COUNCIL APPEALS NOS. 69 AND 70 OF 1917.

December 5, 1917.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Chapman.

Rai BAIJ NATH GOENKA *Bahadur*—APPELLANT

versus

Hon'ble Maharaja SIR RAMESHWAR SINGH—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 2 (2), 47, 109 (a)—Appeal to His Majesty in Council—'Decree', meaning of—Execution, determination of question in, whether final order or decree—Remand, order of, whether appealable to His Majesty in Council—Interlocutory order.

Per *Dawson Miller, C. J.*—A decision on a question relating to the execution, discharge or satisfaction of a decree and which is a matter in controversy in the suit, must be deemed to be included in the definition of a decree given in section 2 (2) of the Civil Procedure Code provided the judgment conclusively determines the rights of the parties in that matter. [p. 194. col. 1.]

BAIJ NATH GOENNKA BAHADUR v. RAMESHWAR SINGH.

An order of remand can be a subject of appeal to His Majesty in Council provided the question involved in the order is a cardinal point in the case. [p. 195, col. 2.]

Plaintiffs obtained an Order in Council for possession of certain shares in a *mahal*. In the meantime, however, the *mahal* had been partitioned and the plaintiffs had been allotted shares other than those for which they were suing. They prayed for execution against the substituted shares but the executing Court rejected their application on the ground that they could not ask for the ascertainment of the shares allotted to them in the execution department. On appeal, the High Court directed the executing Court to hold the necessary enquiries and to execute the order with reference to the substituted shares:

Held, that the order of the High Court conclusively determined the rights of the parties in a matter which went to the whole root of the proceedings and was, therefore, a decree within the meaning of section 109 (*a*) of the Civil Procedure Code. [p. 194, col. 2.]

Per *Chapman*, *J.*—The order of the High Court was an interlocutory order directing procedure and was, therefore, not a final order within the meaning of section 109 *a*) of the Civil Procedure Code. [p. 196, col. 1.]

Application for leave to appeal to the Privy Council from the decision of Sir Edward Chamier, Kt., Chief Justice, and Mr. Justice Roe, dated the 24th April 1917, overruling the decision of the Subordinate Judge, Monghyr, dated the 2nd February 1916

Messrs. *Pugh* and *Naresh Chandra Sinha*, for the Appellant.

Messrs. *Sinha* and *Kulwant Sahay*, for the Respondent.

JUDGMENT.

MILLER, C. J.—In this case application is made for leave to appeal to His Majesty in Council from a decision of this Court dated the 24th April last overruling a decision of the Subordinate Judge of Monghyr. The value of the subject-matter of the suit is over Rs. 10,000 but objection is taken that the judgment sought to be appealed from, is not a decree or final order within the meaning of section 109 (*a*) of the Code of Civil Procedure, 1908. The respondent and others instituted a suit to set aside a revenue sale of the *Ijmali* share in the Mahal Bist Hazari and to recover possession and mesne profits and after protracted litigation eventually obtained an order of His Majesty in Council in their favour. At the time the suit was instituted, partition proceedings were and had been for a long time pending under the Estates Partition Act in respect of the *mahal* the subject-matter of the suit. The partition proceedings terminated after the present suit commenced but some time before the appeal was heard by His Majesty in Council. The result of the partition proceedings was that the plaintiffs in that suit were in many, if not all, cases allotted other shares and interests—in some cases in different villages—in lieu of their original shares in the present estate. This matter was not mentioned to their Lordships of the Privy Council and the Order-in-Council does not purport to give the respondents possession of the substituted shares and interests but only of the original shares. The respondents having applied to the Court under Order XLV, rule 15, the matter was referred for execution to the Subordinate Judge before whom the suit originally came. The respondents (the applicants for execution of the Order-in-Council) prayed not for execution against the shares specified in the schedule to the plaint—but against the substituted shares and interests allotted under the partition. Objection was taken that the Order-in-Council gave no right or title to the decree-holders to possession of the substituted shares and the Subordinate Judge decided that the decree-holders were not entitled by proceedings in the execution department to ask him to ascertain what estates and interests had been substituted or to get possession of the substituted estates and interests and dismissed the case. The ground of this decision was as I understand it, that the Order in-Council disclosed no right of possession to the substituted estates and, therefore, it was unnecessary to hold an enquiry as the foundation of the claim was not proved. On appeal to this Court against the decision of the Subordinate Judge, the appeal was allowed and the Subordinate Judge was directed to restore the case to the file and to hold the necessary enquiries and to execute the order with reference to the substituted estates and interests. As I read this judgment, it was an adjudication that the plaintiffs in the suit were entitled to possession of the substituted estates when the same had been ascertained by the Subordinate Judge in the execution proceedings. The main question in the appeal was one which went to the foundation of the plaintiffs' right to claim

at all and was decided in their favour and could not be re-opened in the execution proceedings. The applicants now ask for leave to appeal from that decision to His Majesty in Council. Whether such an appeal lies, depends upon the interpretation to be placed upon section 109 (*a*) of the Code of Civil Procedure. It is contended by the respondents that the judgment sought to be appealed from, is not a decree or final order within the meaning of that section but is merely interlocutory and one directing procedure. I cannot accept this view. "Decree" is defined in section 2 (2) of the Code as "the formal expression of an adjudication which so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 47 or section 144". Then follow two exceptions which are not material in this case. The section then continues by way of explanation "A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final."

From this definition it is clear that a decree must conclusively determine the rights of the parties with regard to some matter in controversy in the suit although it need not finally dispose of the suit. Further, it must be observed that the word decree shall be deemed to include the determination of any question within section 47 of the Code. It would appear, therefore, that questions within section 47 where there is a controversy must be treated as if they were matters in controversy in the suit. The questions for determination in section 47 include all questions between the parties relating to the execution, discharge or satisfaction of the decree. The question now in dispute is, in my opinion, one relating to the execution, discharge or satisfaction of the decree and is a matter in controversy in the suit and must be deemed to be included in the definition set out in section 2 (2) provided that the judgment sought to be appealed from, conclusively determines the rights of the parties in that matter. It is not easy and perhaps impossible to reconcile the numerous decisions that have been given with regard to the meaning of the words decree or final order and similar expressions in the different High Courts of this country. But this Court should endeavour to give expression to the rulings of their Lordships of the Privy Council in so far as they have been expressed in cases of this nature. In *Rahimbhoy Habibbhoy* v. *Turner* (1), the question for decision was whether a decree directing accounts to be taken between the parties, was final within the meaning of section 595 of the Civil Procedure Code, 1882. The plaintiff in the suit alleged that the defendant was accountable to him on several claims. The defendant alleged that he had legal defences to all the claims and was not accountable at all. The Court held that as to some of the claims the defences were invalid and directed an account to be taken. The Court refused leave to appeal on the ground that their judgment was not a final order. The defendant then petitioned Her Majesty in Council to exercise the royal prerogative to admit an appeal but confined his argument to the ground that the Court below did not rightly interpret the Code. Lord Hobhouse in delivering the judgment of their Lordships of the Privy Council pointed out that although in terms the decree did not declare the liability of the defendant it in effect did so; and as the real question in issue was the liability of the defendant the decree dealt with a cardinal point of the suit and determined it finally against the defendant and, therefore, came within the meaning of the section.

In the present proceedings in execution one of the main cardinal issues between the parties was whether the substituted shares and interests against which execution was sought, were liable at all under the Order-in-Council. Whichever way this question was decided it conclusively determined the rights of the parties in a matter which went to the whole root of the proceedings.

The case of *Bhup Indar Bahadur Singh* v. *Bijai Bahadur Singh* (2) was in many

(1) 18 I. A. 6; 15 B. 155; 15 Ind. Jur. 35; 5 Sar. P. C. J. 639; 8 Ind. Dec. (N. s.) 104 (P. C.).
(2) 23 A. 152; 2 Bom. L. R. 978; 27 I. A. 209; 5 C. W. N. 52 (P. C.).

respects similar to the present case. The plaintiff there obtained a decree afterwards affirmed by Order-in-Council awarding him possession of an estate with future mesne profits. In execution proceedings the plaintiff recovered possession and a contest afterwards arose as to the period over which mesne profits were recoverable. This was argued as a preliminary point. On appeal the High Court varying a decision of the Court below found the plaintiff entitled to mesne profits from the institution of the suit until the date of obtaining possession. They overruled an objection that under the Procedure Code no appeal lay to the High Court for want of finality in the decree. On appeal to Her Majesty in Council the same point was again urged and dealt with in the judgment. Their Lordships were of opinion that the decision as to the period of mesne profits was final in its essence. On page 156 this passage occurs "It resembles in principle a decree for an account made at the hearing of a cause which is final against the party denying liability to account and is appealable, though it is also in another way interlocutory and may result in the exoneration of the accounting party or even in the award of a balance in his favour. And it can make no difference in point of principle whether the decision be in favour of or against the liability to account. It is equally final in its effect and as such equally open to appeal." The judgment went on to test the question apart from general principles, on the construction of the Code then in force which by section 2 defined "decree" as "the formal expression of an adjudication upon any right claimed or defence set up in a Civil Court when such adjudication so far as regards the Court expressing it, *decides the suit*..... An order determining any question mentioned or referred to in section 244 (section 47 of the present Code)..... is within this definition" and came to the conclusion that the plaint and obvious meaning of section 2 was to make the order an appealable decree. Applying the same line of reasoning to the present case I can see no reason why the adjudication now under consideration should not be included in the definition of "decree" in section 2 (2) of the Code of 1908 including as it does the determination of any question within section 47.

It has been argued before us that a remand order cannot be a legitimate subject of appeal to His Majesty in Council. This, in my opinion, is stating the matter too widely. In *Ananda Gopal Gossain* v. *Nafar Chandra Pal Chowdhry* (3), a suit was brought under section 167 of the Bengal Tenancy Act to annul certain encumbrances. The Subordinate Judge of Nadia held that the suit could not be maintained on the ground that service of notices had not been proved and that it was otherwise defective for non-joinder of parties. The High Court differed as to the service and remanded the case for addition of parties and re-trial on the merits. On an application to appeal to His Majesty in Council it was argued that a remand order could not be final. Sir Francis Maclean, C. J., decided that although on the face of it the order was one of remand, the question involved was a cardinal point in the case since, if the view of the Subordinate Judge were correct there was an end of the suit and admitted the appeal. Applying the same principle to the present case the same result follows.

I do not lose sight of the fact that there is a series of cases in which it has been held that the dismissal of a suit on the ground that it is barred by the Limitation Act or by section 43 of the old Code (now Order II, rule 2 of the rules under the present Code) is not a final order from which appeals will lie. Cases of this class may perhaps be reconciled with the principles governing the cases already referred to on the ground that such decisions do not purport to deal with the merits of the case nor even proceed as far as the point where it becomes necessary to determine the rights of the parties which go to the foundation of the suit. However this may be, if and in so far as there is any conflict, I am bound to apply the principles enunciated by their Lordships of the Privy Council which, in my opinion, govern the present case and I would order that a certificate be granted that the case fulfils the requirements of section 110 of the Code of Civil Procedure and is, therefore, a fit one for appeal to His Majesty in Council.

(3) 35 C. 618; 12 C. W. N. 545; 8 C. L. J. 168.

CHAPMAN, J.—I regret that I do not feel entirely able to concur. If a defendant applies for an order that the plaint be rejected upon the ground that the suit appears from the statements in the plaint to be barred by law Order VII, rules 11 (*d*) and the Court decides against the defendant, the decision is not a decree and is not appealable. This is apparent from the definition of the word decree in sub-section 2 of section 2 of the Code of Civil Procedure where it is said that the meaning of the word decree shall be deemed to include the rejection of a plaint. Upon the principle *expressio unius est exclusio alterius*, it is clear that an order deciding that a plaint shall not be rejected, is not included in the meaning of the word decree. In my opinion a mere determination that a plaintiff has a right to sue, is not a determination of his right with regard to all or any of the matters in controversy in the suit within the meaning of the definition of the word decree above referred to. The order of this Court in the present case was to the effect that it did not appear from the statements in the application for execution that the application was barred by any law. The order merely decided that the applicant had the right to apply. Applying the principles above indicated, I am of opinion that the order was not a decree.

If a decree-holder institutes a suit instead of making an application and the opposite party objects that the suit is barred by the terms of section 47 of the Code, an order overruling that objection is not, as I have shown above, appealable. In a converse case such as the present where an application for execution has been made and the preliminary objection that the procedure should have been by suit has been overruled, it is, in my opinion, difficult to say that the order can rightly be held to be a decree.

The order of this Court was, in my opinion, an interlocutory order directing procedure and was, therefore, not a final order. I rely upon the judgment of their Lordships of the Privy Council in the case of *Radha Kishan* v. *Collector of Jaunpur* (4).

Order Accordingly.

(4) 23 A. 220; 28 I. A. 28; 5 C. W. N. 133 (P. C.).

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1452 OF 1915.

January 31, 1918.

Present:—Mr. Justice Richardson and Mr. Justice Beachcroft.

JAHURMUL BABU—PLAINTIFF—APPELLANT

versus

KERAMUTULLAH MOLLA AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Rent received by gomasta *of landlord, whether sufficient to prove tenancy.*

In the absence of evidence to the contrary, the ordinary presumption would be that the *gomasta* of a landlord performed his duty and duly delivered the rent collected by him to his employer the landlord. Therefore independently of the question whether a *gomasta* had authority to grant an *amalnamah* or settle a holding, the receipt of rent by him on behalf of his employer from the person in occupation of a holding is sufficient to prove the tenancy of the latter. [p. 197, col. 2.]

Appeal against the decree of the District Judge, Rajshahye, dated the 20th March 1915, affirming that of the Subordinate Judge of that District, dated the 25th March 1915.

FACTS appear from the judgment.

Babu *Surendra Nath Ghoshal* (with him Babu *Bireswar Bagchi*), for the Appellant.—The appeal arises out of a suit for ejectment of the defendant as a trespasser. The defendant alleges that he has been inducted into the land by the plaintiff's Tahsildar and has been recognised as a tenant by the acceptance of rent by the said Tahsildar. The Court below was wrong in giving effect to the defendant's contention inasmuch as there is nothing on the record to connect the payment of rent with the landlord or to show that the landlord did accept the rent.

[RICHARDSON, J.—The landlord is bound by the act of his servant, the Tahsildar.]

Yes. He is bound by those acts of his servant which are done within the scope of the servant's authority but not for any other act of his servant or agent. The Tahsildar had no authority from his master to induct a stranger into the land without authority from his master. There is nothing on the record to show that the landlord ever received any thing from the defendant or that he has been benefited by the alleged payments made to his Tahsildar without his knowledge and consent, and consequently the alleged payments of rent cannot be said to have been accepted by the

plaintiff. See *Moharani Beni Pershad Koeri* v. *Goberdhan Koeri* (1). The landlord cannot be bound by the receipts of rent or *selami* by the Tahsildar or *gomasta* unless there is some evidence to connect the landlord with such payment. This view is supported by the observation of Mookerjee, J. in *Sudaman Jamadar* v. *Behari Mahton* (2). Acceptance of rent and grant of *amalnama* by the plaintiff's Tahsildar without authority from the plaintiff, cannot bind the plaintiff.

Mr. *K. Ahmed* (with him Babu *Sarat Chandra Mukherjee*), for the Respondents was not called upon.

JUDGMENT.—The only point which was or could be argued on this appeal relates to the question whether the *gomasta* Ishan Chandra Pandey had authority to settle the disputed *jote* or holding with the defendant Keramutullah. It is contended that the Courts below have not found that he had authority. In the first Court 12 issues were found but there is no specific issue directed to that question. As to evidence it appears that the defendant Keramutullah produced an *amalnama* signed by the *gomasta* and certain rent receipts also signed by the *gomasta*. In the Trial Court the learned Subordinate Judge delivered a long and exhaustive judgment from which it would seem that as the case was placed before him, the discussion turned on the genuineness of the documents referred to and not on the question of the *gomasta's* authority. If the latter question had been argued before the learned Subordinate Judge in the way in which it has been argued before us, the learned Subordinate Judge would no doubt have dealt with it expressly. The learned Pleader for the plaintiff relies on a passage in the judgment of the learned District Judge in the lower Appellate Court. The learned District Judge says this: "In this consideration, it is hardly worthwhile to discuss the evidence as to whether the *gomastas* had power to grant the *amalnamas* or not, but I should hold that the fact of rent having been accepted, would be a very clear indication that the *gomastas* had such implied power." That no doubt indicates that the authority of Ishan Chandra Pandey to grand the *amalnama* was mooted but nothing would seem to have been said to the learned Judge about the authority of the *gomasta* to grant rent receipts. The Judge has found in effect that whether or not the *gomasta* had authority to grant the *amalnama* and whether or not *amalnama* is admissible in evidence, the receipt of rent by Ishan Chandra Pandey presumably on behalf of his employer is sufficient to prove the tenancy of the defendant Keramutullah. In our opinion no sufficient ground has been shown for saying that that finding is vitiated by any error of law. Even if Ishan Chandra Pandey had no authority in the first instance to grant the *amalnama* or to settle the holding with Keramutullah, nevertheless if rent was afterwards received from Keramutullah and found its way into the pocket of the plaintiff, that would be evidence of ratification by the plaintiff of the *gomastas'* act on which the Court might act. We are informed that the plaintiffs' son was examined but his learned Pleader is unable to point out any statement in the deposition to the effect that the rent received by the *gomasta* did not find its way into the landlord's pocket. In the absence of the evidence, the ordinary presumption would be that the *gomasta* performed his duty and duly delivered the rent he collected to his employer. In connection with this question we have also to bear in mind the observations made by the Court on the subject of a *gomasta's* authority in the case of *Sudaman Jamadar* v. *Behari Mahton* (2). The present case turns substantially on matters of fact and there is no sufficient reason why we should disturb the concurrent decree of the Courts below.

The appeal must be dismissed with costs.

Appeal dismissed.

(1) 6 C. W. N. 823.
(2) 10 Ind. Cas. 456; 15 C. W. N. 953 at p. 955.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 191 OF 1917.

March 22, 1918.

Present:—Mr. Justice Roe and Justice Sir Ali Imam, KT.

EAST INDIA RAILWAY COMPANY —APPELLANT

versus

JAGO RAM—RESPONDENT.

Appeal, second—Negligence, wilful, whether question of law or of fact.

EAST INDIA RAILWAY CO. v. JAGO RAM.

In a case where wilful negligence is alleged, the question whether there is any evidence at all to go to the Jury is a question of law, but if there is such evidence, the question whether wilful negligence has been established, is a question of fact. Where there is evidence to go to the Jury, the High Court will not interfere with the finding of fact whether there was or was not wilful negligence. [p. 199, cols. 1 & 2; p. 200, col. 1.]

Appeal from a decision of the District Judge, Gaya, dated the 1st November 1916.

Messrs. *Shushil Madhab Mullick* and *Siva Narain Bose*, for the Appellant.

Mr. *Rajendra Prosad*, for the Respondent.

JUDGMENT.

ROE, J.—The facts of this case are that the plaintiff consigned a number of tins of ghee from Palmerganj to Calcutta, a distance of over three hundred miles. Either before the journey commenced or during the journey, sixty-two of these tins weighing nearly a ton disappeared. The plaintiff, therefore, brought a suit for damages against the Railway. The Courts below have made a decree in his favour on the ground that although the goods were despatched under a risk-note making the Railway liable only in the case of wilful negligence the evidence on the record justified the inference that there had been wilful negligence. In second appeal it is argued that the question of wilful negligence is a mixed question of fact and law, and therefore this Court is required to go into the evidence on the record and satisfy itself that legal wilful negligence has been proved. Failing that, it is urged that there is no direct allegation of wilful negligence in the plaint and nothing in the evidence of the plaintiff to show negligence at all on the part of the Railway, and that the Judge if he had been assisted by a Jury, would have been required to direct the Jury as soon as the plaintiff's case was closed that there was no evidence on which they could give a verdict. Further it is urged that the Railway did substantially prove that the goods were lost through a running train theft, and that the words running train robbery which in the risk-note, is a specific cause of loss against which the Railway is protected, includes an ordinary running train theft.

We may take *firstly* the question whether it was the duty of the learned Subordinate Judge in the first instance to refuse to go further into the case when upon the plaintiff's own evidence there was nothing to show wilful negligence. It is true that the learned District Judge has recognised that the burden of proof was on the plaintiff to show that his case came within one of the exceptions stated in this risk-note. It also may be true that if the defendant company had when the plaintiff had finished his evidence, adopted the course now suggested that is to say, had it declined to enter into evidence and relied upon the fact that there was from the plaintiff's side no evidence of negligence, the Court would have had not option but to dismiss the plaintiff's suit. But the Railway Company were not content with this. It undertook to show that it had taken all reasonable precautions. Both the Courts below were of opinion that it had entirely failed to show this. The District Judge went further than the Subordinate Judge. The Subordinate Judge on an erroneous application of section 76 to questions involved in cases in which the Company is protected by a risk-note, had thrown the burden upon the defendant of due diligence. The learned District Judge set himself to show that from the witnesses produced by the defendants themselves, there was evidence upon which wilful negligence had been proved. We are not in sympathy with the argument of the learned Vakil for the appellants that having all this evidence before him the learned Judge should not have regarded it at all, but should have decided the case upon the plaintiff's evidence alone. Having placed the evidence upon the record the Company cannot say that it was not to be taken into consideration. Nor are we in sympathy with the suggestion that the plaint itself disclosed no cause of action. It stated simply that the Company undertook to carry goods and failed to deliver them. The written statement stated that as the Company was protected by a risk-note it was not liable. Had the written statement stopped there, the case might possibly have been dismissed on the pleadings. But the written statement did not stop there. It set forth a substantive case that the goods had been lost owing to a running train robbery. It would have been open to the Company no doubt to confine its written statement to the production of the risk-note. It would have been the duty of the Court to call upon the plaintiff to amend his pleadings by specific allegations of wilful negligence, but seeing

the nature of the defence put up by the Company, there was no necessity for any amendment of the plaintiff's statement of the facts.

It has always been held in the Courts in England that the Judge's duty is merely to say to the Jury that there is or is not evidence on the record which they must consider. If he rightly directs the Jury to take into consideration the facts indicated by the evidence, the verdict of the Jury as to the bearing of those facts upon the question of wilful negligence, is a final verdict and cannot be disturbed in appeal. The learned Judge set out a number of facts apparent on the record from which he held that wilful negligence might be deduced. There had been a suggestion in the cross-examination of the defendants' witnesses that the carriage door was not locked, and no attempt had been made to get rid of this suggestion. This cross-examination also indicated that the only precaution taken with this valuable consignment, was the affixing of a leaden seal which might be broken without difficulty. The discovery of the breaking of the seal was made on the night upon which the theft probably occurred. It was suggested by the learned Judge that if proper steps had been taken immediately to check the contents of the waggon, the bulk and weight of the goods lost was such that prompt action would have resulted in the recovery of at least a great part of the stolen goods. Speaking for myself I do not propose to consider for a moment whether or not the Judge should have found on these facts that there had been wilful negligence on the part of the Railway. I am certainly of opinion that it would have been extremely wrong for a Judge with all these facts upon the record to have informed a Jury that there was no evidence at all on which they could base a verdict. That being so, I am of opinion that the learned Judge's decision was a final decision on the question of negligence, and in this conclusion I am fortified by the decision in *Metropolitan Ry. Co.* v. *Jackson* (1) in which it is said: "In an action arising for personal injuries by negligence, it is the province of the Judge to say whether there is evidence from which negligence may be reasonably inferred, and of the Jury (if the evidence is left to them) to say whether it ought to be inferred."

In *Vaughan* v. *Menlove* (2) it was stated by Tindall, C. J., that "The care taken by a prudent man has always been the rule laid down; and as to the supposed difficulty of applying it, a Jury has always been able to say whether, taking that rule as their guide, there has been negligence on the occasion in question".

A similar view was taken by the Judicial Committee in *Madras Railway Co.* v. *Zemindar of Carvetnagarum* (3). At page 282, it is stated: "Negligence consists in the omitting to do something that a reasonable man would do, or in the doing something that a reasonable man would not do, in either case unintentionally causing mischief to a third party....Their Lordships are unable to say that the case has been decided on an erroneous view of the law. On the question of fact whether or not negligence was proved by the evidence, they see no sufficient reason for departing from their ordinary rule of not disturbing the concurrent finding of two Courts".

The position, therefore, is that we as Judges of law have in second appeal to decide whether there was evidence to put before a Jury. I am of opinion that there was evidence that should have been laid before a Jury, and holding that opinion I must decide that the learned Judge's decision on the facts, was as final as a Jury's verdict would have been.

With regard to the last ground taken it is sufficient to say that theft is not robbery unless violence goes with the theft. I would dismiss this appeal with costs.

IMAM, J.—I am in complete agreement with the decision given by my learned brother. This second appeal is concluded by the finding of fact on the question of wilful negligence. The contention that that question is one that should not have at all been treated by the lower Appellate Court inasmuch as there was a total absence of evidence before the Court

(1) (1878) 3 A. C. 193; 47 L. J. C. P. 303; 37 L. T. 679; 26 W. R. 175.

(2) (1837) 3 Bing. (N. C.) 468; 4 Scott. 244; 3 Hodges 51; 6 L. J. C. P. 92; 1 Jur. 215; 132 E. R. 490; 43 R. R. 711.

(3) 22 W. R. 279; 14 B. L. R. 209; 1 I. A. 364; 3 Sar. P. C. J. 391 (P. C.).

to support the allegation of wilful negligence, has little substance. The grounds stated in the judgment of the learned Judge show that there was evidence bearing upon the question of wilful negligence. The probative value of that evidence was for the Judge to consider. So far as we here are concerned, we are bound to accept the decision of the learned Judge on the question of wilful negligence as ascertained by him on the evidence. Therefore I agree that this appeal should be dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 1092 AND 1156 OF 1913.

February 25, 1918.

Present:—Justice Sir Charles Chitty, KT. and Mr. Justice Smither.

PRAMOTHA NATH SAHA—PLAINTIFF—APPELLANT

versus

Rani SASHIMUKHI DEBI AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 2 (2), O. XVII, rr. 2, 3—Suit dismissed for plaintiff's failure to produce evidence, whether decree or order.

An application for adjournment on the part of the plaintiff having been refused, the Court passed the following order: "As there is no evidence on the side of the plaintiff and some of the defendants, and though other defendants are ready but adduce no evidence, let the suit be dismissed:"

Held, that the order was a decree inasmuch as it was a final decision of the suit so far as the Court was concerned. It was nonetheless so because the suit was dismissed in consequence of the plaintiff's failure to produce evidence. [p. 201, col. 1.]

Appeals against the decrees of the Subordinate Judge, Faridpur, dated the 17th February 1913, affirming those of the Munsif, 1st Court at Goalundo, dated the 28th November 1911.

FACTS appear from the judgment.

Babu *Shib Chandra Palit*, for the Appellant.—The suit was dismissed by the Munsif for non-production of evidence by the plaintiff. The plaintiff then applied to the Subordinate Judge. The learned Subordinate Judge says no appeal lay because the dismissal was not a decree. I submit the order of the Munsif is under Order XVII, rule 3 and is a decree. The appeal must be taken to be dismissed on the merits. See *Gaura Bibi* v. *Ghasitiya* (1).

Babu *Anilendra Nath Chowdhury* (with him Babus *Kumar Sankar Ray* and *Biraj Mohan Mozumdar*), for the Respondents.—The case comes under Order XVII, rule 2 and not under rule 3. The defendants applied for time.

[CHITTY, J.—Both parties applied for time. See the order.],

Referred to *Satish Chandra Mukerjee* v. *Ahara Prasad Mukerjee* (2).

[CHITTY, J.—There the Pleader withdrew.]

I submit it is not a decree because it comes under rule 2 and not under rule 3 of Order XVII, Civil Procedure Code.

JUDGMENT.—On 18th June 1907, the plaintiff instituted two suits for possession of land on declaration of their title thereto, mesne profits, and other relief.

For reasons which need not now be considered the suits did not come on for hearing for over two years.

On 9th November 1911, the suits were on the defendants' application adjourned to 28th November. As the plaintiff appears to have had some witnesses present in Court the defendants were ordered to pay the costs of that adjournment.

It appears clear that the oral testimony of those witnesses for the plaintiff was not considered sufficient to establish his case as we find that on 20th November 1911 on the application of the plaintiff a *robokari* was sent to the Collector of Dacca to send certain records. On the same day the defendants made a similar application and a *robokari* was also sent at their request. On 28th November 1911 the records had not arrived and it appears that the plaintiff was not able to make out his case without them. He applied for an adjournment which was refused. The Munsif then passed this order in each suit:—

"As there is no evidence on the side of the plaintiff and some of the defendants, and though other defendants are ready but adduce no evidence, let the suit be dismissed."

The plaintiff applied to the Subordinate Judge who held that no appeal lay on the ground that the order of the Munsif was not a "decree". It was argued for the respondents

(1) 12 Ind. Cas 603; 34 A. 123; 8 A. L. J. 1265.

(2) 34 C. 403 (F. B.); 5 C. L. J. 247; 2 M. L. T 123; 11 C. W. N. 329.

that it was an order under Order XVII, rule 2 but that cannot be as it was passed in the presence of the plaintiff and his Pleader. There is nothing to indicate that on the application for adjournment being refused, the plaintiff or his Pleader withdrew from either suit and allowed the order to go *ex parte*.

Then it was suggested that in these cases time had not been given to the plaintiff as on 9th November 1911 the suits were adjourned on the application of the defendants.

It is unnecessary to discuss whether it was an order under Order XVII, rule 3 or not. It was undoubtedly a final decision of the suit so far as the Munsif was concerned and the order in each case was a "decree" from which an appeal lay to the Subordinate Judge.

It was not the less so because the suits were dismissed in consequence of the plaintiffs' failure to produce evidence, see *Kartick Chandra Pal* v. *Sridhar Mandal* (3).

The orders of the lower Appellate Court must be set aside and the cases remanded to that Court for disposal of the appeals, upon the merits The costs of these appeals to abide the result.

Order set aside;
Cases remanded.

(3) 12 C. 563; 6 Ind. Dec. (N. S.) 383.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 24-B OF 1917.

November 7, 1917.

Present:—Mr. Mittra, A. J. C.

YESHWANTRAO AND ANOTHER—DECREE-HOLDERS—APPELLANTS

versus

DATTATRAYA KRISHNA—JUDGMENT-DEBTOR—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 11, 47—Civil Procedure Code (Act XIV of 1882), s. 617—Partition decree—Accounts, whether can be claimed in execution—Res judicata—Reference, invalid, opinion expressed in, whether binding on parties.

In a suit for partition the parties believed that some of the villages which were the subject-matter of the suit could not be partitioned. A consent decree was passed under which some of these villages were left under the management of the plaintiff and others under that of the defendant. The decree also contained the following direction: "Accounts should be rendered once in a year and that in the month of April and the produce shall be divided according to the shares at the time." The parties had been seeking accounts from each other year after year in execution:

Held, that accounts could not be claimed in perpetuity in execution of a decree in evasion of the law of procedure and in evasion of the Court Fees Act. [p. 202, col. 1.]

In the year 1904 on the objection of one of the parties to render accounts, a reference was made to the Judicial Commissioner in which he expressed an opinion that it was too late to re-open the interpretation of the decree:

Held, (1) that as the reference was incompetent under section 617 of the Code of Civil Procedure, 1882, any opinion expressed upon such a reference could not operate as *res judicata*, and did not amount to an adjudication binding on the Courts in subsequent stages; [p. 202, col. 1.]

(2) that even if it was an adjudication the Court was not bound to perpetuate an error. [p. 202, col. 1.]

Chamanlal v. *Bapubhai*, 22 B. 669; 11 Ind. Dec. (N. S.) 1028, followed.

Appeal against the order, dated the 30th January 1917, passed by the 2nd Additional District Judge, East Berar, Amraoti, in Execution Case for 1322-23 F in Suit No. 1 of 1884.

Mr. *G. V. Deshmukh*, and the Hon'ble Mr. *S. B. Tambe*, for the Appellants

Mr. *M. V. Joshi*, for the Respondent.

JUDGMENT.—This appeal and the cross-objection filed by the respondent will be disposed of by this judgment. In Civil Suit No. 1 of 1884 in the Court of the Deputy Commissioner of Wun District a decree was passed by consent of parties on the 20th April 1885. The suit was a partition suit in which all property that could be divided was, as a matter of fact, divided, and effect has been given to this division in the course of execution proceedings. The parties, however, believed that under the law certain Jagir and Palampat villages could not be partitioned. Some of them were left under the management of the plaintiffs and some under that of the defendants. The parties have been seeking accounts from each other year after year in execution of this decree. Although no objection was raised, I was bound to take notice of the law on the subject as laid down in section 47 of the Civil Procedure Code. The decree in case No. 1 of 1884 is a long decree, a printed copy of which has been placed before me contained in ten pages of foolscap

paper. To establish the respondent's right to accounts in execution of this decree reliance is placed on the following passage contained in paragraph 1: "Accounts should be rendered once in a year and that in the month of April, and the produce shall be divided according to the shares at the time." It is contended that this direction in the decree is mandatory and not declaratory. I do not agree with this contention. I find it difficult to believe that the parties contemplated and the Court sanctioned that year after year in perpetuity, accounts are to be taken in execution of a decree in evasion of the law of procedure, and in evasion of the Court Fees Act. However, for years this has been going on without objection on the part of anybody except on one occasion when a reference was made by the Civil Judge to the Judicial Commissioner, Berar (*vide* Case No. 170 of 1904). The learned Officiating Judicial Commissioner doubted the legality of the reference inasmuch as an appeal lay to him. It is quite clear that under section 617 of the Civil Procedure Code, 1882, the reference was incompetent, and any opinion expressed upon such a reference cannot operate as *res judicata*. A reluctant opinion was expressed by the learned Judge that it was too late to re-open the interpretation of the decree. I note that the parties to the reference are all dead, and the parties before me are their successors-in-interest. The argument advanced on behalf of the respondent that the question is constructively *res judicata* does not merit serious consideration. As I have already pointed out, the opinion expressed on the reference does not amount to an adjudication binding on the Courts in subsequent stages. Even if it were an adjudication, the Court is not bound to perpetuate an error. The case is analogous to the case of *Chamanlal* v. *Bapubhai* (1).

We have, however, reached a convenient stage in the history of this litigation which, apart from all other considerations, compels me to take a view which puts an end to the present and all future applications. Assuming that there was a duty cast upon the defendants to pay the plaintiffs in suit No. 1 of 1884 the amounts due in respect of their share, and this duty was enforceable by an application in execution, that duty has ceased to exist. There have been partitions amongst the plaintiffs *inter se*. The result is that the joint right created by the decree in favour of the former plaintiffs collectively has, by reason of subsequent events, ceased to be enforceable in execution of the decree. Reliance, however, is placed on behalf of the respondent upon a passage in paragraph eleven of the judgment delivered by a Bench of this Court in First Appeal No. 21-B of 1912. This was an appeal from the partition suit (No. 36 of 1908). The passage is to the following effect: "The last prayer made by the plaintiff is that the sixth defendant Dattatraya should be ordered to give separate accounts in future for plaintiff's own share. An order will, therefore, be added to the decree that the sixth defendant Dattatraya shall in future pay separately to each branch of the junior branch of the whole family its own share of the income of the property left undivided in 1884." This creates a new liability but that liability cannot be enforced in execution of the decree in suit No. 1 of 1884 nor in execution of suit No. 36 of 1908 which was modified in First Appeal No. 21-B of 1912.

There are 39 issues in the case, and the lower Court with commendable patience has recorded voluminous evidence. It may be that the parties would agree to have this evidence treated as evidence in the suit which the respondent will not have to file. I have no doubt the parties were acting in good faith in filing applications for execution, and in fact they were bound to do so in deference to the opinion expressed by the Officiating Judicial Commissioner upon the reference already mentioned.

If the applications could have been converted into suits without objection on the ground of jurisdiction, I would have levied the additional Court-fees and treated them as plaint. But unfortunately the applications were made in the Court of the Additional District Judge whilst the suits should have been presented in an inferior Court.

The result is that I set aside the order of the Additional District Judge, dated the 30th January 1917 and dismiss the application for

(1) 22 B. 669; 11 Ind. Dec. (N. s.) 1028.

execution dated the 1st August 1914. The lower Court will now dispose of the order pending applications in accordance with this order. Each party will bear his own costs throughout.

Application dismissed.

PATNA HIGH COURT.

APPEAL FROM APPELLATE ORDER No. 181 OF 1917.

February 26, 1918.

Present:—Mr. Justice Roe and Justice Sir Ali Imam, KT.

Shaikh KHODA BUKHSH—DECREE-HOLDER—APPELLANT

versus

BAHADUR ALI—JUDGMENT-DEBTOR—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 182 (6)—'Date of issue of notice,' meaning of—Patna High Court, whether bound by view of Calcutta High Court.

The date of the issue of notice in Article 182 (6) of the Limitation Act means the date on which the notice actually issues from the office of the Court, that is to say, the date for which it is signed by the *sheristadar* in the name of the Court.

In such cases the Patna High Court is bound to accept the view of the Calcutta High Court, inasmuch as it is on this view that Pleaders have been calculating limitation in making applications for execution. It would not be fair to turn round suddenly and say that the view of the Calcutta High Court is wrong.

Appeal from a decision of the District Judge, Bhagalpore, dated the 26th April 1917, reversing that of the Munsif, Madhipura, dated the 10th February 1917.

Mr. *Chandra Sekhar Banerji*, for the Appellant.

Messrs. *P. K. Sen*, *B. N. Mitter* and *Lalit Mohan Ghosh*, for the Respondent.

JUDGMENT.

ROE, J.—This appeal arises from an order of the District Court of Bhagalpur setting aside an order of the Munsif of Madhipura directing that a decree be executed. The only point for consideration is, whether execution of the decree is barred by limitation. On this point the decision turns upon the question which was to some extent left open by this Court in the case of *Ram Kumar* v. *Kesho Prasad Singh* (1). That question is, in clause 6

(1) 36 Ind. Cas. 999; (1917) Pat. 52.

Article 182 of the Limitation Act, do the words: "The date of the issue of the notice" mean the date of the Court's order that notice issue or the date on which a ministerial officer of the Court actually issues the notice.

I have again considered the views quoted in the case of *Ram Kumar* v. *Kesho Prasad Singh* (1). It cannot be for a moment denied that there is much to be said in support of those held in Calcutta and Madras. Perhaps even more may be said in favour of those held in Bombay and Allahabad. But I am of opinion that in a case such as the one before us we are bound to accept the view of the Calcutta Court. It is on this view that Pleaders have been calculating limitation in making applications for execution. It would not be fair to turn round suddenly and say that the decision of the Calcutta Court was wrong. For this reason I would hold as I held in the case of *Ram Kumar* v. *Kesho Prasad Singh* (1) that the date of the issue of notice means the date on which the notice actually issued from the office of the Court, that is to say, the date on which it is signed by the *sheristadar* in the name of the Court. In this view the application was within time. The appeal must, therefore, be decreed, the order of the District Court set aside and that of the Munsif's Court restored. The respondent will pay the appellant's costs throughout.

IMAM, J.—I agree.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 115 OF 1916.

February 5, 1918.

Present:—Mr. Justice Richardson and Mr. Justice Beachcroft.

SONAULLA SARKAR—DEFENDANT No. 1—APPELLANT

versus

Srimati TULA BIBI—PLAINTIFF—RESPONDENT.

Muhammadan Law—Mother of minor girl appointed certificated guardian, whether can question marriage of minor effected by her uncle—Specific Relief Act (I of 1877), ss. 42, 43—Suit for declaration that the marriage

SONAULLA SARKAR v. TULA BIBI.

of a Muhammadan minor girl is invalid, whether maintainable.

Under the Muhammadan Law the mother, even when appointed certificated guardian of the person and property of her minor daughter, has no legal character within the meaning of section 42, Specific Relief Act, entitling her to a declaration that the marriage of her daughter with a certain person effected by her uncle, is not valid. [p. 206, col. 1.]

It would not be a proper exercise of judicial discretion to make any declaration under section 42 of the Specific Relief Act in a suit by the guardian of a Muhammadan minor girl for a declaration that her marriage with a certain person is invalid when the minor is not a party to the suit inasmuch as under section 43 of the Act, the decree would not be binding upon the minor. [p. 206, col. 1.]

Appeal against the decree of the Subordinate Judge, Rajshahi, dated the 28th of February 1916, affirming that of the Munsif, Boalia, dated the 14th of April 1915.

FACTS appear from the judgment.

Babu *Dhirendra Nath Baghi* for Babu *Brojendra Nath Chatterjee*, for the Appellant —This appeal is on behalf of the defendant No. 1, and it arises out of a suit for a declaration that the marriage of plaintiff's minor daughter Mahitan (who has not been made a party to this suit) with the defendant No. 3, the minor son of defendant No. 2, is fictitious, invalid and inoperative. The minor Mahitan was at first given in marriage by th defendant No. 1, who is her paternal uncle, to Baharulla (defendant No. 3), the minor son of defendant No. 2. This marriage took place on the 2nd Chaitra 1320 B. S. Two days after this marriage, plaintiff, the mother of Mahitan again gave her in marriage to one Ismail. Thereafter this suit has been brought by the plaintiff for cancelling the first marriage effected by the uncle on the ground that that marriage was collusive and inoperative, that the certificated guardian of the person of the minor plaintiff alone was competent to give her minor daughter away in marriage and that the marriage set up by the defendants might cause harm to the plaintiff, her daughter, son-in-law and other relations.

My submission is that as the plaintiff's minor daughter Mahitan (to cancel whose marriage with the defendant No. 3 the present suit has been brought) has not been made a party to the suit, the suit is not maintainable, because any decree passed in this suit would not be binding upon the girl under section 43 of the Specific Relief Act. The marriage in question cannot be cancelled by a suit in the present form, inasmuch as, there cannot be a marriage effected and made in the absence of the bride so there cannot be a marriage cancelled in the absence of the wife.

As regards the question as to whether the plaintiff is entitled to maintain the suit, the finding of the lower Appellate Court is as follow:—"It is an admitted fact that the plaintiff has been appointed by the District Judge the guardian of the person and property of her minor daughter, Mahitan. She has thus a legal character which entitles her to keep the minor in her custody. According to Muhammadan Law among the Hanifees the mother is entitled to the custody of her daughter until she attains puberty, and again it is provided that among the Malikis, Shafis, etc., the custody continues until she is married. The parties to this suit are Sunnees and so if the marriage is proved as it is attempted in this case by the defendant, the husband or if he be a minor, his guardian can claim the possession of the person of the married minor girl from the custody of her mother Thus section 42 of the Specific Relief Act applies to the present case as it provides "that any person entitled to any legal character may institute a suit against any person denying or interested to deny his title to such character." My submission is that the above finding of the lower Appellate Court is erroneous. Section 42 does not apply to this case because nobody is denying or can deny the plaintiff's right to keep her daughter in her custody until she attains puberty. Moreover, under the Muhammadan Law the uncle of the girl (the defendant No. 1) as the nearest male agnate is entitled to give away his niece in marriage in preference to the mother of the girl (the plaintiff), and the fact that she has been appointed guardian of her daughter's person and property, does not make any difference. See Mullah's Muhammanan Law, 5th Edition, page 165. The plaintiff as the certificated guardian is entitled to the custody of the person and property of her minor daughter, and her right of custody continues even after the marriage and would continue up

till the attainment of the puberty of her minor daughter. The fact that she has been given in marriage by her natural guardian, the uncle, does not deprive the mother of her right to the custody of her daughter. So far as the Muhammadan Law is concerned, the bulk of modern authority is in favour of the view that according to that law the mother of a girl who is married but has not attained puberty, is entitled to the custody of her person as against the husband. Refers to *Khatija Bibi, In the matter of* (1), *Nur Kadir* v. *Zuleikha Bibi* (2), *Korban* v. *King-Emperor* (3). Therefore, as the plaintiff's legal character as guardian of the person of her minor daughter has not in any way been affected by the marriage, she is not competent to question the validity of the marriage of her daughter effected by the paternal uncle who had a preferential right to give away the girl in marriage. No cause of action accrues to her when her guardianship continues even after the marriage.

[BEACHCROFT, J.—Is not the mother as certificated guardian appointed by the District Judge, entitled to give the girl in marriage in preference to the girl's natural guardian for marriage?]

No. The rules as to guardianship for marriage depend exclusively upon the Muhammadan Law. Refers to Wilson's Digest of Anglo-Muhammadan Law, 4th Edition pages 90 and 176. Those rules cannot be affected by any order that may be passed under the Guardian and Wards Acts Refers to *Hadish Bapari* v. *Bogamulla Sheik* (4). Under the above circumstances as there has been no infringement or threatened infringement of the plaintiff's right she is not entitled, under section 42 of the Specific Relief Act, to get the declaration sought for in this suit. Refers to *Harendra Lal Ray* v. *Salimullah* (5).

Babu *Krishna Kamal Maitra*, for the Respondent.—As regards, the question of the mother's right to the custody of the person of her married minor daughter, the rule of Muhammadan Law on this subject is summarised in Wilson's Digest of Anglo-Muhammadan Law, 4th Edition, page 193.

The Courts below have found that the defendant No. 1, who is the step brother of the girl's father has all along been trying to deprive the girl Mahitan and her mother (the plaintiff) of their property and has also been acting inimically to the mother and the daughter, and has brought about this marriage with the defendant No 3 to serve his own purpose. The factum of marriage has been found by both the Courts below to be fictitious. I submit that the plaintiff, who is the natural and certificated guardian of the person of her minor daughter, is entitled, for the welfare of the latter to bring a suit for a declaration that the alleged marriage, the factum of which has been disbelieved by both the Courts below, is fictitious, invalid and inoperative.

Babu *Dhirendra Nath Bagchi* in reply.

JUDGMENT.

RICHARDSON, J.—The plaintiff in this suit is the mother and certificated guardian of a minor Muhammadan girl The defendant No. 1, the appellant before us, is the uncle of girl. He is said to be the step-brother of the defendant No. 2, who is the father of the minor defendant No. 3 Baharulla Mundal. The suit was brought for a declaration that a ceremony purporting to be a ceremony of marriage between the plaintiff's daughter and the defendant No. 3 was not duly performed and was invalid. The Courts below have concurred in making the declaration sought and this appeal is preferred by the defendant No. 1.

The question whether the rites required by the Muhammadan Law were duly performed, turns on matters of fact and if the decrees of the Courts below were not otherwise open to objection, their finding on that question would be binding on us.

On behalf of the defendant No. 1, however, it has been contended throughout that the suit is not maintainable by the plaintiff on the ground that she has no right or authority to intervene in matters relating to the marriage of her daughter. It is said that when, as here, the uncle is the nearest male

(1) 5 B. L. R. 557.
(2) 11 C. 649; 10 Ind. Jur. 103; 5 Ind. Dec. (N. S.) 1191.
(3) 32 C. 444 at p. 446; 2 Cr. L. J. 328.
(4) 38 Ind. Cas. 787; 25 C. L. J. 551.
(5) 7 Ind. Cas. 21; 12 C. L. J. 336 at p. 344.

agnate, he is the guardian for marriage of his minor niece and is in a position to compel her marriage to a bridegroom of his own selection, subject to the girl's right, on attaining puberty, to refuse her consent to the marriage and to take the proper steps to have it cancelled.

In the Courts below it seems to have been held (without reference to the rights of the uncle) that the mother as the appointed guardian of the person and property of her minor daughter has a legal character within the meaning of section 42 of the Specific Relief Act entitling her to the declaration which she seeks. The daughter's marriage or alleged marriage is apparently regarded as an invasion of the mother's rights as guardian, which, it is said, are "affected." This view of the case cannot be supported.

Clearly the legal character or status involved is the status of the two persons said to have been married, and the true objection to the suit is that the plaintiff's daughter is no party to it She is, it would seem treated as a chattel while her elders are disputing about her disposal in marriage, either because there are money considerations involved or because they are quarrelling about other matters. As the suit is framed, in any view of the rights of the uncle it would not be a proper exercise of judicial discretion to make any declaration under section 42 of the Specific Relief Act, inasmuch as under section 43 the decree would not be binding on the daughter.

It is unnecessary, therefore, to determine the relative rights of the mother and uncle in the present connection or to deal with the further question whether under any or under what circumstances it would be open to a mother either as the natural guardian or as the appointed guardian of her daughter, with a view to the protection of her daughter's interests to bring all necessary parties before the Court and to seek a judicial pronouncement as to the validity of a form of marriage to which that daughter had been subjected.

If our decision in the present case should leave the mother in any doubt as to her duty, it will be open to her by application to ask for the advice of the District Judge.

The appeal succeeds on the ground indicated. The judgments and decrees of the Courts below are set aside and the suit dismissed. In the circumstances we make no order as to costs

BEACHCROFT, J.—I agree.

Appeal allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 1-B OF 1917.

March 30, 1917.

Present:—Mr. Mittra, A. J. C.

BHIKA *alias* UTTAM NARAYAN—PLAINTIFF—APPELLANT

versus

HARLAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Alienations by father—Suit by son—Immoral debts—Burden of proof—Evidence of immorality, whether sufficient.

In order to exempt a Hindu son's share in the family property from liability for his father's debts the son must show that the debts were incurred for immoral purposes. [p. 208, col. 1.]

Babu Singh v. *Behari Lal*, 30 A. 156; A. W. N. (1908) 61; 5 A. L. J. 175, relied on.

Chandradeo Singh v. *Mata Prasad*, 1 Ind. Cas. 479; 31 A. 176; 6 A. L. J. 263 (F. B.), distinguished.

Maharaj Singh v. *Balwant Singh*, 28 A. 508; 3 A. L. J. 274; A. W. N. (1906) 117, explained.

There must be some definite connection established between the debt and the expenditure. It is not sufficient to prove that the father was a man of extravagant and vicious habits. [p. 208, col. 1.]

Jawahirsing v. *Mohanlal*, 6 C. P. L. R. 140; *Chintamanrav Mehendale* v. *Kashinath*, 14 B. 320; 7 Ind. Dec. (N. S.) 674, followed.

The onus of proof that the debt was incurred by the father for illegal or immoral purposes, is not shifted on to the creditor by proof of immoral habits. [p. 208, col. 1.]

Vasudev Morbhat Kale v. *Krishnaji Ballal Gokhale*, 20 B. 534; 10 Ind. Dec. (N. S.) 921; *Dattatraya Vishnu* v. *Vishnu Narayan*, 12 Ind. Cas. 949; 36 B. 68; 13 Bom. L. R. 1161, followed.

Appeal against the decree of the Additional District Judge, East Berar, Amraoti, dated 7th October 1916, in Civil Suit No. 3 of 1916.

Mr. *S. Y. Deshmukh*, for the Appellant.

Messrs. *P. S. Kotwal*, and *K. K. Gandhe*, for Respondent No. 1.

JUDGMENT.—The two minor plaintiffs are the sons of defendant No. 2 Bhagwanappa. They sue for a declaration that

their two-third share in the joint ancestral property foreclosed by defendant No. 1 in pursuance of a mortgage, dated the 11th February 1913, is unaffected by the mortgage and the decree. The plaintiffs' case is that their father incurred debts for immoral purposes, and hence the debts are not binding upon the plaintiffs. The second plaintiff was not even born at the date of the mortgage, and it is practically conceded that so far as he is concerned, the suit must fail in any case. Now the consideration for the mortgage consists of the following items:—

	Rs.	a.	p.
Due on a decree to one Lahanappa to which the plaintiff No. 1 was a party	6,711	2	0
Due to defendant No. 1 on a prior mortgage, dated the 9th May, 1912	1,269	0	0
Borrowed for payment of assessment and cultivation expenses	519	14	0
TOTAL ...	8,500	0	0

The plaintiffs if they can succeed at all, can only succeed with regard to the share of plaintiff No. 1, which would be half of the family property. To start with, there was a decree binding on plaintiff No. 1 for Rs. 6,000 and odd. There is nothing in the pleadings which questions the binding character of that decree as against the plaintiff No. 1 beyond the general allegation that all the debts were incurred for immoral purposes. Unless, therefore, the plaintiff No. 1 is in a position to successfully get rid of that decree, he cannot, in my opinion, raise a defence which might and ought to have been raised in the previous suit, (Suit No. 19 of 1912).

The lower Court has very properly summed up the evidence in the following terms: "The plaintiff's father was extravagant, fond of entertaining, and was perhaps to some extent immoral. There is vague evidence that the father was fond of *natches*, *tamashas* and the society of prostitutes" There is also vague evidence that he used to borrow money for such purposes from creditors and eventually pay them off by borrowing from other creditors. The plaintiffs in their evidence have gone a stage beyond the pleadings by suggesting that their father was also a gambler, an imputation which the latter indignantly repudiates.

A detailed examination of the evidence will not prove anything more than what I have said, except the evidence of the father himself. It is clear that the grandfather of the plaintiffs had no debts and left 20 *tiffans* of land yielding an annual income of Rs. 1,500 to 2,000. Bhagwan (P. W. No. 7) who is the father of the plaintiffs says that he used to borrow and then re-pay and borrow again and re pay. He used to take Rs. 100 to Rs. 500 at a time, but he cannot state the years and details. The money was borrowed for keeping women at his place as his wives were young. The debts incurred in small amounts accumulated to about Rs. 400 or 500, and to pay off these he had to borrow from Harlal (defendant No. 1). Then he borrowed from a Kachhi and a Rohilla for purposes of cloth, and also for keeping women, but he is unable to state how much he borrowed for the latter purpose. To pay off his other debts he borrowed from Lahanappa and Panduappa. He did not inform Harlal (defendant No. 1) in 1907 that the money was borrowed for bad purposes, but he had informed Lahanappa that the purpose of the debt was bad. This is practically all the evidence which he gives of the immoral purpose of the loans. He practically admitted that part of the money borrowed was for necessary purposes, such as the purchase of cloth, but he is unable to state how much and from which creditor and in what year he borrowed money for immoral purposes. His statement that he informed Lahanappa about the reason for the borrowing, has been disbelieved by the lower Court, and it is obviously false.

There is really no clear statement as regards Rs. 1,269 due upon the mortgage of May 1912, nor is any statement made with regard to the cash borrowed under the mortgage. On the contrary, the evidence of D. W. No. 1 would show that the money was required for payment of assessment and household purposes. The question is whether the plaintiff No. 1 can impeach the mortgage and decree. The

biggest item is binding on plaintiff No. 1 as I have already stated there is nothing to connect the loans taken in 1912 and 1913 with any immoral debt. In fact, the witness Bhagwan admits that he has given up his immoral habits since some time. At first he stated that this was when his wives came of age but later on he says he has reformed since the last two years, that is, since the date of the last mortgage in suit.

The appellant's learned Counsel relies upon the case of *Maharaj Singh* v. *Balwant Singh* (1). In a later case *Babu Singh* v. *Bihari Lal* (2) Banerji, J. and Richards, J., held that the burden of proof is on the son to show that the father's debt was incurred for immoral purposes in order to exempt the son's share of the family property from liability. Although the Full Bench case of *Chandradeo Singh* v. *Mata Prasad* (3), takes a different view as regards the father to alienate joint family property, yet the particular part decided in *Babu Singh* v. *Bihari Lal* (2), was not overruled, a distinction being made between a suit upon a mortgage and a suit upon a money claim.

The view taken in Bombay is in accordance with the view of this Court in *Jawahirsing* v. *Mohanlal* (4). There must be some definite connection established between the debt and the expenditure. It is not sufficient to prove that the father was a man of extravagant and vicious habits. See *Chintamanrav Mehendale* v. *Kashinath* (5). In *Vasudev Morbhat Kale* v. *Krishnaji Ballal Gokhale* (6), it was held that the onus of proving that the debt incurred by the father was for immoral or illegal purpose, was not shifted on to the creditor by proof of immoral habits. The same view was taken in *Dattatraya Vishnu* v. *Vishnu Narayan* (7). In *Maharaj Singh* v. *Balwant Singh* (1) the learned Judges make a distinction between a case where a mortgage is sought to be enforced against the son's interests and a case where the property has already passed out of a joint family. In the present case, the property has been already foreclosed by defendant No. 1. But I think the learned Judges of the Allahabad High Court meant to refer to cases where the property has passed out of a family under a sale in execution of a decree. The present case, therefore, cannot really be distinguished from the Allahabad case. Although the learned Judges state as their opinion, that it is the duty of the creditor to prove that he has made proper enquiries with a view to satisfy himself that the money was not borrowed for immoral purposes, they eventually proceed to record their finding that the son has satisfied the onus in the particular case of proving that the loan made to the father was for an immoral purposes. But the learned Judges held that it was not incumbent upon the son to prove that the lender knew of the immoral purpose. Whether it is for the son to prove that the lender had notice of the immoral purposes of a loan taken by the father or whether it is for the creditor to prove that he made enquiries and was satisfied that it was not required for any such purpose, is a difficult question which need not be decided in this case. Following the judgment of this Court in *Jawahirsing* v. *Mohanlal* (4), I hold that as no definite connection has been established between the debts which were satisfied by the mortgage and any immoral expenditure, the plaintiffs are not entitled to maintain this suit. The appeal is, therefore, dismissed with costs.

Appeal dismissed.

(1) 28 A. 508; 3 A. L. J. 274; A. W. N. (1906) 117.
(2) 30 A. 156; A. W. N. (1908) 61; 5 A. L. J. 175.
(3) 1 Ind. Cas. 479; 31 A. 176; 6 A. L. J. 263 (F. B.).
(4) 6 C. P. L. R. 140.
(5) 14 B. 320; 7 Ind. Dec. (N. S.) 674.
(6) 20 B. 534; 10 Ind. Dec. (N. S.) 921.
(7) 12 Ind Cas. 949; 36 B. 68; 13 Bom. L. R. 1161.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 441 OF 1916.

June 18, 1917.

Present:—Mr. Lindsay, J. C.

KALKA SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

SURAJ BALI LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Construction of document—Grant, deed of, interpreta-

KALKA SINGH v. SURAJ BALI LAL.

tion of—Under-proprietary rights, whether conferred—Perpetual lease.

Where a deed of grant, which was executed by the superior proprietors of a village and wound up with a declaration that it had been drawn up as a deed of perpetual lease, put the grantee in possession of a specified share in the village and of all rights attaching thereto; declared expressly that the grant made to him was for generation after generation, provided that the grantee as lessee was to deposit a certain amount of money per year in the Government Treasury for *malguzari* and in addition to pay the lessors another sum per year by way of *malikana*; stipulated that the grantors were to have mutation made in favour of the grantee by setting his name recorded in "*khana milkiat*"; and gave the lessee the powers of distraint, of suing for arrears of rents and of ejecting tenants:

Held, that the deed conferred upon the grantee rights of a perpetual lessee and not of an under-proprietor. [p. 211, col. 2]

In construing a deed the terms of which appear to be clear enough and which purports to be nothing more than a deed of lease, it is not permissible to attribute to the lessor an intention to confer rights of transfer unless there are express words to that effect or unless such an intention is necessarily implied in the language of the grant. [p. 211, col. 2]

Appeal from the decree of the Additional Subordinate Judge, Fyzabad, dated the 16th September 1916, confirming the order of the Additional Munsif, Sultanpur, dated 5th June 1916.

The Hon'ble Pandit *Gokaran Nath Misra*, for the Appellants.

Babu *Ram Chandra*, for the Respondents.

JUDGMENT.—After hearing this case argued at length by the learned Counsel on both sides I have come to the conclusion that the decision of the Courts below is wrong and that this appeal should be allowed. The suit which has given rise to the appeal, was a suit for declaration brought by two plaintiffs Kalka Singh and Sital Singh against three defendants Suraj Bali Lal, Kali Din Lal and Ram Narain Lal. The declaration which the plaintiffs asked for, was that the defendants had neither proprietary nor under proprietary rights in a 2-*biswas*, 18-*biswansis*, 4-*kachwansis*, 13-*nanwansis* share in Manza Amrethu Dadiha. The defendants relied upon a deed which was executed in their favour by the predecessors-in-interest of the plaintiffs who were owners of a certain share in this village. This document bears date the 4th of March 1901. On the face of it, it purports to be nothing more than a deed of perpetual lease. It is an admitted fact that after this lease had been executed the name of the lessee, Bindeshuri Lal was entered in the register of proprietors. After the present plaintiffs had succeeded to their interest in the village it is admitted that they made an application to the Revenue Courts to have the *khewat* corrected, alleging that under the terms of the document just mentioned, Bindeshuri Lal or his successors had no right to be recorded as proprietors. The plaintiffs asked that they should be recorded as under-proprietors. The Court in which this application was made, seems to have entertained considerable doubts as to the proper manner in which the entry should be made. However, an entry was made and subsequently by reason of an order passed by the Commissioner in appeal it was finally settled that the names of these defendants should be recorded as under-proprietors. The plaintiffs now bring this suit asking for a declaration that the defendants have no proprietary or under-proprietary interest in the property affected by the deed of 1901. It is admitted frankly in the plaint that the plaintiffs had previously, by a mistake of law, been under the impression that the defendants were under-proprietors and that it was principally in consequence of that admission that the entry was made in the revenue records which the plaintiffs now desire to have corrected by means of this declaration. Both the Courts below have held on their interpretation of this document of the 4th March 1901 that Bindeshuri Lal acquired the rights of an under-proprietor. There can be no doubt as to the meaning of the expression "under-proprietor" which is defined in section 3, clause 8, of the Oudh Rent Act where it is said that an "'under-proprietor' means any person possessing a heritable and transferable right of property in land for which he is liable to pay rent." If we look to the terms of the deed which is relied upon by the defendants-respondents we find that the lessee Bindeshuri Lal was put in possession of the share specified and of all rights attaching thereto; and it was expressly declared that the grant made to him was for generation after generation. A further term of the deed was that Bindeshuri Lal as lessee was to deposit in the Government Treasury Rs. 60 a year for *malguzari* exclusive of cesses and was in addition to pay the lessors the sum of Rs. 10 per annum by way of *malikana*. In the third clause of the docu-

ment, the grantors were to have mutation made in favour of Bindeshuri by getting his name recorded in what is described as "*khana milkiat.*" Then it was provided that the lessee was to have the powers of distraint of suing for arrears of rent and of ejecting tenants, and finally the document winds up with a declaration that it had been drawn up as a deed of perpetual lease. It is not disputed by either party that Bindeshuri under the terms of this document acquired a heritable interest in the property of which he was put in possession; but that fact would not of course be sufficient by itself to constitute him an under proprietor regard being had to the definition which I have mentioned above. It must also be shown that a transferable right was created in favour of Bindeshuri. Both the Courts below have admitted that there is nothing in the language of the deed to show expressly that any power of transfer was granted; and it seems to me that unless it can be shown from the language of the document, which on the defendants' own case is the source of all the title they possess, that a power of transfer was granted, either expressly or by necessary implication, it follows that these defendants cannot claim for themselves the status of under-proprietors. The learned Subordinate Judge has laid great stress on the clause in the document by which the grantors agreed to have the name of Bindeshuri entered in the revenue registers in the "*khana milkiat*"; but I think undue importance has been attached to this clause especially when it is borne in mind that lessees are under the Land Revenue Act treated in certain respects as if they were proprietors. A reference to section 32 of the Land Revenue Act (U. P. Act III of 1901) and in particular to the Explanation attached to the section shows that for the purpose of maintaining the registers which go to make up the Record of Rights the terms 'proprietor' and 'under-proprietor' "include a person in possession of proprietary or under-proprietary rights under a mortgage or lease." It cannot, therefore, be said that the use of the words "*khana milkiat*" in this document necessarily imports that the intention of the grantors was to confer upon Bindeshuri Lal any proprietary interest including a power of transfer with respect to the property referred to in the deed. It is true, and the learned Counsel for the respondents is entitled to rely upon the fact, that the terms of the document provide that the lessee is to pay the lessors a certain annual sum by way of *malikana*, and it is true, as has been argued, that in a manner this position assigned to the lessee is similar to the position of an under-proprietor who pays the revenue in the same way and pays a percentage on the revenue to the superior proprietor. But I should be very unwilling to concede that the use of these terms can be treated as indicating with anything like certainty an intention on the part of the grantors to give the lessee Bindeshuri a right of transfer which would make him an under-proprietor within the meaning of that expression as used in the Oudh Rent Act. It is quite true of course that the perpetual lessee Bindeshuri and his successors-in-interest have a certain power of transfer which they acquired by virtue of the Statute (*Cf.* section 108 of the Transfer of Property Act). There is no doubt that the interest of a lessee may be transferred absolutely or by way of mortgage or sub-lease in the absence of any contract to the contrary. But, in my opinion, this statutory right of transfer cannot be called in aid for the purpose of demonstrating that the person to whom this perpetual lease was granted, is an under-proprietor, for, in my view of the law, in order to constitute a person an under-proprietor by a grant it is necessary that his power of transfer should be derived from the grant and not from the Statute Law. The Statute merely says that the interest which the lessee acquires by the execution of a lease in his favour is capable of transfer with certain conditions; but what we have to determine in this case really is the nature of the interest which was conferred by the document itself; and that question must be determined without any reference to the language of the Transfer of Property Act: and obviously there is a wide distinction between the power of transfer which a lessee has under section 108 of the Act and the power of transfer which an under-proprietor possesses. However many

transfers of the lessee's interest there may be under the power which is granted by section 108 (B), clause (j), of the Transfer of Property Act, the law says that the lessee does not cease by reason of the transfers to be subject to any of the liabilities attaching to the lease. On the other hand, I think it is well-understood that if a person possesses an under-proprietary interest in the land and transfers that interest to a third party he ceases *ipso facto* to be liable to the superior proprietor for the payment of any rent in respect of the land. The superior proprietor is bound to accept the transfer and to look for his rents to the transferee. He cannot in any way hold the under-proprietor who has parted with his interest, liable for the payment of anything by way of rent. In the course of argument I have been referred to a number of cases to be found in the reports of this Court [*Kesho Singh* v. *Chaudhri Mohammad Azim* (1), *Mohammad Mehdi Ali Khan* v. *Ram Charan* (2) and *Nand Ram* v. *Amanat Fatima Begam* (3) and an unreported case decided by Mr. Chamier (Second Civil Appeal No. 23 of 1910, *Anant Bahadur* v. *Ram Adhin*)]. I cannot see that there is anything in these cases which really helps much to the decision of the case which is before me. Cases like these must be decided on their own facts and the law being well understood the only question in each case is how the law is to be applied to the particular facts which are put before the Court. Mr. Ram Chandra, however, relies strongly upon an observation made by Mr. Chamier in the second civil appeal to which I have referred. His argument is that as there can be no doubt that Bindeshuri acquired a heritable interest under the terms of this perpetual lease, the inference should be, in the absence of language to the contrary that the intention was to grant also an interest which was transferable. Mr. Chamier observed as follows in connection with him:—"It cannot be said that every *shankalapdar* is an under-proprietor but where under a deed of *shankalap* or otherwise a person is shown to have a permanent heritable interest in land under a grant and no right of re-entry is reserved to the grantor it must, I think, be presumed that the interest is transferable." I am not prepared to accept this dictum as being one of general application and I certainly could not apply it in the case of a deed which, as in the present instance, purports to be nothing more nor less than a perpetual lease. In the case of *shankalap* grants there may perhaps be some reason for attributing to the grantor an intention to give a transferable right because under the customary law it is understood generally that *shankalap* tenure is an under-proprietary tenure; but I am not prepared to allow that in construing a deed the terms of which appear to me to be clear enough and which purports to be nothing more than a deed of lease it is permissible to attribute to the lessor an intention to confer rights of transfer unless, as I have already observed, there are express words to that effect or unless such an intention is necessarily implied in the language of the grant. On my interpretation of this document the right of Bindeshuri Lal and his successors-in-interest is clear enough. They are perpetual lessees entitled to hold from generation to generation upon payment of Rs. 60 Government revenue into the Treasury *plus* Rs. 12 per annum to the superior proprietors by way of *malikana* and it is not to be denied that they have certain rights of transfer or assignment rights which are allowed to them by Statute and no others. But I am bound to hold in view of the definition of the term "under-proprietor" and of the law relating to under-proprietary tenures as well settled in this Court that this document of the 4th of March 1901 did not confer upon Bindeshuri the status of an under-proprietor. I think, therefore, that in these proceedings that the plaintiffs were entitled to have a declaration that the defendants have no proprietary nor under-proprietary rights in the land referred to in the suit. As regards the admissions made by the plaintiffs in the course of the proceedings which were taken in the Revenue Court for the purpose of having the entries in the registers corrected I have already referred to them. The plaintiffs acknowledge that the admissions were made under a mistake of law and on my interpretation of the document which I have just set out it must, I think, be held that there

(1) 3 O. C. 108.
(2) 5 O. C. 187.
(3) 6 O. C. 94.

was a mistake of law on the plaintiffs' part. The question of the plaintiffs' mistake is only of importance in considering the matter of costs; and as it is apparent that it was the plaintiffs' mistake which contributed in a large degree, if not entirely, to the wrong entry which is now found in the revenue record I consider they are not entitled to any costs in any of the three Courts through which this case has gone. I, therefore, allow the appeal and grant the declaration sought for in the plaint, but I allow the plaintiffs no costs in any of the three Courts.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL ORDER No. 407 OF 1915.

March 15, 1918.

Present:—Mr. Justice Teunon and Mr. Justice Newbould.

TAIMUDDI BEPARI AND ANOTHER—JUDGMENT-DEBTORS—APPELLANTS

versus

Sheikh LAKPAT BEPARI—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 90—Execution—Sale—Irregularity, effect of—Sale, whether can be set aside.

An execution sale cannot be set aside on the ground of irregularity under Order XXI, rule 90, Civil Procedure Code, if there is nothing to warrant the necessary or at least reasonable inference, that the inadequacy of price was the result of the irregularity. [p. 213, col. 2.]

Appeal against the order of the Second Subordinate Judge, Dacca, dated the 29th June 1915.

FACTS material to the report will appear from the judgment of the Subordinate Judge which was as follows:—

"This is an application to set aside the sale on the grounds (1) that the hour of the sale was not mentioned; (2) that no sale-proclamation was published and the properties were, therefore, sold for inadequate values at the sale.

Point No. 1.

The order-sheet of the execution case shows that on the 12th September 1914 the sale was postponed to the 12 o'clock on 26th October 1914 at the instance of the judgment-debtors. On the 26th October 1914 the judgment-debtors presented another petition to postpone the sale so that they might pay off the decree, but their petition was rejected and the properties were sold on the 2nd November 1912 within 7 days from the date of 26th October 1914, and the Court did do so in order to enable the judgment-debtors to pay off the decree within those 7 days and the Court was competent to postpone sale from day to day within 7 days without the necessity of a fresh sale proclamation. So the ruling in *Bhikari Misra* v. *Rani Surja Moni Pat Maha Dai* (1) has no application in this case.

As to the second point.—The record of the execution case shows that the judgment-debtors objected to the values of the properties to be sold, and the properties were allowed to be advertised for sale with the values as stated by the judgment-debtors. So the decree-holder had not the intention to suppress the notice to determine such values, and such notice gave the judgment-debtors an opportunity to be on the alert for the sale which was to follow the notice. From the deposition of Taimuddi Bepari, judgment-debtor, it appears that he knew of the non-publication of the sale proclamation and with such knowledge he repeatedly put in petitions for postponements offering to allow the sale without fresh proclamation. His conduct amounts to a waiver as to the factum of service or its regularity, formality and legality. If he had not such knowledge of publication or non-publication, there could have been no waiver. The decree-holder relied on *Girdhari Singh* v. *Hurdeo Narain Sahoo* (2), *Raja Thakur Barkam* v. *Ananta Ram Marwari* (3), *Dhanukdhari Singh* v. *Nathima Sahu* (4) in support of this view of the law. Again, the evidence of factum of publication of the sale proclamation seems to be more reliable, and the conduct of the parties lends support to it. The evidence

(1) 6 C. W. N. 48;
(2) 3 I. A. 230; 26 W. R. 44; 3 Sar. P. C. J. 637; Suth. P. C. J. 294; Bald. 12.
(3) 2 C. L. J. 584.
(4) 11 C. W. N. 848; 6 C. L. J. 62

of its non-publication does not seem to be convincing. The witnesses in proof of such evidence of negative character are not independent and reliable. Then, again, the properties were subject to two previous mortgages of Rs. 2,000 principal with Rs. 4,500 as interest and Rs. 3,000 respectively. The evidence as to the values of the properties which the judgment debtor has adduced, is not reliable in the absence of documentary evidence available. The *Sthith furd* Exhibit 1 does not bear the signature of its scribe. It is only corroborative evidence. Its scribe is dead. It does not seem to have been prepared in ordinary course of business.

On the above grounds I am inclined to decide both the grounds against the applicant. So ordered that the application is rejected with costs. Pleader's fee for each party is Rs. 13."

Babu *Surendra Nath Guha*, for the Appellants.

Babu *Upendra Lal Roy*, for the Respondent.

JUDGMENT.—This is an appeal against the order of the Subordinate Judge, Second Court, Dacca, dated 29th June 1915, refusing an application under Order XXI, rule 90 of the Code of Civil Procedure for setting aside the sale of certain properties of the appellants in execution of a decree obtained against them by the respondents. The contention of the appellants is that property worth over Rs. 17,000 has been bought by the decree-holder respondent for Rs. 4,950 and that this inadequacy of price is due to material irregularity in conducting the sale. Before the lower Court it was sought to prove that there had been no publication of the sale proclamation but this point was not pressed before us. As regards the other point that was taken in the lower Court it is conceded by the learned Pleader for the respondent that the omission of the Court to specify the hour of sale, when the sale was adjourned, amounted to an irregularity but he supports the decision on the ground that the price was not inadequate. The evidence has been read to us and we see no reason to differ from the finding of the learned Subordinate Judge that the oral evidence as to the value of the properties sold, is not reliable. The question whether the properties are subject to a valid mortgage is a point in dispute between the parties that has not been decided in these proceedings but, whether the judgment-debtor's assertion that the properties are not mortgaged be true or not, the fact that such an assertion had been made, would discourage intending purchasers. On the evidence we are, therefore, unable to hold that the price fetched is inadequate but, even if we held to the contrary, the appeal would still fail on the ground that the only irregularity proved, did not result in the injury suffered in that view by the appellants. The present case resembles that of *Mahabir Pershad Singh* v. *Dhanukdhari Singh* (5), and after considering the circumstances and facts of the present case we are of opinion, as the learned Judges were in that case, that there is nothing to warrant the necessary, or at least reasonable, inference that the inadequacy of price, if there were any, was the result of the admitted irregularity. The learned Pleader for the respondent undertakes that if the sale stands, his client will enter full satisfaction of the decree in execution of which the property was sold.

We accordingly dismiss this appeal but under all the circumstances without costs.

Appeal dismissed.

(5) 8 C. W. N. 686; 31 C. 815.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 45 OF 1916.

January 16, 1918.

Present:—Mr. Stuart, A. J. C.
and Mr. Kanhaiya Lal, A. J. C.

Musammat LAKSHMI KUNWAR

DEFENDANT—APPELLANT

versus

Srimati Rani MURARI KUNWAR AND OTHERS—PLAINTIFFS—RESPONDENTS

Civil Procedure Code (Act V of 1908), s. 92—Trust, public, for religious purposes—Endowment, deed of, silent as to nature of trust—Circumstantial evidence, weight of—Proof, nature of—Persons having right to worship in public temple, position of—Trustee not guilty of mismanagement or misappropriation—Scheme for better management of trust—Court, discretion of.

LAKSHMI KUNWAR *v.* MURARIKUNWAR.

Where a deed of endowment did not expressly state whether the temple built by the executant was intended for private or for public worship, but it was found from extrinsic evidence that the executant was anxious to obtain religious benefit for her soul, that the temple had been from its very beginning open to the public for worship and that the customary religious festivals had been celebrated therein in a public manner:

Held, that under the above circumstances, the trust must be taken to be a public trust created for religious purposes. [p. 215, col. 1.]

Persons having a right to perform worship in a temple intended for public worship, are competent to institute a suit under section 92, Civil Procedure Code [p. 215, col. 2.]

Where a Court does not find a trustee to be guilty of neglecting the trust or misappropriating its property, it has nevertheless full discretion to frame a scheme for the better management of the trust if under the circumstances such a course is deemed to be in the interests of the trust. [p. 216, col. 1.]

Appeal from the decree of the Additional Judge, Fyzabad, dated the 21st February 1916.

The Hon'ble Pandit *Gokaran Nath Misra* and Babu *Mahendra Deo Varma*, for the Appellant.

Messrs. *A. P. Sen* and *H. K. Ghosh* and Babu *Salig Ram*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the late Raja Udai Pratab Adya Dat Singh, C. S. I., of Bhinga, now represented by his widow, and three other persons for the removal of *Musammat* Lakshmi Kunwar from her position as a trustee and manager of a temple at Ajudhia and the property appertaining to it. The temple aforesaid was constructed by Thakurain Sukhraj Kunwar, the Taluqdar of Deotaha. At the time of the Summary Settlement, the Deotaha Estate was incorporated with that of Bhinga. In 1871 Thakurain Sukhraj Kunwar succeeded in establishing her right to the Deotaha estate and obtained possession thereof under a decision of their Lordships of the Privy Council in *Musammat Thakrain Sookraj Koowar* v *Government* (1). The construction of the temple was started in 1857 and completed in 1861.

On the 21st May 1872, *Thakurain* Sukhraj Kunwar executed what she described as a *muafi-nama* or deed of *muafi* grant, entrusting the village Dharm Nagar, forming part of the Deotaha estate, to her family *guru* or preceptor *Mahant* Rangrajpat for the purpose of providing for the performance of the worship of and the offering of *bhog* or food to the deity installed in the temple and authorising him and his successors to collect the rents thereof without any liability for the payment of the revenue and to apply the same to the purposes of the trust. By the said deed she directed her heirs and descendants for all generations to come not to interfere with the collection of the rents of the village, which was set apart for the said purposes. On the same date she executed a Will, by which she bequeathed the rest of her estate to Raja Udai Partab Adya Dat Singh of Bhinga.

On the 2nd June 1875 the lady died without leaving any issue. It is not denied that Rangrajpat remained in possession of the temple and of the village endowed for its use till his death in 1883. He was succeeded in the management by his son Rasikrajpat *alias* Babbanpat, who died in 1905, and was succeeded in turn by his widow *Musammat* Lakshmi Kunwar, the present defendant-appellant. Between 1893 and 1911 several attempts were made by the Court of Wards in charge of the Bhinga estate and after its release by the Raja of Bhinga to obtain possession of the village and the temple, but they were unsuccessful. A suit filed by the Court of Wards in 1893 was dismissed on the ground that the Court in which it was instituted, had no jurisdiction to entertain it (Exhibit A 6). Another suit filed by the Court of Wards in 1897 was similarly dismissed on the ground that the deed of 21st May 1872 created an endowment for a public religious purpose and that no suit was maintainable except in accordance with section 539 of the then Code of Civil Procedure (Exhibit 83). In 1911 a suit brought by the Raja of Bhinga for possession of certain buildings appertaining to the temple was withdrawn. In 1904 the Raja, however, succeeded in obtaining a decree for the resumption of the village Dharam Nagar under section 107, clause (E), of the Oudh Rent Act, thereby depriving the temple of the main source of its income, which was derived from that village.

In the present suit the plaintiffs seek to oust the defendant from the management of the temple and the buildings appertaining thereto alleging that the defendant has been mismanaging the trust, neglecting to keep

(1) 14 M. I. A. 112; 2 Sar. P. C. J. 705; 20 E. R. 728.

accounts and disregarding the regular performance of worship and the celebration of the customary festivals, and that she had misappropriated jewellery, clothes and other valuable furniture appertaining to the temple. It is also asserted that she is an illiterate *pardanashin* lady about 70 years old and consequently incompetent and unfit for the office and duties appertaining to the trustee of a temple. The learned Additional Judge exonerated her from the charge of neglecting the trust and misappropriating its property; but in the interests of the trust framed a scheme for the better administration of the trust, giving the defendant a position on the board of trustees.

The defendant seeks to challenge the decree passed by the Court below on three grounds. In the first place, she contends that the plaintiffs other than the Raja Bhinga had no right to institute the suit inasmuch as they were not interested in the object of the trust. In the second place, she contends that the trust was a private trust in regard to which the Court had no power to interfere under section 92 of the Code of Civil Procedure. In the third place, she argues that on the finding that she had committed no breach of trust, she ought not to have been deprived of her power of management.

In the written statement, filed by her in the Court below, she had denied the existence of a trust of any kind whatsoever suggesting that the temple had been made over to her father-in-law Rangrajpat Tewari, by Thakurain Sukhraj Kunwar, but no such position has been taken up in this Court. In the deed of endowment, executed by Thakurain Sukhraj Kunwar, it is not expressly stated whether the *thakurdwara* or temple built by her was intended for private or for public worship; but from the circumstances admitted by the witnesses of either party, that the temple has been from its very beginning open to the public for worship and that the customary religious festivals have been celebrated therein in a public manner, there can be no doubt as to the intention of the author of the trust. The lady lived in Bhinga. The temple was constructed in Ajudhia, a place of pilgrimage. The lady had no issue and was obviously anxious to obtain religious benefit for her soul. The temple forms the main structure in a set of buildings in one of which she herself lived in the latter days of her life, looking after the performance of worship, and died. In the written statements filed by Rasikrajpat, the husband of the defendant-appellant, in the previous suits, it was distinctly admitted that the trust was not a private trust. In her own statement in one of the previous suits, the present defendant-appellant admitted that Thakurain Sukhraj Kunwar had told her that she had built the temple for the public benefit and to perpetuate her name (Exhibit 10). In her statement in this case she similarly admits (O. P. 288) that the temple was constructed for being visited by the Hindu public and that no restriction was placed on visitors. Several witnesses of the defendant-appellant, including Banke Behari Lal (O. P. 184), Mahabir Prasad (O. P. 193), Shambhu Nath (O. P. 201) and Jai Dayal (O. P. 220), also admit that the temple is open to the Hindu public like the other temples at Ajudhia. The evidence adduced to show that a gift of the temple was made in favour of Rangrajpat after it was completed, was rightly disbelieved by the learned Additional Judge. In *Mohan Lalji* v. *Tikait Sri Gordhan Lalji* (2) their Lordships of the Privy Council pointed out that apart from positive testimony of the point the performance of the worship of an idol in accordance with the rites of the sect for whose benefit it was held, might be treated as good evidence of dedication, and the ordinary rule of the Hindu law, relating to the descent of private property, would not apply to the temple, where such worship was conducted. The evidence led in the case sufficiently justifies the finding of which the learned Additional Judge has arrived.

The next question is whether this temple being one intended for public worship the plaintiffs other than the Raja of Bhinga were sufficiently interested in its proper management to entitle them to bring the suit. Section 539 of the old Code of Civil Procedure required that the persons who would have a right to sue under that section, would have a direct interest in the trust; but the word "direct" was taken out by Act VII of 1888. The inference as pointed

(2) 19 Ind Cas 397; 35 A. 283; 17 C. W. N 741; 11 A. L. J 548; 17 C. L. J 812 15 Bom. L. R. 693 1913) M. W. N. 535; 14 M. L. T. 27; 40 I. A. 97 (P. C.).

out in *Sajedur Raja Chowdhury* v. *Gour Mohun Das Baishnav* (3), is that the Legislature intended to allow persons having the same sort of interest, that is, sufficient under section 14 of Act XX of 1863, to maintain a suit under section 539. In *Jawahra* v. *Akbar Husain* (4) and *Jugalkishore* v. *Lakshmandas Raghunathdas* (5), it was accordingly held that any person having a right to use a mosque or a temple for purposes of devotion was entitled to seek a proper administration of the trust and to prevent its breach.

Plaintiffs Nos. 2 to 4 are as much interested in the proper management of the trust as plaintiff No. 1, for they have a right to perform worship in the temple whenever they visit Ajudhia, and as the suit was filed with the leave of the Legal Remembrancer, the Court below had ample jurisdiction to entertain it.

In regard to the alleged breach of trust, the learned Additional Judge finds that the defendant-appellant kept no accounts of the income, derived from the temple, that she allowed one of her relations to live in one of the buildings attached to the temple presumably without the payment of any rent, that the paintings inside the temple had been neglected, and that a crack was noticeable in the gate, leading to the temple. He exonerates the lady from the charges of misappropriation of jewellery and furniture belonging to the temple and the neglect of worship and the celebration of the customary festivals. The small funds at the disposal of the lady after the temple was deprived of its main income from the village Dharam Nagar by the Raja of Bhinga, are probably responsible for the expenditure in connection with the temple having to be kept within the narrowest limits. But in the interest of the proper administration of the trust, it is desirable that an account should be kept of such income, as may be realized, and of its being put to the best use. A person, who has no business in connection with the temple should not, moreover, be allowed to stay in its precincts without paying any rent. The position of the defendant as an illiterate *pardanashin* lady of an advanced age and protracted to some extent by disease also renders it desirable that the management of the trust should be placed on a sounder footing. She has no male issue, who can help her in the management of the trust, and we agree with the learned Additional Judge that a Committee should be placed in charge of the temple with a representative of the family of the founder of the trust and another representative from the family of Rangrajpat the family preceptor and a third selected from among the respectable Hindu residents of Ajudhia or Fyzabad. Rangrajpat has, however, no male descendant alive, and it does not seem desirable that after the death of the defendant either her widowed daughter or her widowed daughter-in-law should necessarily be accorded a position on the board of trustees. Rangrajpat had four brothers, from among whose descendants a suitable representative can be selected to take up the place of the defendant when it falls vacant.

The plaintiffs have filed certain cross-objections, impeaching the findings, at which the learned Additional Judge has arrived, and questioning the propriety of the scheme which he has framed. We do not think that any of these objections, except in so far as they have already been dealt with above, are entitled to any weight. In deference to the wishes of the founder of the trust and the interest which the defendant has shown in preserving the trust property, we do not consider it desirable to remove her entirely from the management. Her position as the widow of the family preceptor will exert an influence for good in favour of the temple, while her absence may alienate the sympathies of many by whom Rangrajpat and his family were held in very high esteem. We append a scheme for the administration of the trust which modifies the scheme framed by the learned Additional Judge in a few particulars and, subject to that modification, we dismiss the appeal and disallow the cross-objections, directing the parties to bear their own costs throughout. A copy of the scheme will be sent to the members of the Committee for information and necessary action.

* * * * * *

Appeal dismissed.

(3) 24 C. 418; 12 Ind. Dec. (N. S.) 946.

(4) 7 A. 178; A. W. N. (1884) 324; 4 Ind. Dec. (N. S.) 390

(5) 23 B. 659; 1 Bom. L. R. 118; 12 Ind. Dec. (N. S.) 440.

RAGHOBA v. PALHOBA.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 202-B OF 1903.

January 15, 1907.

Present:—Mr. Stanyon, A. J. C.

RAGHOBA AND OTHERS—APPELLANTS

versus

PALHOBA—RESPONDENT.

Possession, value of—Adverse possession of co-owner—Revenue record in Berar, correctness of—Presumption.

Where nothing else is known, the person in possession of property is presumed to be the owner.

Though the revenue record in Berar is not supported by a statutory presumption like a Record of Right in the Central Provinces, an entry in the Record of Rights does raise a presumption, and the presumption arising from possession is weakened considerably if the person in possession fails to explain an adverse entry and is unable to state the origin of the possession by virtue of which he claims an adverse title to the recorded holder.

The possession of one co-owner even over the whole co-parcenary, is not *prima facie* adverse to the other co-owners.

Though a certain lease may be inadmissible in proof of its terms, it may still be used to prove the relationship of landlord and tenant.

Augustien v. *Challis*, (1847) 1 Ex. 279 at p. 280; 17 L. J. Ex. 73; 154 E. R. 118; 74 R. R. 670, *Kedar Nath Joardar* v. *Shurfoonnissa Bibee*, 24 W. R. 425, followed.

Appeal from the decree of the Court of the Additional District Judge, East Berar, dated the 7th August 1906.

Messrs. *J. Mitra* and *V. R. Dixit*, for the Appellants.

Mr. *A. C. Roy*, for the Respondent.

JUDGMENT.—I think this case must go back for a fresh decision on the merits. The first Court made the mistake of treating a revenue record as all but absolute proof of title. The Additional District Judge, in pointing out this error went to the opposite extreme of brushing the record aside as of no value whatever. The plaintiff's possession was held proved and that without further consideration was taken to have established plaintiff's title though it was admitted that plaintiff could not show how his possession began. It is of course the law that where nothing else is known, the person in possession of a property is presumed to be the owner. But here we have first a revenue record which shows the land in dispute to be the holding of another person. This is not supported by a statutory presumption like a Record of Right in the Central Provinces. But it does not follow from the absence of such enactment that the entry raises no presumption, or even that it raises a weak presumption. It must be taken that the Revenue Authorities in Berar took reasonable steps to secure that their records were correct as to facts, and the entry in this case certainly weakens considerably the presumption in favour of the possession of a plaintiff who does not explain the entry and is unable to state the origin of the possession by virtue of which he claims an adverse title to the recorded holder. Next there is an admission by the plaintiff pointed out in the judgment of the first Court, that defendant's predecessor-in-title was a co-occupant with himself. This admission is of itself sufficient to destroy the presumption upon which the lower Appellate Court has decided the case, because the possession of one co-owner even over the whole co-parcenary, is not *prima facie* adverse to the other co-owners. The case really wants careful enquiry, in order to ascertain whether defendants are speculative purchasers of a long definite holding or the plaintiff is endeavouring to appropriate the neglected heritage of a co owner. It may be well to note that though the alleged lease may be inadmissible proof of its terms, and incapable of affecting the property in the way a valid lease would have done, it may still be used to prove that the relation between plaintiff and defendant's predecessor was one of landlord and tenant. This has been held to be the law in England *Augustien* v. *Challis* (1) and also the law under the Evidence Act in India, *Kedar Nath Joardar* v. *Shurfoonnissa Bibee* (2). For the reasons given, the decree appealed against is reversed and the case is remanded for a fresh decision on the merits. The appellants will be given the usual refund certificate. Other costs in this Court will abide the result.

Case remanded.

(1) (1847) 1 Ex. 279 at p. 280; 17 L. J. Ex. 73; 154 E. R. 118; 74 R. R. 670.

(2) 24 W. R. 425.

BALDEO BAKHSH *v.* PAHLAD SINGH.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND RENT APPEAL No. 58 OF 1917.

November 7, 1917.

Present:—Mr. Lindsay, J. C.

Thakur BALDEO BAKHSH—PLAINTIFF—APPELLANT

versus

Thakur PAHLAD SINGH—DEFENDANT—RESPONDENT.

Res judicata—*Profits, suit for*—Sir *and* khudkasht, *profits of, rate of.*

A decision in a previous suit for profits between the co-sharers of a village that the *sir* and *khudkasht* of a particular co-sharer yielded profits at a certain rate in the years in suit, does not operate as *res judicata* in a subsequent suit between the same co-sharers for profits in respect of other years.

Appeal from the decree of the District Judge, Sitapur, dated the 15th May 1917, upholding the order of the Deputy Collector, Sitapur, dated the 13th February 1917.

Babu *Ishwari Prasad*, for the Appellant.

JUDGMENT.—The only question which arises for decision in this second appeal is with regard to the manner of taking account between the parties. The suit was a suit between co-sharers for profits and there is no dispute that the defendant-respondent Pahlad Singh is in possession of certain lands as *sir* and *khudkasht*. It is on the basis of the profits of these *sir* and *khudkasht* lands that the account has to be settled between the parties and the argument for the appellant here is that in estimating the profits the account should be made up on the basis that the land yields profit at the rate of Re. 1-6-0 per *kachcha bigha*. It is claimed that in a previous litigation between the parties with respect to other years than the year now in suit, this rate was adopted by the Court in making up the account and so the contention is that on the principle of *res judicata* the same rate ought to be applied in the present instance. The learned Judge of the Court below has met this argument by saying that any previous decision of the Court laying down a uniform rate of Re. 1-6-0 per *kachcha bigha* could not be treated to be binding on the parties because in suits for profits what has to be looked at is the amount of the actual profits during the years in suit and the proportion in which those profits must be divided. I have looked at the previous decision which

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was relied upon by the plaintiff for the purpose of enforcing the principle of *res judicata*. It certainly appears to me that it has never been laid down by any Court that in all suits between these parties for profits the rate of profit is to be calculated on the basis that each *kachcha bigha* of land in the occupation of the defendant yields a profit of Re. 1-6-0 a year. I understand from the judgment which I have perused that all that was found, was that during the years then in suit this was a reasonable rate to assume in the case of *sir* and *khudkasht* lands occupied by the defendant-respondent Pahlad. The profit of any particular land may vary from year to year and it may very well be, as I pointed out to the learned Counsel for the appellant, that lands which a few years ago might reasonably be charged at the rate of Re. 1-6-0 per *kachcha bigha* might now, in view of altered circumstances, be liable to be charged at the rate of Rs. 3. I think the *res judicata* argument is altogether untenable in the case and that the Courts below were right in making up the account on the basis of the actual profits during the years in suit calculated on the actual rent rates prevailing in the village during the period which the suit covers. This is the only point which has been argued before me and I think the appeal must fail. The decision of the Court below appears to be quite correct. I dismiss the appeal. No order as to costs as the defendant-respondent has not entered an appearance.

Appeal dismissed.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 393 OF 1915.

December 6, 1916.

Present:—Sir Edward Chamier, KT., Chief Justice, and Mr. Justice Roe.

JANG BAHADUR LAL—OBJECTOR—APPELLANT

versus

PALTU TEWARI—PETITIONER—RESPONDENT.

Execution—Suit against lunatic—Court refusing to appoint guardian ad litem*—Decree passed—*

DEBI BAKHSH SINGH v. BED NATH.

Representative of lunatic, whether can object to decree in execution.

Where a suit is brought against a person of unsound mind and the trying Court is asked to appoint a guardian of the lunatic for the purposes of the suit, but refuses to do so and passes a decree against the lunatic, the representative of the lunatic after his death cannot raise an objection in the execution Court that the decree was null and void and could not be executed.

Second appeal against the decision of the Subordinate Judge, Muzafferpore, reversing the order of the Munsif, 1st Court, Muzafferpore.

FACTS.—A suit was brought against one Bom Bahadur and others in 1901. In the plaint Bom Bahadur was described as a person of unsound mind and a prayer was, therefore, made to appoint his brother Jang Bahadur as his guardian. The Court by an order dated 19th December 1901, held that Bom Bahadur had not been adjudged a lunatic under Act XXXVI of 1858 and that, therefore, the plaintiff had no right to have him represented by another person in the suit. In adopting this course the Court relied upon *Uma Sundari Dasi* v. *Ramji Haldar* (1) and *Jonnagadla Subbaya* v. *Thatiparthi Seundala Euthayn* (2). The Court thereafter proceeded to pass a decree in favour of the plaintiff and against the lunatic. Applications for execution were made against Bom Bahadur without any objection having been made as to the invalidity of the decree. Bom Bahadur died and the decree was then sought to be executed against his brother Jang Bahadur as his representative Jang Bahadur objected among other grounds that the decree could not be executed as it was on the face of it null and void having been passed against a person of unsound mind without the appointment of a guardian *ad litem*. The Munsif in whose Court the execution application was pending, relying upon *Purna Chandra Kumar* v. *Beioy Chand* (3) and *Rojani Kanta Bhowmik* v. *Karamat Ali* (4), allowed the objection and rejected the application for execution. The Subordinate Judge in appeal reversed the order of the learned Munsif. A second appeal was preferred against the order of the Subordinate Judge to the High Court.

Mr. *Lachmi Narain*, for the Appellant.

Mr. *Atul Krishna Roy*, for the Respondent.

JUDGMENT.

ROE, J.—The only point for decision in this case is whether it having been brought to the notice of the Court trying an action that one of the defendants in the action was of unsound mind, and the Court having nevertheless insisted upon going on with the suit without appointing a next friend, the representative-in-interest of the person alleged to be of unsound mind, can after his death assail the decree made against such person. It is obvious that the point having been taken in the trial of the suit and having been decided against the person alleged to be of unsound mind, the same question cannot possibly be raised in execution. This appeal should be dismissed with costs.

CHAMIER, C. J.—I agree. The Munsif who tried the case applied the law as it had been laid down in decisions which were then in force and which were binding upon him. This appeal must be dismissed.

Appeal dismissed.

(1) 7 C. 242; 9 C. L. R. 13; 3 Ind. Dec. (N. s.) 704.

(2) 6 M. 350; 7 Ind. Jur. 414; 2 Ind. Dec. (N. s.) 545.

(3) 18 Ind. Cas. 859; 17 C. W. N. 549; 18 C. L. J. 18.

(4) 5 Ind. Cas. 523. 14 C. W. N. c. (100).

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL NO. 8 OF 1917.

June 7, 1917.

Present:—Pandit Kanhaiya Lal, A. J. C.

Raja DEBI BAKHSH SINGH AND ANOTHER—JUDGMENT-DEBTORS—APPELLANTS

versus

BED NATH—DECREE-HOLDER—RESPONDENT.

Oudh Land Revenue Act (XVII of 1876), s. 174, scope of—Execution of decree Decree on contract entered into while estate under Court of Wards' superin-

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tendence—Property purchased from profits of estate after release from superintendence of Court of Wards, attachment of—Court of Wards' superintendence, release from, effect of.

The language used in section 174 of the Oudh Land Revenue Act points to the property which was actually under the superintendence of the Court of Wards and not to any profits that may be derived therefrom after its release or to any acquisition made from the same.

Property purchased by a person from the profits realised by him from his estate after its release from the superintendence of the Court of Wards, is liable to attachment in execution of a decree obtained against him in respect of a contract entered into while his estate was under the superintendence of the Court of Wards.

Appeal against the order of the Subordinate Judge, Sitapur (Tahsil Biswan), dated the 1st March 191 .

The Hon'ble Pandit *Gokaran Nath Misra*, for the Appellants.

Mr. *A. P. Sen*, for the Respondent.

JUDGMENT.—The question for consideration in this appeal is whether property acquired by a person after the release of his estate from the Court of Wards is liable to attachment in execution of a decree obtained against him in respect of a contract entered into while his estate was under the superintendence of the Court of Wards. The estate, in the present instance, was released from the superintendence of the Court of Wards in 1898. The property in question was purchased in 1909. It is not disputed that the purchase was made from the profits, realized by the debtor, from his estate after its release from the superintendence of the Court of Wards.

The learned Counsel, who appears for the judgment-debtors, contends that the protection afforded by section 174 of the Oudh Land Revenue Act (XVII of 1876) extends as much to the estate as to the profits which may be realized from the same after its release or to any acquisition made therefrom. But section 174 extends the protection only to "such property" as was actually under the superintendence of the Court of Wards. Any profits accruing from the property after its release would be absolutely at the disposal of the holder of that property, and he would be at liberty to apply the same in paying his old debts or acquiring other property therewith or in any manner he likes.

In *Jhamman Lal* v. *Himanchal Singh* (1) it was held that the prohibition contained in the second paragraph of section 205B of Act XIX of 1873, which contained a similar provision applicable to what was then known as the North Western Provinces, did not apply to rents and profits of property which accrued after the release of the corpus from the superintendence of the Court of Wards. Any acquisition made from those profits would similarly be excluded from that prohibition. The language used in section 174 of the Oudh Land Revenue Act points to the property which was actually under the superintendence of the Court of Wards and not to any profits that may be derived therefrom after its release or to any acquisition made from the same. The object of the provisions, as pointed out by their Lordships of the Privy Council in *Debi Bakhsh Singh* v. *Shadi Lal* (2), was to protect the property under the superintendence of the Court of Wards against transactions entered into by a person under tutelage and against the consequences of any execution, in respect of contracts entered into by such a person, and so long as the tutelage lasts, the property and the profits partake of the same character, but when it ceases, the protection ends, so far as the enlargement of the estate from future profits or by acquisition is concerned. Such future profits do not form accretions to the estate for the purposes of that protection which is limited in character.

The appeal is, therefore, dismissed with costs.

Appeal dismissed.

(1) 24 A. 136, A. W. N. (1901) 183.

(2) 33 Ind. Cas 681; 19 O. C. 55; 14 A. L. J. 477; 24 C. L. J. 15; 38 A. 271; 20 M. L. T. 53; 20 C. W. N. 770; 18 Bom. L. R. 412; (1916) 1 M. W. N. 425; 31 M. L. J. 72; 4 O. L. J. 1; 3 L. W. 525 (P. C.).

DHARANI KANTA LAHIRI *v.* ISMAIL SHAIKH.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2377 OF 1915.

March 14, 1918.

Present:—Mr. Justice Fletcher and Justice Sir Shamsul Huda, Kt.

DHARANI KANTA LAHIRI CHOWDHURI—PLAINTIFF—APPELLANT

versus

ISMAIL SHEIKH AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Lease to tenant for term with liberty to landlord to settle land on expiration of term, whether confirmatory of pre-existing tenancy.

A document which gives the tenant a lease for a particular term at a fixed rent and which gives to the landlord the right at the expiration of that term to settle the land with whomsoever he pleases, cannot be taken as a mere recognition of a pre-existing tenancy. [p. 222, col. 1.]

Appeal against the decree of the Special Judge, Mymensingh, dated the 16th August 1915, affirming that of the Assistant Settlement Officer of that District, dated the 5th September 1914.

FACTS.—The appeal arose out of a proceeding under section 105 of the Bengal Tenancy Act for settlement of fair and equitable rent. The plaintiff prayed for increase of rent on account of increase of area as well as for enhancement on the ground of rise in the prices of food crops. The plaintiff produced a *kabuliyat* which showed that its term was for five years only and there it was stipulated that at the expiration of the term the landlord was entitled to settle the land with any body he pleased. The tenants-defendants pleaded that they had been holding these *jamas* at fixed rate of rent from the time of the Permanent Settlement and as it had been found by them that since 1285 B. S. they were paying the same rent, they claimed the benefit of the presumption under section 50 of the Bengal Tenancy Act. They also pleaded that their rentals were consolidated. The Assistant Settlement Officer held that the tenant-defendant had been paying at uniform rates of rent since 1285 B. S. So that they were entitled to the benefit of the presumption under section 50 of the Bengal Tenancy Act inspite of their admission that their *jotes* were "*sadharan*" (ordinary.) He, however, held that the rentals were not consolidated and he assessed rent on the excess area as found by the standard of measurement stated in the *kabuliyat*. The learned Special Judge, on appeal, also held that the tenants were entitled to the benefits of the presumption under section 50 of the Bengal Tenancy Act and dismissed the appeal. Upon this the plaintiff-landlord preferred the present second appeal.

Sir *Rash Behari Ghose* (with him Babu *Sasankajiban Roy*), for the Appellant:—I submit that upon the terms of the *kabuliyat* the tenancy was for five years only and the landlord could settle the land after the expiration of the period with any body he pleased. So the tenancy of the defendants created by the *kabuliyat* cannot be said to be a mere recognition of a pre-existing tenancy or confirmatory of an old tenancy. Therefore the Courts below have erred in holding that the defendants are entitled to the benefits of the presumption under section 50 of the Bengal Tenancy Act.

Babu *Chandrakanta Ghose* (with him Babu *Nilkanta Ghose*), for the Respondent.—The *kabuliyat* does not show that by it a new tenancy was created. It shows that a pre-existing tenancy was recognised or confirmed. Both the Courts below have found that the tenants had been paying uniform rates of rent from 1285 B. S. onwards hence they are surely entitled to the benefit of the presumption under section 50 of the Bengal Tenancy Act. No variation of rent has been proved and the plaintiff has not rebutted the presumption arising out of the tenancy having been held by the tenants at fixed rents since 1285 B. S. Although the tenants admit that their *jotes* were "*sadharan*" that does not, I submit, take away their rights to claim full benefits under section 50, Bengal Tenancy Act.

JUDGMENT.

FLETCHER, J.—This is an appeal from the decision of the learned Special Judge of Mymensingh, dated the 16th August 1915, dismissing an appeal from the judgment of the learned Assistant Settlement Officer of the same place. The only question involved in the appeal is whether the defendants, the tenants, are entitled to the presumption mentioned in section 50 of the Bengal Tenancy Act. It is common ground that the tenants are holding under the terms of a document in writing and the question is whether that document was the origin of the tenancy or whether it was merely confirmatory of a pre-existing tenancy. I have come to the conclusion that the document was not confirmatory

nor was the origin of the tenancy under which the defendants hold. The term granted was a term of five years and it was provided by the document that at the expiration of that term, the landlord would be entitled to make a settlement of the land with whom he pleased and it seems to me quite impossible on those terms to hold that the document which gave tenants a lease for a particular term at a fixed rent and which gave to the landlord the right at the expiration of that term to settle the land with whomsoever he pleased, can be taken as a mere recognition of a pre existing tenancy. It is also to be noticed that under the rent law as existed at the time when the *kabuliyat* was executed, there was nothing to prevent a tenant from surrendering a right of occupancy in favour of the landlord. Whether the bargain that was entered into between the parties, was not a prudent one it is not for us to say, but in my opinion, the document negatives the presumption under section 50 of the Bengal Tenancy Act. In that view, the present appeal ought to be allowed and the case will be sent back to the Court of Appeal below for settling the rent. The appeal will stand dismissed as against respondent No. 13 in regard to No. 7 *khatian*. We make no order as to costs.

SHAMSUL HUDA, J.—I agree.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 341 OF 1916.

August 20, 1917.

Present:—Mr. Lindsay, J. C.

GHASI RAM—PLAINTIFF—APPELLANT

versus

DALEL SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 2—Execution—Satisfaction of decree not certified to Court—Decree-holder purchasing property at auction sale—Purchase, validity of—Fraud.

During the course of an execution proceeding the decree was satisfied out of Court but the satisfaction was not certified to or brought to the notice of the Court. The decree-holder brought an equity of redemption belonging to the judgment-debtor to sale and purchased it himself. The judgment-debtor then brought a suit for redemption in respect of the property without having got the sale set aside:

Held, that the execution sale was a nullity inasmuch as by failing to certify the satisfaction of the decree to the Court, the decree-holder had committed a fraud on the Court, and that therefore the judgment-debtor was entitled to redeem the property. [p. 224, col. 2.]

Appeal from the decree of the District Judge, Hardoi, dated the 30th June 1916, reversing the order of the Munsif, Bilgram, dated the 22nd February 1916.

The Hon'ble Pandit *Gokaran Nath Misra*, for the Appellant.

Babu *Basudeo Lal*, for Respondents Nos. 2, 3, 4 and 5.

JUDGMENT.—The facts of this case may be stated shortly as follows. The matter in issue between the parties is the right of the plaintiff appellant, Ghasi Ram, to redeem a mortgage which was executed by his father Dalip Singh on the 24th of June 1872. The first four defendants in the case are the representatives of the mortgagee. A plea was raised to the effect that the plaintiff had no right to redeem because the equity of redemption of the property mortgaged, had vested in another person Bhikham Singh, who was impleaded as the fifth defendant. Bhikham Singh also resisted the claim for redemption, saying that the right to redeem was with him and not with the plaintiff. The way in which Bhikham Singh came to be interested in this matter is as follows. On the 26th of October 1900 he got a money decree against the plaintiff Ghasi Ram in the Court of the Munsif of Bilgram. That decree was for a sum of Rs. 150. On the 13th of April 1904 Ghasi Ram, in order to arrange for the satisfaction of this decree and in order to discharge certain other debts which were owing to him, sold certain property, other than the property mortgaged, to Bhikham Singh for a sum of Rs. 500. It was stated in this sale-deed that Rs. 150 had been set off on account of the money which the vendor owed Bhikham Singh under the Munsif's decree above referred to. After this sale-deed had been executed, a dispute arose between Ghasi Ram and Bhikham Singh regarding ex-proprietary rights. Bhikham Singh took up the position that the understanding was at the time of the sale that Ghasi

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Ram was not to retain any ex-proprietary rights in the land sold. On the other hand Ghasi Ram's case was that he was entitled by law to have these ex-proprietary rights and that in fact Bhikham Singh could not in any way deprive him of them. The matter was taken before a Revenue Court and it was decided that Ghasi Ram was entitled to ex-proprietary rights After this Bhikham Singh brought a suit in the Court of the Subordinate Judge of Hardoi demanding cancellation of the sale-deed. He got a decree in his favour in that Court on the 13th of July 1905. Having obtained this decree Bhikham Singh then applied to execute the Munsif's decree for Rs 150 and made an application for that purpose on the 21st of June 1906. Meantime Ghasi Ram had filed an appeal against the decree of the Subordinate Judge and on the 30th of November 1906 the District Judge allowed the appeal and dismissed the suit of Bhikham Singh for cancellation of the sale-deed. This order of the District Judge was upheld in appeal by an order of this Court dated the 30th of May 1907. Notwithstanding the fact that Bhikham Singh lost his case in appeal before the District Judge of Hardoi he persisted in going on with the execution proceedings and on the 20th of December 1906 he had Ghasi Ram's property brought to sale and purchased it himself. The property which was brought to sale on this occasion was the property held in mortgage under the deed which had been executed on the 24th of June 1872; in other words, as a result of this auction sale Bhikham Singh became the purchaser of the equity of redemption of the mortgaged property now in suit. This sale was confirmed by the executing Court on the 24th of January 1907. Bhikham Singh never applied for any sale-certificate until the 24th of March 1914. The present suit for redemption was brought on the 26th of August 1915. The Munsif held that Bhikham Singh took nothing by his purchase of the 20th of December 1906 inasmuch as he had committed a fraud on the executing Court. He, therefore, gave a decree for redemption in favour of the plaintiff-appellant. This decree has been reversed in appeal by the District Judge who was of opinion that the execution-sale was still binding upon Ghasi Ram and that until he succeeded in getting it set aside, he could not maintain the present suit. In his judgment the learned Judge observes that the decree in execution of which the sale took place, was no doubt satisfied by the sale-deed which Ghasi Ram had executed in favour of Bhikham Singh on the 13th of April 1904; but he was of opinion that because satisfaction of the decree was never certified to the Court as required by law there was no bar to the execution of the decree. With regard to the argument that Bhikam Singh was not a *bona fide* purchaser the learned Judge held that this was a matter which could not be considered in the present case. His view was that the sale in execution was not a nullity and that Ghasi Ram should either have applied or sued to have the sale set aside. It may be mentioned here that although Ghasi Ram had won his case in appeal by the 30th of November 1905 while the execution proceedings were still running their course, he never brought to the notice of the Court that the result of the appeal was that the decree had been satisfied and that there was no occasion for proceeding any further in execution, nor does he appear in any way to have offered any resistance to the execution proceedings after he had won his case in appeal. The question which I have to decide here is whether in the present suit it is open to the plaintiff Ghasi Ram to plead that the execution-sale at which Bhikham Singh purchased, was a nullity and does not stand in the way of his claiming redemption, or whether he is so bound by the proceedings in execution as to be debarred from claiming redemption until he has got the sale proceedings set aside by suit. It seems at least doubtful whether any suit for the purpose of having the sale set aside could now be entertained, for any remedy of this nature would appear to be time-barred. However I have come to the conclusion that the rights of the case are with the plaintiff and that there is no bar to his seeking redemption and pleading that Bhikham Singh has no title to the property which he acquired at the auction-sale. It is admitted on all hands that the conduct of Bhikham Singh in connection with these execution proceedings was fraudu-

lent. There can, as the lower Appellate Court remarks, be no doubt that after the 30th of November 1906 when Ghasi Ram and Bhikham Singh were restored to their original position as it was after the execution of the sale-deed of the 13th of April 1904 the result was that the decree in favour of Bhikham Singh was fully satisfied. Consequently it was the duty of Bhikham Singh as decree-holder to inform the Court that his decree had been adjusted. This duty was imposed on him by section 258 of the old Code of Civil Procedure (Act XIV of 1882) which corresponds with Order XXI, r. 2, of the present Code. That section also provided that the judgment-debtor might inform the Court of the adjustment and apply for issue of a notice to the decree-holder, but while the judgment-debtor "might" make this application, the decree-holder was by law, and is still by law, bound to certify to the Court. It is true that section 258 and Order XXI, rule 2, provide that a payment or adjustment which has not been certified to the Court, shall not be recognised by any Court executing the decree and the learned District Judge is quite right in saying that in the circumstances attending the execution of the decree which resulted in the sale of the property the Court was not debarred from ordering execution inasmuch as the adjustment had not been certified to it. But it is plain at the same time that if Bhikham Singh had done what the law required of him and had given the Court the information which he was bound to give the Court would certainly have stopped execution proceedings and prevented the property from being brought to sale. It must, therefore, be held that by this breach of duty and by withholding the information which he was bound to give, Bhikham Singh committed a fraud upon the Court by means of which he was enabled to purchase the property in execution. He cannot, in my opinion, be allowed to avail himself of his own fraud and consequently I am satisfied that in the present case he ought not to be allowed to succeed on the plea that he purchased the property and holds the certificate of the Court which confirmed the sale. There is no question of the rights of third parties being affected in any way. If that were so it might be necessary to consider how far the plaintiff was to blame in standing by and not informing the executing Court that the decree had been adjusted. As between Ghasi Ram and Bhikham Singh no such question can arise. The plain fact remains that Bhikham Singh committed a fraud and acquired the right to redeem the property now in suit, and he cannot be allowed to plead his own fraud and to take any benefit thereby. Fraud as has repeatedly been said, vitiates the most solemn transactions. I find, therefore, that the appellant has the right to redeem this mortgage and that Bhikham Singh has no such right. The lower Appellate Court has disposed of the case on a preliminary point and has not gone into the other matters which are in dispute between the parties regarding the state of the mortgage account. Under Order XLI, rule 23, I reverse the decree of the Court below and send the case back for disposal upon the merits. Costs here and hitherto will abide the result.

Appeal allowed;
Cause remanded.

SIND JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 2 OF 1917.
August 31, 1917.
Present:—Mr. Pratt, J. C., and Mr. Hayward, A. J. C.
Musammat MIKANBAI—APPELLANT
versus
DASSIMAL GANGARAM AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XL, r. 1—Receiver, appointment of, principles followed in—'Just and convenient', effect of the substitution of the words, in new Code—Discretion of Court in appointing Receiver—Appellate Court, interference by.

The intention of the Legislature in substituting the words "just and convenient" in place of the phrase "necessary for the realization, preservation, or better custody or management, of any property moveable or immoveable the subject of a suit or attachment," in Order XL, rule 1, of the new Civil Procedure Code, was to bring the law in India into conformity with that in England. [p. 226, cols. 1 & 2.]

MIKANBAI v. DASSIMAL GANGARAM.

The power of appointing a Receiver should be exercised in India in accordance with principles already settled by the Court of Chancery in England, subject to such modifications as conditions peculiar to India may suggest. [p. 226, col. 2.]

These principles are the preservation of the estate pending litigation on a consideration of the merits of the conflicting titles, the risk to the tenants and other circumstances of the case. The Court, however, is always reluctant to dispossess a party in actual possession under a *prima facie* title. [p. 226, col. 2; p. 227, col. 1.]

An order directing a Receiver to manage a partnership business where all the partners are not parties to the suit is *ultra vires*. [p. 226, col. 1.]

A Court of Appeal, though slow to interfere with the discretion of the lower Court in the appointment of a Receiver, would interfere if satisfied that that discretion has not been exercised in accordance with settled principles of law. [p. 227, col. 1.]

It would be mischievous to appoint a Receiver as a matter of course without regard to the principles governing such appointments. [p. 227, col. 1.]

The appointment of a Receiver is unnecessary where there is no allegation of any act of waste or mismanagement but on the contrary there are partners in the estate other than the litigating parties who are interested in seeing that the property is kept safe and regular accounts are kept of the business. [p. 225, col. 2.]

Mr. *Lalchand Hasomal*, for the Appellants.

Mr. *Wadhumal Odharam*, for the Respondents.

JUDGMENT.

PRATT, J. C.—This is an appeal under Order XLIII, rule 1 (*s*), against an order made in the District Court jurisdiction appointing a Receiver before decree.

The parties to the suit are the descendants of Gopaldas, Gangaram and Nihalchand, three sons of Hundaldas.

Plaintiff No. 1 Dassimal is a son of Gangaram and the second and third plaintiffs are his (Dassimal's) sons. Defendant No. 2 is the son of Gopaldas. Defendant No. 3 is also a descendant of Gangaram, being the son of a brother of Dassimal.

Defendant No. 1, the principal defendant, is the widow of Deomal the son of Nihalchand.

The suit was a suit for partition and the property alleged to be joint family property consists of lands and a business. Most of the land is in the name of Deomal Nihalchand, who died three months before the institution of the suit and the business was conducted in his name. Thus the main issue in the suit is, whether the land and business of Deomal Nihalchand was joint family property.

The application for the appointment of the Receiver was made the day on which the plaint was filed and was supported by only two affidavits, that of plaintiff No. 1 Dassimal and plaintiff No. 2 his son, Santumal. In neither of these affidavits is there an allegation of acts of waste or mismanagement. Dassimal says in paragraph 15 of his affidavit that Tolaram the brother of the widow is now attempting to interfere with the management of the properties; in paragraph 20 he "apprehends" that Tolaram will forcibly remove the crop. Santumal in paragraph 3 of his affidavit says that he was manager in Deomal's lifetime and at paragraph 20 that Tolaram is attempting to take forcible possession.

Tolaram is the brother of defendant No. 1 and is acting on her behalf. The phrase "interfere", therefore, begs the question and assumes that Deomal's widow has no right to possession. There is no definition of the attempt to take forcible possession referred to in Santumal's affidavit. Dassimal refers to no such attempt and is only under an apprehension that force will be used

On the other hand, several affidavits were filed for the defence. These are of partners both *in* the lands and in the business. Jethanand Tanumal (P. 25), a partner in the land, says that regular accounts are kept of the estate for the information of the partners and that there were several partners in the business who all managed in the lifetime of Deomal. Khajuriomal (P. 30) is the principal surviving partner of the business. He says he manages it now and during Deomal's lifetime he also denies that Santumal was sole manager and avers that all the partners managed the business. He also says that regular accounts are kept of the business.

On the affidavits it is difficult to understand what reason there was for appointing a Receiver. There is no allegation of waste and in so far as there was a vague allegation of an apprehended waste, that is completely met by the affidavits of the partners who are in-

terested in seeing that the property is kept safe.

Again a Receiver would only represent the interests of the litigating partners. He would not be competent to dispossess the other partners who claim to be in possession and to be managing the business and the land. These other partners cannot be compelled to continue the partnership with the Receiver and it is foreign to the functions of a Court to carry on a partnership business. The utmost the Receiver could do would be to demand an account and receive the profits from the other partners as in the case referred to in Order XXI, rule 49 (2). The order of the lower Court directing the Receiver to manage the business is '*ultra vires*' in regard to those other partners.

Many affidavits have been filed as to events that occurred since the order under appeal. These we need not refer to, for they complain that the appointment has paralysed the business, for the Judge appointed as co-Receivers two persons who are at daggers drawn, plaintiff Santumal and Tolaram the brother of the widow.

Mr. Wadhumal admits the confusion caused by this joint appointment and suggests that this Court should substitute an independent single individual. But is it a case where any Receiver should be appointed ?

On this point Mr. Wadhumal argues that the discretion to appoint a Receiver has been enlarged by the new Code of Civil Procedure which has substituted the words "just and convenient" for the more particular phrase in the Code of 1882 "necessary for the realization, preservation or better custody or management of any property, moveable or immoveable, the subject of a suit or attachment." He further contends that the lower Court having exercised this discretion, this Court should be slow to interfere in view of the dictum of the Privy Council in *Jaipal Kunwar* v. *Indar Bahadur Singh* (1), followed by this Court in *Shivandas* v. *Pamanmal Mangharam* (2).

(1) 26 A. 238; 31 I. A. 67; 8 C. W. N. 465; 6 Bom. L. R. 495; 14 M. L. J. 149; 8 Sar. P. C. J. 625; 7 O. C. 334.

(2) 27 Ind. Cas. 942; 8 S. L. R. 275.

I do not, however, think that the effect of the amended section in the new Civil Procedure Code is to give the Court a wider discretion than that exercised by the Courts in England. The appointment of a Receiver is a form of equitable relief given for the protection of the property and in aid of the legal right. This relief was originally granted by the Court of Chancery in accordance with certain well settled principles. When that equitable relief received statutory recognition in the Judicature Act it was expressed in the words:

"A mandamus or an injunction may be granted or a Receiver appointed by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made."

This statutory power has been held in a series of cases, of which it is only necessary to refer to the most recent case of *Morgan* v. *Hart* (3), to be limited to cases where the Court of Chancery could have appointed a Receiver before the Judicature Act.

The words "just or convenient" in section 25 (8) of the Judicature Act have been held to mean just and convenient. *Beddow* v. *Beddow* (4). The Civil Procedure Code was, therefore, amended to bring the law in India into conformity with that in England. The power must be exercised in India in accordance with principles already settled by the Court of Chancery, subject of course to such modifications as conditions peculiar to India may suggest (Woodroffe, page 28).

These principles have been set forth in the cases of *Owen* v. *Homan* (5), followed in *Sidheswari Dabi* v. *Abhoyeswari Dabi* (6), and *John* v. *John* (7). They are the preservation of the estate pending litigation on a consideration of the merits of the conflicting titles (for the Court is

(3) (1914) 2 K. B. 183; 83 L. J. K. B. 782; 110 L. T. 611; 30 T. L. R. 286.

(4) (1878) 9 Ch. D. 89 at p. 93; 47 L. J. Ch. 588, 26 W. R. 570.

(5) (1853) 4 H. L. C. 997; 17 Jur. 861; 10 E. R. 752; 94 R. R. 516.

(6) 15 C. 818; 13 Ind. Jur. 258; 7 Ind. Dec. (N. S.) 1128.

(7) (1898) 2 Ch. 573; 67 L. J. Ch. 616; 79 L. T. 362; 14 T. L. R. 583; 47 W. R. 52.

always slow to dispossess a party in possession under a *prima facie* title), the risk to the tenants and other circumstances of the case.

It does not appear that these principles have been considered by the lower Court. The party in possession is widow of the last holder who has a *prima facie* title, and as the property is the partnership property there are partners who have an interest in the preservation of the estate.

It is true that the Court of Appeal is slow to interfere with the discretion deliberately exercised by a lower Court, but it must interfere when it is satisfied that that discretion has not been exercised in accordance with settled principles of law.

I am satisfied that this is such a case. The mischief of appointing a Receiver as a matter of course and without regard to these principles has been pointed out by Straight, J., in a similar case of *Srimati Prosonomoyi Devi* v. *Beni Madhab Rai* (8).

I would accordingly reverse the order of the lower Court and allow this appeal with costs.

HAYWARD, A. J. C.—I concur in the order proposed by the learned Judicial Commissioner, briefly for the reasons that plaintiff has no clear right to the property; that the association of plaintiff with the defendants' representative Tolaram in the management of the property has led to confusion; that serious practical difficulties exist in the way of effective official supervision of the working of a business firm, while the land is sufficiently protected by the pendency of the suit; and that there are other partners both in the business and the land interested in the preservation of the property. These circumstances which have now become plain were not, it would seem, fully apprehended at the time the order for a Receiver was granted by the learned Judge of the lower Court.

Order reversed.

(8) 5 A. 556; A. W. N. (1883) 136; 3 Ind. Dec. (N. S.) 511.

COURT OF THE BOARD OF REVENUE, UNITED PROVINCES.

PETITION No. 174 OF 1916-17 OF PARTABGARH DISTRICT.

April 19, 1917.

Present:— Mr. Campbell, S. M., and Sir H. V. Lovett, J. M.

DWARKA—PLAINTIFF—APPELLANT

versus

Raja BHAGWATI PRASAD SINGH—DEFENDANT—RESPONDENT.

Oudh Rent Act (XXII of 1886), s. 27—Improvement by tenant—Compensation for improvement, amount of.

Where it is found that a tenant is entitled to compensation for an improvement made by him on his holding, the Court is not justified in reducing the amount of compensation on the ground that a cheaper improvement could have served the tenant's purpose unless such a plea is raised by the landlord, inasmuch as such a consideration does not form part of the considerations enumerated by section 27 of the Oudh Rent Act. [p. 228, col. 1.]

Appeal from the decree of the Commissioner, Fyzabad, dated the 27th November 1916, modifying the order of the Assistant Collector, Partabgarh.

FACTS of the case are briefly as follows:—

The plaintiff-tenant sued to contest a notice of ejectment issued against him by the defendant-landlord, claiming therein compensation for a big well made by him on his small holding. The defendant opposed the suit, stating that the plaintiff was not entitled to any compensation because no written permission for sinking and constructing the well, as required by section 23 of the Oudh Rent Act, had been secured by the plaintiff from the defendant. The Assistant Collector found that such permission had been obtained by the plaintiff from the defendant, and allowed Rs. 800 to the plaintiff as the approximate value of the compensation to which the plaintiff was then entitled. On appeal, the Commissioner also agreed with the Assistant Collector on the fact of the permission, but reduced the amount of compensation from Rs. 800 to Rs. 200, on the ground that in view of the extent of the plaintiff's holding such a big well was not required and that a cheaper well would have answered the plaintiff's purpose as well as this expensive well.

Babu *Har Bhawan Dayal*, for the Appellant.

Babu *Har Dhyan Chandra*, for the Respondent.

JUDGMENT.

LOVETT, J. M.—(*April* 14, 1917.)—In my opinion the Commissioner was not justified in altering the amount of compensation awarded. He found (*a*) that written permission was granted for building the well, (*b*) that the well was worth at least Rs. 1,000 originally. He apparently accepted the view that it is worth Rs. 800 now. But he arbitrarily reduced this sum to Rs. 200 on the ground that a cheaper well would have answered the plaintiff's purpose as well as this expensive well.

This plea was never put forward by the landlord (respondent) and forms no part of the considerations enumerated by section 27 of the Rent Act.

I would modify the Commissioner's order and restore the order of the Court of first instance in its entirety. I would direct the respondent to pay the appellant's costs and Pleader's fees in the two Appellate Courts.

CAMPBELL, S. M.—I agree.

Appeal allowed.

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CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 405 OF 1914.

August 22, 1917.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Walmsley.

SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—APPELLANT

versus

GANGADHAR NANDA—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), s. 15 (2), applicability of, to suits under s. 104H of the Bengal Tenancy Act (VIII B. C. of 1885).

Section 15 (2) of the Limitation Act cannot be applied to extend the period of six months provided for the institution of suits under section 104H of the Bengal Tenancy Act. [p. 229, col. 2.]

Appeal against the decision of the Subordinate Judge, Midnapur, dated the 26th March 1913.

Babu *Ram Charan Mitra*, for the Appellant.

Mr. *B. Chakravarti* and Babus *Shib Chunder Palit*, *Kshirod Narayan Bhuiya* and *Dhirendra Krishna Roy*, for the Respondent.

JUDGMENT.—This is an appeal by the Secretary of State for India in Council against a decree in a suit instituted by the respondent on the 16th May 1910, under section 104H of the Bengal Tenancy Act. The lands in suit are comprised in three villages—Dakhin Baraj, Uttar Dighe and Dhai Kukusria. The settlement roll, to which exception was taken by the plaintiff, was published, in the case of the first village on the 2nd June 1910, and in the case of the other two villages on the 17th June 1910. As regards the claim in respect of the first village, objection is taken that the suit is barred under sub-section (2) of section 104H, which provides that a suit under sub-section (1) must be instituted within 6 months of the date of the certificate of final publication of the Record of Rights. This objection does not apply to the second and third villages, and for the reasons assigned in our judgment in *Secretary of State* v. *Digambar Nanda* (1) [Appeal from Original Decree No. 252 of 1913] the case must be remitted to the Subordinate Judge for investigation, whether the plaintiff is an occupancy *raiyat* or a non-occupancy *raiyat* in respect of the lands comprised in these two villages and for ascertainment of fair and equitable rent payable in respect thereof. In respect of the lands of the village Dakhin Baraj, however, the question of limitation requires careful consideration.

The Record of Rights was finally published on the 2nd June 1910. The suit was instituted on the 1st December 1910, after the expiry of the period of six months prescribed by section 104H, sub-section (2). The plaintiff claims the benefit of section 15, sub-section (2), of the Indian Limitation Act, which provides that in computing the period of limitation prescribed for any suit of which notice has been given in accordance with the requirements of any enactment for the time being in force the period of such notice shall be excluded. In the case before us, the plaintiff served a notice as required by section 80 of the Code of 1908,

(1) 45 Ind. Cas. 43; 27 C. L. J. 334.

which provides that no suit shall be instituted against the Secretary of State for India in Council until after the expiration of two months next after notice in writing has been delivered or left at the office of a Secretary to the Local Government or the Collector of the District. Consequently if section 15, sub-section (2), of the Indian Limitation Act is held applicable to the case before us, it is plain that the suit is not open to objection on the ground of limitation. Now the term "prescribed", as used in sub-section (2) of section 15, read with section 3, obviously means "prescribed by the First Schedule to the Indian Limitation Act"; consequently, this provision cannot, by its own force, extend the period of six months mentioned in section 104H, sub-section (2) of the Bengal Tenancy Act. The plaintiff-respondent has thus been forced to argue that section 29 of the Indian Limitation Act and sections 184 and 185 of the Bengal Tenancy Act make section 15 sub-section (2) of the Indian Limitation Act applicable to suits under section 104H of the Bengal Tenancy Act. In our opinion there is no force in this contention.

Section 29 (1) (*b*) provides that nothing in the Indian Limitation Act shall affect or alter any period of limitation specially prescribed for any suit, appeal or application by any special law or local law now or hereinafter in force in British India. Section 184 of the Bengal Tenancy Act provides that the suits, appeals and applications specified in the Third Schedule annexed to the Act shall be instituted within the time prescribed in that Schedule for them respectively, and every such suit or appeal instituted or application made after the period of limitation so prescribed shall be dismissed, although limitation has not been pleaded. Section 185, sub section (1), then lays down that sections 7, 8 and 9 of the Indian Limitation Act, 1877, shall not apply to suits or applications mentioned in section 184. Section 185, sub-section (2), next provides that subject to the provisions of Chapter XVI of the Bengal Tenancy Act, the provisions of the Indian Limitation Act, 1877, shall apply to all suits, appeals and applications mentioned in section 184; that is, suits, appeals and applications specified in the Third Schedule. It is plain beyond reasonable controversy that section 15 (2) of the Indian Limitation Act, which is made applicable to suits, appeals and applications mentioned in the Third Schedule annexed to the Bengal Tenancy Act, by virtue of section 185, sub-section (2), cannot possibly apply to suits instituted under section 104H, which are not mentioned in the Third Schedule. This view is supported by the decision in *Radha Shyam Kar* v. *Dinabandhu Biswal* (2), where it was ruled that section 18 of the Indian Limitation Act does not apply to an application under section 174, Bengal Tenancy Act. Much stress, however, has been laid on the decision of a Full Bench of the Allahabad High Court in *Draupadi* v. *Hira Lal* (3), where a question arose as to the applicability of the provisions of the Indian Limitation Act to proceedings in insolvency. That case is clearly distinguishable; but it may be observed that the decision has not always been regarded with favour: *Thakur Prasad* v. *Punno Lal* (4), *Munjuluri Sivaramayya* v. *Singumahanti Bujanga Rao* (5); *Abu Baker Sahib* v. *Secretary of State for India* (6). There is also no analogy between the case before us and the decisions in *Sharoop Das Mondal* v. *Joggessur Roy Chowdhry* (7), *Dulhin Mothura Koer* v. *Bansidhar Singh* (8) and *Srinivasa Aiyangar* v. *Secretary of State* (9). A question of the description now before us must be determined by a reference to the terms of the Special Statute, and on a plain reading of the provisions of section 185, Bengal Tenancy Act, taken along with section 15, sub-section (2) of the Indian Limitation Act, we feel no doubt whatever that section 15 (2) cannot possibly be applied to extend the period of six months provided for the institution of suits under section 104H of the Bengal Tenancy Act. In our opinion, the

(2) 20 Ind. Cas. 760; 18 C. L. J. 533; 18 C. W. N. 31.

(3) 16 Ind. Cas. 149; 34 A. 496; 10 A. L. J. 3.

(4) 20 Ind. Cas. 673; 35 A. 410; 11 A. L. J. 603.

(5) 30 Ind. Cas. 703; 18 M. L. T. 200; 39 M. 593.

(6) 5 Ind. Cas. 884; 34 M. 505; 7 M. L. T. 132; 20 M. L. J. 283 (F. B.).

(7) 26 C. 564; 3 C. W. N. 464; 13 Ind. Dec. (N. S.) 962.

(8) 10 Ind. Cas. 880; 16 C. W. N. 924; 15 C. L. J. 83.

(9) 18 Ind. Cas. 617; 38 M. 92; 24 M. L. J. 41.

suit is barred by limitation in respect of the lands comprised in village Dakhin Baraj.

The result is that this appeal is allowed and the decree of the Subordinate Judge set aside. The suit will stand dismissed in respect of the lands in village Dakhin Baraj. With regard to the lands of Utter Dighe and Dhai Kukusria, the decree of this Court will declare that the plaintiff is a *raiyat* and not a tenure holder and the case will be remitted to the Subordinate Judge to determine whether the plaintiff is an occupancy *raiyat* or a non-occupancy *raiyat* and then to ascertain the amount of fair and equitable rent payable by him according to his status. Each party will pay his own costs both here and in the Court below up to the present stage. The costs after remand will abide the result.

Appeal allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 901 OF 1914.

March 9, 1918.

Present:—Mr. Justice Chevis and Mr. Justice Broadway.

TALAWAND AND OTHERS—PLAINTIFFS—APPELLANTS

versus

FATEH DIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Oaths Act (*X of* 1873), *s.* 11—*Civil Procedure Code* (*Act V of* 1908), *O. XXIII, r.* 3—*Plaintiffs, one of several, agreeing to be bound by defendant's oath—Other plaintiffs, whether bound by oath—Compromise of suit.*

Section 11 of the Oaths Act shows that an oath is conclusive as against the person who offers to be bound by it; as against other persons it is not conclusive evidence and a Court has no right to treat it as such. [p. 231, col. 1.]

F. and other plaintiffs sued *M.* for possession of certain land. After the plaintiffs' evidence had been recorded *F* agreed to let the decision of the suit rest on *M.*'s oath. *M* took the oath and on this the Court dismissed the suit as regards all the plaintiffs:

Held (1) that the suit was correctly dismissed as regards *F.*; [p 231, col 1]

(2) that the oath was not binding as against the other plaintiffs unless the defendant could show that they joined in *F's* challenge to the defendant or agreed to the dismissal of the suit either personally or by agent duly authorised in that behalf; [p. 231, col. 1.]

(3) that the mere presence of the other plaintiffs or of their Pleader at the time of *F's* challenge was no proof of assent, inasmuch as a man may disapprove of what is being done, though if he thinks it is to affect some one else only and not himself, he may not trouble to express his dissent. [p. 231, col. 1.]

Second appeal from the decree of the Additional Divisional Judge, Gujranwala, dated the 28th January 1914, affirming that of the Munsif, 1st class, Gujranwala, dated the 3rd July 1913, dismissing the plaintiffs' claim.

Messrs. *Ganpat Rai* and *Duni Chund*, for the Appellants.

Babu *M. N. Mukerji*, for Mohkam Din, Respondent.

JUDGMENT.—In this case Fateh Din and other plaintiffs sued Mohkam Din for possession of land. After plaintiffs' evidence had been recorded Fateh Din agreed to let the decision of the suit rest on defendant's oath on the *Koran*. Defendant accepted this challenge and took the oath. The first Court then dismissed the suit as regards all the plaintiffs. Plaintiffs other than Fateh Din appealed to the Additional Divisional Judge, who held that the decree passed was one under Order XXIII, rule 3, and that no appeal lay under Order XLIII, rule 1 (*m*), and that the appellants' only remedy was, as pointed out in *Ala Bakhsh Khan* v. *Kasim Ali Khan* (1), an application for review or (in the case of fraud) a regular suit to set the decree aside, or an application to the Chief Court for revision. So the Divisional Judge dismissed the appeal. Hence this second appeal.

We are quite unable to see that, as regards the present appellants Order XXIII, rule 3, has any application; that is, assuming that their contention is correct, *viz*, that they never joined in challenging defendant to take the oath nor authorized the challenge by Fateh Din, and never agreed in any way to any adjustment of the suit. We note here, as regards *Ala Bakhsh Khan* v *Kasim Ali Khan* (1), that that part of section 375 of the old Code which declared that the decree should be final is not embodied in Order XXIII, rule 3 of the present Code, and that Order XLIII, rule 1 (*m*), is a new provision, there being nothing in section 588 of the old Code allowing an appeal from an order under

(1) 48 P. R. 1895.

section 375 recording an adjustment.

Fateh Din would, of course, be out of Court, but not so other persons who never joined in the challenge. Section 11 of the Oaths Act shows that the oath is conclusive *as against the person who offered to be bound by it.* As against other persons it is not conclusive evidence, and the Court has no right to treat it as such. We are unable at present to hold that the present appellants are in any way bound by the oath, and we consider that they have the ordinary right of appeal from the decree.

So far as the record shows Fateh Din alone agreed to be bound by defendants' oath, but Counsel for respondent-defendant urges that Jhandu plaintiff and also the Pleader who represented all the plaintiffs were present when Fateh Din challenged defendant, and that Jhandu held a power of-attorney from those plaintiffs who were not present. But mere presence is no proof of assent. A man may disapprove of what is being done, though if he thinks it is to affect some one else only and not himself, he may not trouble to express his dissent.

We accept the appeal and setting aside the decree of the lower Appellate Court we return the case to that Court for re-decision of the appeal. If the defendant can show that the appellants joined in Fateh Din's challenge to the defendant either personally or by agent duly authorized in that behalf, or that they agreed either personally or by agent as aforesaid to the dismissal of the suit, then the District Judge should dismiss the appeal; otherwise he should return the case to the first Court under Order XLI, rule 23, for decision of the suit, so far as appellants are concerned, on the merits. Costs in this Court to be costs in the cause.

Appeal accepted.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 276 OF 1917.

February 5, 1918.

Present:—Mr. Lindsay, J. C.

RAM DUT SINGH AND ANOTHER—DEFENDANTS NOS. 1 AND 2—APPELLANTS

versus

BALKARAN SINGH—PLAINTIFF—RESPONDENT.

Pre-emption, right of, how can be defeated—Fraudulent form of transaction, effect of—Mortgage to one brother—Sale of equity of redemption to another brother, effect of.

Persons are entitled to defeat the operation of the law of pre-emption if they can do so by legitimate means, but it is not permissible to throw a transaction of transfer into a fraudulent form for the purpose of avoiding a claim for pre-emption. [p. 232, col. 1.]

Where a property was mortgaged with possession for a long term to one of two brothers forming a joint family and the mortgage was followed by a sale of the equity of redemption in favour of the other brother:

Held, that there was really only one transaction, thrown into a fraudulent and deceptive form, to effect a complete sale, so that pre-emption of the property could be allowed regardless of the mortgage created on the same [p. 232, col. 2.]

Appeal from the decree of the District Judge, Gonda, dated the 19th April 1917, modifying the order of the Probationary Munsif, Gonda, dated the 16th March 1917.

Babu *Adity Prasad*, for the Appellants.

Mr. *St. C. Thompson*, for the Respondent.

JUDGMENT.—This appeal has arisen out of a pre-emption suit brought by the plaintiff-respondent, Balkaran Singh. The two principal defendants in this case were Ram Dut Singh, defendant No. 1, and his brother Drig Bijai Singh, defendant No. 2. Both these men are admittedly members of a joint Hindu family. The case for the plaintiff was that the other defendants had, on the 16th of June 1915, transferred their property to the first two defendants in circumstances which gave him a right of pre-emption. What took place was this. On the 15th of June 1915 a mortgage of this property was executed in favour of the 2nd defendant, Drig Bijai Singh, to secure a loan of Rs. 100. The mortgage was a mortgage with possession and the period was 55 years. On the following day what purported to be a sale deed of the right

of redemption was executed in favour of the other brother Ram Dut in consideration of a payment of Rs. 450, out of which Rs. 100 were left for the purpose of redeeming the mortgage which had been executed on the previous day. Both deeds were registered on the 18th of June. After the trial had opened and the pleas of the parties had been recorded, an amendment of the plaint was made and a new paragraph 5 (*a*) was introduced into the plaint alleging that although the transaction had been carried out by means of the two deeds just referred to, it was in reality one solitary transaction and amounted to a transfer by sale.

The Munsif gave the plaintiff a decree for pre-emption in respect of the sale of the 16th of June, but he held that the mortgage transaction could not be disturbed and that all the plaintiff was entitled to was to acquire the right of redemption which had been transferred to Ram Dut.

The plaintiff appealed to the learned Judge. He came to the conclusion that the dealings between the other defendants and the first and the second defendants were intended to deceive and that in fact the property was sold to these defendants under the guise of a mortgage followed by conveyance of the equity of redemption.

The point taken here before me on behalf of the first and second defendants is that the decision of the Court below is wrong. It has been argued that there was nothing illegal in the manner in which the property was transferred and that these appellants were entitled to resort to any device which was not illegal for the purpose of defeating the plaintiff's right of pre-emption. It need not be doubted that persons are entitled to defeat the operation of the law of pre-emption if they can do so by legitimate means, but it is not permissible to throw a transaction of transfer into a fraudulent form for the purpose of avoiding a claim for pre-emption. In the present case I think the learned Judge was entitled to hold that the transaction was a fraudulent one and intended to deceive. We have the admitted fact that both the transferees are brothers and members of a joint family and it is hardly to be doubted that it was the intention of the parties to effect a complete transfer by sale. In the course of the argument it was stated that the plaintiff had never set up a case that the transaction was one intended to deceive or defraud, but in view of the amendment made in the plaint to which I have referred above that argument seems to me to be untenable. When the plaintiff became aware of the facts set up by way of defence he took the plea that the dealings between the defendants, although thrown into the form of two separate transactions, amounted to only one transaction of sale. In this connection I may refer to what was stated by the first defendant in the 11th paragraph of his written statement. The plea taken there reads as follows:—"The sale has been effected for Rs. 450 and according to the market rate the price of the property sold is not less than Rs. 450." This practically amounts to giving away the whole of the case. I look upon this plea as a distinct admission by the first defendant that the intention was to effect a transfer by sale. In these circumstances I hold that it is not possible for the appellant here to argue that in dealing with the property as they did they were resorting merely to legitimate devices for the purpose of defeating a pre-emption suit. I think the Judge was entitled to find that the first and the second defendants had conspired to throw the transaction into a fraudulent form. The appellants are not, in my opinion, entitled to any relief. I affirm the judgment of the Court below and dismiss the appeal with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1706 OF 1914.

June 7, 1917.

Present:—Mr. Justice Chevis and Mr. Justice Leslie Jones.

MUHAMMAD ALI—DEFENDANT—APPELLANT

versus

PARMA NAND—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), s. 74—Interest, enhanced, whether penalty—Civil Procedure Code (Act V of 1908), O. XLI, r. 22—Cross-objections, failure to file—Respondent, right of, to support decree.

MUHAMMAD ALI *v.* PARMA NAND.

The mere fact that for certain reasons the parties to a mortgage agreed on very low interest to begin with, is no sufficient reason for holding an agreement to pay enhanced interest at a reasonable and normal rate later on to be penal. [p. 233, col. 2.]

A party who is content to accept the lower Court's decision can resist an appeal from that decision on the ground that the decree errs in favour of the appellant. In such a case the respondent, not having appealed nor filed cross-objections, cannot ask that the decree should be altered in his favour, but he is entitled to urge that if he can show that the decree errs in favour of the appellant it should not be disturbed. [p. 233, col. 2; p. 234, col. 1.]

Second appeal from the decree of the Divisional Judge, Multan, dated the 20th of April 1914, modifying that of the District Judge, Multan, dated the 29th of January 1914, decreeing the claim in part.

Bhagat *Gobind Das*, for the Appellant.

Lala *Hargopal*, for the Respondent.

JUDGMENT.—Plaintiff sues on a registered bond for Rs. 2,620. This sum of Rs. 2,620 was made up as follows:—principal amount due Rs. 2,487, costs of execution and registration Rs. 20 and interest in advance Rs. 113. The bond went on to provide for payment in two instalments. Rs. 1,310 on 15th August 1907, and Rs. 1,310 on 13th January 1908. If these instalments were paid by due date no further interest was to be charged, as the Rs. 113 was reckoned to cover interest on half the principal sum up to date fixed for payment of the first instalment, and on the other half up to date of the second instalment. In case of the instalment not being paid by due date interest was to run at 12 per cent. per annum and *chilkana* at 1 anna per rupee was also to be charged from date of default.

The plaintiff sued for Rs. 4,591-12-0 including Rs. 1,808 interest due on instalments from dates of default and Rs. 163-12-0 *chilkana*.

Both the lower Courts have held that the condition as to payment of interest is penal. The first Court allowed damages at the rate at which the Rs. 113 had been calculated, *viz.*, a very low rate of about 2 per cent. per annum. The lower Appellate Court, on plaintiff's appeal allowed interest at 6 per cent. per annum and increased the first Court's decree from Rs. 2,911 to 3,779. Both Courts disallowed *chilkana*. Defendant has preferred a second appeal to this Court urging, (1) that the lower Appellate Court should not have allowed interest at a rate higher than that at which the Rs. 113 was calculated, and (2) that the lower Appellate Court should have allowed interest only from date of default.

As to (1) defendant's Pleader can quote no authority for the proposition that in such cases the rate of interest should not exceed the original rate. As to (2) the contention seems reasonable.

But plaintiff's Pleader urges in reply that the lower Courts are wrong in holding that the agreement to pay enhanced interest is penal. This contention is, we think, correct. *Velchand Chhaganlal* v. *Flagg* (1) and *Avathani Muthukrishnier* v. *Sankaralingam Pillai* (2), on which plaintiff's Pleader relies, are both cases in which an agreement to pay enhanced interest from date of default at an exorbitant rate was held to be penal. Here the enhanced rate is a perfectly reasonable and normal one, and though it is a good deal higher than the original rate we see no reason to regard it as penal. Even if the *chilkana* claim be included the increased rate is nothing at all unreasonable, though certainly it is not usual to charge *chilkana* in such cases. The mere fact that for certain reasons the party agreed on very low interest to begin with is no sufficient reason for holding an agreement to pay enhanced interest later on to be penal. We think, therefore, the lower Courts might well have allowed interest at the rate agreed upon, and had they done so the amount decreed, even calculating only from dates of default, would have considerably exceeded the amount which the lower Appellate Court has decreed.

Bhagat Govind Das urges that plaintiff cannot raise such a plea, as he has neither filed an appeal to this Court nor lodged cross-objections, and that he is not supporting the lower Appellate Court's decree as he is really urging, not that that decree is correct, but that that decree is less than the amount which should have been decreed. But we fail to see why a party who is content to accept the lower Court's decision should not resist an appeal from that decision on the ground that the decree errs in favour of the appellant. The respondent, not having appealed nor filed cross-objections, cannot ask that the decree should be altered in his favour

(1) 13 Ind. Cas. 853; 36 B. 164; 14 Bom. L. R. 18.

(2) 18 Ind. Cas. 417; 36 M. 229; 13 M. L. T. 20; 24 M. L. J. 135.

but surely he is entitled to urge that if he can shew that the decree errs in favour of the appellant, it should not be disturbed.

We uphold the lower Court's decree and dismiss this appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 3325 OF 1915, 474 AND 475 OF 1916.

March 15, 1918.

Present:—Mr. Justice Fletcher and Justice Sir Shamsul Huda, KT.

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

versus

NAYAN CHANDRA PARAMANIK—DEFENDANT—RESPONDENT IN S. A. NO. 3325 OF 1915

SRIMANTA BHAROSHA AND OTHERS—DEFENDANTS—RESPONDENTS IN S. A. NO. 474 OF 1916

SARIF MOLLAH—DEFENDANT—RESPONDENT IN S. A. NO. 475 OF 1916.

Bengal Tenancy Act (VIII B. C. of 1885), s. 46—"Agreement," meaning of—Tender of agreement, how to be made—Notice accompanying agreement, whether necessary.

The word "agreement" in section 46 of the Bengal Tenancy Act does not mean an agreement strictly so called but means an agreement which the landlord proposes that the tenant should execute. [p. 234, col. 2.]

What the landlord has got to do under the section is to tender a document containing the terms of the proposed agreement, but it is not necessary that a notice to the tenant should accompany the document. [p. 235, cols. 1 & 2]

Where a landlord filed in Court under section 46 of the Bengal Tenancy Act the draft of a proposed agreement duly stamped, but the Court, thinking it safer not to part with the stamped document, served on the tenant an identical copy but without a stamp on it along with a notice:

Held, that there was perfectly good tender of the agreement as required by section 46 of the Bengal Tenancy Act, even though the notice was not in accordance with the terms of the Act as there is nothing in section 46 which requires a notice to be served along with the agreement. [p. 235, col. 2.]

Appeals against the decrees of the Additional District Judge, 24-Perganahs, dated the 2nd of December 1915, affirming those of the Munsif, 2nd Court, Basirhat, dated the 18th September 1914.

Sir *Rash Behari Ghose* and Babu *Bepin Behari Ghose*, II, for the Appellants:

Dr. *Dwarka Nath Mitter*, Babus *Harendra Coomar Sarbadhikary* and *Beni Madhab Chatterjee*, for the Respondents.

JUDGMENT.

No. 3325 OF 1915.

FLETCHER, J.—This is an appeal by the plaintiffs against the decision of the learned Additional District Judge of the Twenty-four Perganahs, dated the 2nd December 1915, affirming the decision of the Munsif of Basirhat. The suit was brought by the plaintiffs under the provisions of section 46 of the Bengal Tenancy Act. The questions raised in the appeal are as follows:—Section 46 of the Bengal Tenancy Act mentions a suit for ejectment on the ground of refusal to agree to enhancement of rent. It states that 'such a suit shall not be instituted against a non-occupancy *raiyat* unless the landlord has tendered to the *raiyat* an agreement to pay the enhanced rent and the *raiyat* has within three months before the institution of the suit refused to execute the agreement. There seems to be a certain amount of confusion as to what is meant by that section. It is quite obvious that the word "agreement" mentioned in the first sub-section of section 46 cannot be strictly construed, because an agreement cannot come into existence until it has been assented to by both parties and where it requires to be reduced to the writing until it has been executed. Therefore, the agreement mentioned cannot mean an agreement strictly. It is quite obvious from what the section says that the Statute means an agreement proposed by the landlord because a landlord cannot tender an agreement to the tenant that has already been executed. If you read that, the section is a perfectly straightforward section. What it means is this: that a landlord before he can institute a suit for ejectment on the ground of refusal to agree to an enhancement of rent has got to tender to the tenant the agreement which he proposes that the tenant should execute; and if the tenant fails to execute it, then certain other provisions in the section say what the landlord may do with reference

to the property. Now, in this case it is quite clear that the landlord followed the provisions of the sub-section, which states that a landlord desiring to tender an agreement may file it in the office of the Court, that the Court is to direct it to be served in the prescribed manner and that when it is so served, it should be deemed to have been tendered. There is nothing stated in the section as to a notice going along with the agreement. The only requisite is that the agreement, that is, the document containing the terms of the proposed agreement, has got to be tendered. Now, what happened in this case was this: The landlord sent a draft of the proposed agreement duly stamped to the Court, and exercising a wise discretion the Court thought it safer not to part with the stamped copy but tender to the tenant or rather serve on him a copy identical but without a stamp on it. It also served along with that copy a notice. It is said that it was not the original of the agreement that was tendered to the *raiyat* but only a copy. Of course, there was an agreement with a stamp on; but they were both drafts of the proposed agreement; that being so, the tenant could have executed either draft and, if he had executed the draft tendered to him, it would have been a sufficient compliance within the terms of the section although perhaps, strictly speaking, the duty of paying the stamp would have fallen on the tenant. But the tenant did not do that; but being served with it, he set up the objection that he had been served with a copy of an agreement. The short answer is that there has not been an agreement. There never has been an agreement. The agreement could not come into being until executed by the tenant and not being in being, all copies of the draft of the proposed agreement are just as much originals as the other. That being so, it is quite clear that what was served on the tenant in this case was the proposed agreement in writing. The tenant could have, if he thought fit, executed it. I do not agree with the view taken by the learned District Judge on that point.

Then the other point urged is one which it is said that the learned Judge made himself and was not a matter raised in the arguments before him. He says that the notice accompanying the copy of the agreement or the proposed agreement that was served on the tenant was not in accordance with the terms of the Act. The short answer is that there is nothing in section 46 that requires a notice to be served along with the copy of the agreement. I have no doubt that it is convenient to do so. But the Statute does not make it obligatory and the form of the notice in this case did not tell the tenant that he would lose his rights if he did not execute before a particular date, but informed him that he should execute the agreement and that if he had any objection he could submit it to the Court. He did not make any objection, nor did he submit any to the Court. The notice is not shown to have been issued under a statutory obligation, and the tenant had his three months and the suit was not instituted until after the expiration of that time. In this case, there seems to me to have been a perfectly good tender of the agreement as mentioned in the section and, the tenant not having availed himself of that, the plaintiff was entitled to institute the suit. I think the decision of the learned District Judge must be set aside in this respect.

Then, as regards the cross-appeal. That was not disposed of by the learned Judge of the lower Appellate Court because he thought that the point which he had decided, although purely technical, was sufficient to dispose of the whole case. As regards the actual service of what is called in the Statute the agreement, that is, the proposed agreement, on the tenant, the fact that there was such a service has been adjudicated on. The case was decided against the plaintiff on the grounds, *first*, that the so called original had not been served, and *secondly*, that the notice that accompanied the original was not in accordance with the terms of the Statute. I have already dealt with these points. *First* of all, the document served on the tenant was just as much an original as any other copy, and *secondly*, no notice under the terms of the Statute was necessary. However, these points have been adjudicated on between the parties and you cannot have the same points argued in the cross-appeal as in the appeal.

But another point has not been adjudicated on, and that is as to whether the defendants are non-occupancy *raiyats* because section 46

of the Bengal Tenancy Act only applies if the landlord establishes that the tenants are *raiyats* with non-occupancy rights. That point has not been decided and the case must go back to the Court of appeal below to have the rest of the cross-appeal decided as to whether or not the defendants are non-occupancy *raiyats*. If the learned Judge decides that they are non-occupancy *raiyats*, then he must proceed to settle the fair and equitable rent under the other provisions of section 46 of the Bengal Tenancy Act. If, on the other hand, the Judge finds that the defendants are *raiyats* with rights of occupancy, then the other part of the case which has been kept in abeyance—what exactly that means I do not know—will be disposed of.

The present appeal is, therefore, allowed with costs both in this Court and in the lower Courts and the case is sent back to the Court of appeal below with the above remarks.

SHAMSUL HUDA, J.—I agree.

NOS. 474 AND 475 OF 1916.

The order made above in appeal No. 3325 will apply to these cases also.

Appeals allowed;
Cases remanded.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 291 OF 1916.

September 14, 1917.

Present:—Mr. Stuart, A. J. C., and Mr Kanhaiya Lal, A. J. C.

The Hon'ble Maharaja Sir BHAGWATI PRASAD SINGH, K. C. I. E., OF BALRAMPUR ESTATE
PLAINTIFF—APPELLANT

versus

Raja MUHAMMAD ABUL HASAN KHAN OF BILAHRA ESTATE—DEFENDANT—RESPONDENT.

Small Cause Court, suit cognizable by—Jurisdiction—Contribution suit.

A suit for contribution is not exempted from the cognizance of a Court of Small Causes. [p. 238, col. 1.]

Appeal from the decree of the District Judge, Gonda, dated 8th May 1916, upholding that of the Munsif, Utraula (Gonda), dated 13th March 1916.

FACTS of the case appear from the following Order of Reference by the Judicial Commissioner:—

"I have decided after consideration to refer this case for disposal to a Bench.

The suit was one for contribution and the facts are as follows:—The plaintiff, the Maharaja of Balrampur, being the mortgagee of an 8 anna share in the *Taluqa* of Birwa Mahnon, brought a suit for arrears of rent against four persons who were the *thekadars* of a village called Kapurpur and obtained a decree. Subsequently the Maharaja and the defendant-respondent the Raja of Bilahra (who owned the other 8-anna share of the *taluqa*) joined in issuing a notice of ejectment against these *thekadars* under the provisions of the Oudh Rent Act. A suit to contest the notice was filed by *thekadars*, who lost their case in the Court of first instance but won it in appeal with the result that the Maharaja and the Raja were cast in costs of considerable amount. Subsequent to the passing of the appellate decree the Maharaja of Balrampur applied for execution of his decree for rent against the *thekadars*: the latter applied for set-off of the sum awarded to them as costs in the ejectment suit and this was allowed, the consequence being that the entire costs were paid by the Maharaja. He now sues to recover from the Raja of Bilahra his proportionate share of those costs, and his suit has been dismissed by both the Courts on the ground that such a suit for contribution does not lie. They have relied upon two authorities of this Court, one a ruling of Mr. Chamier reported as *Musammat Kaniz Fiza Bibi* v. *Sheo Narain Misr* (1), the other a recent ruling of Mr. Stuart reported as *Jamshed Ali Khan* v. *Zahur-ul-Hosan Khan* (2).

The facts of the case decided by Mr. Chamier were not the same as those of the case before me, for the plaintiff was seeking to recover from the defendant a share of certain costs which had been made payable under a decree to which the defendant was no party. Mr. Chamier, on the authority of the ruling in *Punjab* v. *Pelam Singh* (3), decided that the plaintiff could not recover. According to him the reasoning in the judgment just mentioned was unanswerable.

The facts in the case were similar to

(1) 10 O. C. 168.
(2) 33 Ind. Cas. 357; 18 O. C. 340.
(3) 6 N. W. P. H. C. R. 192

those of the case which Mr. Chamier was considering and the reasoning which Mr. Chamier accepted is set out at page 196 of the report in the following language:—

'We see no sufficient reason for departing from the ordinary rule with regard to costs. When a joint debt is incurred, it is in contemplation of the parties that it will be paid without suit. Although every one of the persons who may be under the joint liability must be presumed to engage to contribute his fair share to its satisfaction, they are not to be presumed to engage to pay their shares of the costs of litigation to which they may not be parties and over which, whether it be more or less protracted, they may have no control.

'*If persons who are under a joint liability are jointly sued and a decree passes for the debt and costs against both of them, each being under a joint liability in virtue of a decree is bound to contribute in respect both of debt and costs his share of the decree.* Where only one of several co-contractors is sued, he cannot call upon his co-contractors to contribute to the costs of the suit.'

Without committing myself to the whole-hearted acceptance of this doctrine which appealed so strongly to the learned Judge responsible for the ruling in *Musammat Kaniz Fizza Bibi* v. *Sheo Narain Misr* (1), I may be permitted to observe that it does not appear to me to be applicable to the case where the joint liability of the parties to the suit for contribution has arisen out of a decree as distinguished from a contract. This indeed seems clear from the passage which I have underlined (italicised) above. Whatever state of mind may be imputed to parties who enter into an agreement which imposed upon them a joint liability for the payment of a sum of money, it is obvious that the contemplations of the parties can have nothing to do with the matter when the Court passes a decree imposing upon them a joint and several liability for payment of damages or costs on both The liability is imposed regardless of the state of mind of the parties and they must accept the consequent legal relation, whether they like it or not.

Is that legal relation to be altered by the mere accident of the choice of a decree-holder, who under the law has the option of realising the judgment-debt from one or other of the judgment-debtors? When one of the debtors has been compelled to pay the whole debt, can the others turn round and claim that they have been released from their obligations by reason of the action of the decree-holder over which none of the judgment-debtors has any control? Surely not. If the case does not come under section 69 of the Contract Act (a matter regarding which there has been a conflict of judicial authority), it certainly seems to come under section 70, and I altogether fail to see why the judgment-debtor who has satisfied the whole debt should be debarred from suing his joint judgment-debtors to enforce the obligation arising out of the joint decree.

With regard to Mr. Stuart's decision in *Jamshed Ali Khan* v. *Zahur-ul-Hasan Khan* (2) the facts are not stated in the judgment. I have referred to the record and find that the case was one of a decree against two defendants. One of them was obliged in execution to discharge the whole amount awarded for costs and he sued his joint judgment-debtor for his share of the costs. According to the ruling the suit was not maintainable. Mr. Stuart followed the opinion of Mr. Chamier in the earlier case and I think I have succeeded in showing that the facts were different and that the *ratio decidendi* of the High Court which Mr. Chamier adopted is altogether inapplicable to the case where the joint liability of the parties to the contribution suit has its origin in a decree of Court. I cannot assent to the proposition laid down in the head-note to the ruling in *Jamshed Ali Khan* v. *Zahur-ul-Hasan Khan* (2) that a suit for contribution in respect of costs is not maintainable.

I have only to add a few words with respect to an observation of the learned Judge of the Court below in his judgment in the present case. Apart from the authorities just referred to, he thought the suit was not competent on the ground that a Court of Equity is not bound to decide a pecuniary dispute between two wrong-doers. No doubt the learned Judge had in mind what was laid down in the well-known case of *Merryweather* v. *Nixan* (4),

(4) (1799) Sm.L.C. (9th Ed.) Vol. II, 569; (12th Ed.) Vol. I, 443; 8 T. R. 186; 101 E. R. 1337; 16 R. R. 810.

namely, that there is no right of contribution between joint tort-feasors: but he has given far too wide an interpretation of this rule of law. It is well settled that there are limits to the application of this doctrine. Lord Denman in *Betts* v. *Gibbins* (5) observed:—'The general rule is that between wrong-doers there is neither indemnity nor contribution: the exception is where the act is not clearly illegal in itself:' and the principle does not extend to cases where the plaintiff is a tort-feasor by inference of law only.

And lastly it is to be observed that the issuing of a notice of ejectment under the Oudh Rent Act, even if the notice is set aside after contract, is not a tort, *i.e.*, an actionable wrong. The parties to this present appeal are not joint tort-feasors. For the above reasons I refer this appeal to a Bench for decision."

Shaikh *Shahid Husain*, for the Appellant.

Syed *Ali Mohammad*, for the Respondent.

JUDGMENT.—The hearing of this appeal has been referred to a Bench by the order of the Judicial Commissioner with special reference to a point of law. We regret that we are unable to express any opinion on the point referred. It escaped the notice of the Counsel of the parties and the learned Judicial Commissioner that the suit was a suit of which a Court of Small Causes could take cognizance. It was not a suit of the nature specified in the Second Schedule of Act IX of 1887. This is the conclusion at which the learned Judicial Commissioner arrived in *Suraj Baksh Singh* v. *Raghubar Singh* (6). The valuation of the suit was Rs. 406-2-0. It is thus clear that no second appeal can lie under the provisions of section 102, Act V of 1908. Such being the case, we feel ourselves precluded from expressing any opinion on the merits. The appeal is, therefore, dismissed. Costs on parties.

Appeal dismissed.

(5) (1834) 2 Ad. & E 57 at p. 74; 4 N. & M. 64; 4 L. J. K. B. 1; 111 E. R. 22; 41 R. R. 381.

(6) 24 Ind. Cas. 28; 1 O. L. J. 244; 4 O. & A. L. R. 240.

PATNA HIGH COURT.

FIRST CIVIL APPEAL.

January 28, 1918.

Present:—Mr. Justice Roe

Musammat NOOWOOAGAR OJAIN—PLAINTIFF—APPELLANT

versus

SHIDHAR JHA—DEFENDANT—RESPONDENT.

Court Fees Act (VII of 1870), s. 7 iv) (c)—Specific Relief Act (I of 1877), s. 39—Suit to avoid registered deed—Court-fee payable

A plaintiff suing for the cancellation of a document under section 39 of the Specific Relief Act is not entitled to reduce the Court-fee payable on his plaint by an assertion that the suit falls under Chapter VI of the Act. [p. 239, col. 1.]

On an adjudication under section 39 of the Specific Relief Act that a deed is void the Court is required by law, if the instrument has been registered, to send a copy of its decree to the officer in whose office the instrument has been registered, and this forwarding of the copy of the decree to the Registrar is a consequential relief upon which an *ad valorem* Court-fee must be paid. [p. 239, col. 1.]

FACTS.—The plaintiff brought a suit to avoid a registered deed of gift executed by her in 1917 in respect of 23 *bighas* of land. The plaintiff stated in her plaint that the defendant had got her to execute the deed by falsely giving her to understand that it was a bond for Rs. 50, the money being required for a pilgrimage to Benares which was suggested by the defendant and which he afterwards got her to abandon by representing that cholera was rife at Benares. The plaintiff valued her relief at Rs. 6,000, but paid a Court fees of Rs. 10 only. The suit having been dismissed on other grounds, the plaintiff appealed to the High Court and again paid a Court-fees of Rs. 10 only on the memorandum of appeal. The Stamp Reporter, relying on the decisions in *Parathayi* v. *Sankumani* (1), *Samiya Mavali* v. *Minammal* (2), *Arunachalam Chetty* v. *Rangasamy Pillai* (3), *Parvatibai* v. *Vishvanath* (4) and *Nanak Chand* v. *Jiwan Mal* (5), submitted that an *ad valorem* Court-fee on the value of the relief sought in the plaint and in the memorandum of appeal should have

(1) 15 M. 294; 5 Ind. Dec. (N. S.) 556.

(2) 23 M. 490; 10 M. L. J. 240; 8 Ind. Dec. (N. S.) 744.

(3) 28 Ind. Cas. 79; 38 M. 922; 28 M. L. J. 118; (1915) M. W. N. 118; 17 M. L. T. 154.

(4) 29 B. 207; 6 Bom. L. R. 1125.

(5) 25 Ind. Cas. 435; 35 P. R. 1914; 237 P. L. R. 1914.

been paid under section 7, clause (*iv*), sub-section (*c*) of the Court Fees Act. The report of the Stamp Reporter was contested before the Taxing Officer and reliance was placed on *Karam Khan* v. *Daryai Singh* (6) and section 39 of the Specific Relief Act. The Taxing Officer, agreeing with the decisions of the Madras and Bombay High Courts, was of opinion that the case came under section 7, clause (*iv*) (*c*), of the Court Fees Act. The matter was referred to the Taxing Judge.

Messrs. *Lachmi Narain Sinha* and *L. K. Jha*, for the Appellant.

JUDGMENT.—This is clearly a suit under Chapter V of the Specific Relief Act. I am of opinion that the plaintiff is not entitled to reduce the Court-fees payable thereon by an assertion that it falls under Chapter VI. In coming to this conclusion I have considered the cases of *Tacoordeen Tewarry* v. *Nawab Syed Ali Hossein Khan* (7), *Karam Khan* v. *Daryai Singh* (6), *Parathayi* v. *Sankumani* (1), *Samiya Mavali* v. *Minammal* (2), *Shrimant Sagajirao* v. *Smith* (8) and *Parvatibai* v. *Vishvanath* (4). The latter decision, if I may say so, is clearly a correct decision. On the adjudication that a deed is void the Court is required by law, if the instrument has been registered, to send a copy of its decree to the officer in whose office the instrument has been so registered, and as held in the cases of *Parathayi* v. *Sankumani* (1) and *Parvatibai* v. *Vishvanath* (4), this forwarding of the copy of the decree to the Registrar is a consequential relief upon which an *ad valorem* Court fee must be paid. The plaintiff cannot avoid payment of this Court-fee by omitting to ask for this necessary consequence of the decree sought.

Appeal dismissed.

(6) 5 A. 331; A. W. N. (1883) 55; 3 Ind. Dec (N. S.) 317.

(7) 21 W. R. 340; 13 B. L. R. 427; 1 I. A. 192; 3 Sar. P. C. J. 368.

(8) 20 B. 736; 10 Ind. Dec. (N. S.) 1061

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 820 OF 1915.

November 2, 1917.

Present:—Justice Sir William Ayling, KT., and Mr. Justice Phillips.

SUBBARAYA CHETTIAR (DEAD) AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

PAPATHI AMMAL *alias* LAKSHMI AMMAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Provincial Insolvency Act (III of 1907), s. 16—Order of adjudication, effect of—Suit by undischarged insolvent after vesting order, maintainability of—Appeal, right of.

After the passing of an order of adjudication and the vesting of the insolvent's property in the Official Receiver under section 16 of Act III of 1907, the insolvent is *ipso facto* divested of the same and can have no vested interest in the property until after it is restored to him after administration. The insolvent cannot maintain a suit in respect of such property, nor has he a right of appeal against any decree passed in a suit instituted by him, the Official Assignee alone being competent to sue for enforcing the rights possessed by the insolvent at the date of adjudication. [p. 240, col. 1.]

Sriramulu Naidu v. *Andalammal*, 30 M. 145; 17 M. L. J. 14, distinguished.

Second appeal against the decree of the District Court, Tanjore, in Appeal Suit No. 815 of 1913, preferred against the decree of the Court of the Subordinate Judge, Kumbakonam, in Original Suit No. 50 of 1912.

Mr. *T. R. Venkatarama Sastriar*, for the Appellants.

Messrs. *S. T. Srinivasa Gopalachariar*, *A. Krishnasami Iyer* and *R. Ramachandra Iyer*, for the Respondents.

JUDGMENT.—In this case an objection has been taken that appellant has no right to appeal. Two grounds are put forward, (1) that plaintiff, being an insolvent, had no right to bring the suit and consequently has no right of appeal, and (2) that even if he had a right to sue, the right of appeal was taken away by the intervention of the Official Receiver after plaintiff obtained a decree in the Original Court.

At the date of suit the plaintiff was an undischarged insolvent, and under section 16 of the Provincial Insolvency Act all his property vested in the Official Receiver, who would then have the right to sue in respect of that property. It is, however, contended for the appellant that he had the permission of the Official Receiver to bring

this suit, and, therefore, could do so inasmuch as there remained vested in him an interest in the property, as would appear from the fact that any residue of his estate after administration in insolvency would be returned to him. This contention must, however ,be rejected, for when the property becomes vested in the Official Receiver, the insolvent must *ipso facto* be divested of the same, and can have no vested interest in the property until after it is restored to him after administration. *Sadodin* v. *Spiers* (1) is authority for the proposition that the Official Assignee alone is competent to sue for enforcing the rights to property possessed by an insolvent at the date of adjudication [*vide* also *Ramasamy Iyengar* v. *Ramalinga Mudaliar* (2) and *Ramasami Aiyangar* v. *Pavadai Chetty* (3)] and there is no authority to the contrary. Reliance is then placed on *Sriramulu Naidu* v. *Andalammal* (4), where it was held that an undischarged insolvent could sue in respect of property acquired after his adjudication and before the intervention of the Official Receiver. That case, however, is based on the rule in *Cohen* v. *Mitchell* (5) that until the trustee intervenes, all transactions by a bankrupt after his bankruptcy with any person dealing with him *bona fide* and for value in respect of his self-acquired property, whether with or without knowledge of bankruptcy, are valid against the trustee." That rule now appears to be embodied in a modified form in section 47 of the Bankruptcy Act of 1914, and appears to be for the protection of a third party who deals *bona fide* with an undischarged bankrupt. Whether the rule can be applied so as to give a right to sue in respect of such property need not be considered now, for, as pointed out in *Sundarappaiyar* v. *Arunachella Chettiar* (6), the ruling in *Sriramulu Naidu* v. *Andalammal* (4) does not refer to property in the possession of the insolvent at the date of adjudication. We must, therefore, hold that plaintiff had no right to institute this suit and consequently the second objection taken need not be considered. This second appeal is dismissed with costs.

The Court-fee due must be paid to Government by appellant.

Appeal dismissed.

M. C. P.

(1) 3 B. 437; 4 Ind. Jur. 248 and 350; 2 Ind. Dec. (N. S.) 291.
(2) 22 Ind. Cas. 687.
(3) 23 Ind. Cas. 813.
(4) 30 M.145; 17 M. L. J. 14.
(5) (1890) 25 Q. B. D. 262; 59 L. J. Q. B. 409; 63 L. T. 206; 38 W. R. 551; 7 Morrell 207.
(6) 31 M. 493; 4 M. L. T. 188; 18 M. L. J. 487.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 141 OF 1916.

December 22, 1917

Present:—Mr. Batten, A. J. C.

PARWATRAO - PLAINTIFF—APPELLANT

versus

RAMJI AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), Sch. III, para. 11—Sale-deed, executed, but not registered—Collector, permission, granted by, before registration, validity of.

Plaintiff sued for possession of property under a sale-deed executed during the pendency of an attachment when the execution proceedings were before the Collector, who accorded his sanction to the sale after the execution but before the registration of the sale-deed:

Held, that permission having been granted while the sale was complete for want of registration, the sale was not void. [p. 241, col. 1.]

Appeal from the decree of the Court of the Divisional Judge, Nagpur, dated the 3rd December 1915, in Appeal No. 78 of 1915.

Dr. *H. S. Gour* and Mr. *A. V. Kinzerde*, for the Appellant.

Messrs. *M. B. Kinkhede* and *V. D. Kale*, for the Respondents.

JUDGMENT.—The facts are as follows. The plaintiff sues for possession under a sale-deed executed by the 1st defendant Ramji on the 9th August 1914. The plaintiff had in October 1913 attached the properties, the subject of the sale-deed, in execution of a money-decree, and the execution proceedings were transferred to the Collector. While the proceedings were still pending, the judgment-debtor executed the sale-deed in question without the previous sanction of the Court or of the Collector. On the

10th August the parties to the deed applied to the Munsif to sanction it and he re-transferred the proceedings to the Collector. On the 18th August the Collector made the endorsement " permission granted " on the sale-deed, which was registered on the 20th August. The learned Divisional Judge has held that the sale is void, as the Collector's sanction could not ratify a sale already made without his sanction. I am of opinion that the view taken by the learned Judge is incorrect. The sale was not complete until the deed was registered, as registration was necessary. The Collector sanctioned it before it was registered. The written permission was given while the sale was incomplete. I find nothing in *Salu Bai* v. *Bajat Khan* (1) that a sale which receives the written sanction of the Collector after execution but before registration is void. In this view of the case I reverse the decree of the Divisional Judge and restore the decree of the Subordinate Judge dated the 14th May 1915. Costs of the 1st Court will be paid as ordered by that Court. The defendants Nos. 2 and 3 will pay their own and plaintiff's costs in the two Appellate Courts.

Appeal accepted.

(1) 42 Ind. Cas. 200; 18 N. L. R. 130.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1228 OF 1916.

August 24, 1917.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Beachcroft.

PADMA LOCHAN PATAR—DEFENDANT—APPELLANT

versus

GIRIS CHANDRA KIL—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), s. 19, Sch. I, Art. 78—Acknowledgment—Payment by cheque—Cheque dishonoured—Limitation—Civil Procedure Code (Act V of 1908), O. VI, r. 17—Amendment of plaint, when to be allowed.

The fact that the defendant, in a suit to recover money alleged to be due on accounts taken between the parties, sent to the plaintiff a *hundi* and a cheque which were dishonoured on presentation, cannot attract the application of Article 78 of the Limitation Act to the suit. [p. 242, col. 1.]

The mere delivery of such a *hundi* and cheque does not constitute an acknowledgment within the meaning of section 19 of the Limitation Act. [p. 242, col. 1.]

An application for amendment of a plaint in second appeal was refused by the High Court on the ground that if the amendment were granted, the plaintiff would be able to start afresh on allegations wholly inconsistent with those made in the original plaint. [p. 242, col. 2.]

Appeal against the decree of the District Judge, Bankura, dated the 30th March 1916, modifying that of the Subordinate Judge, Bankura, dated the 25th January 1915.

Babus *Biraj Mohan Mojumdar* and *Bhagirath Chunder Das*, for the Appellant.

Dr. *Dwarka Nash Mitter* and Babu *Bejoy Kumar Bhattacherjee*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for recovery of Rs. 3,954-4-0. The Court of first instance gave the plaintiff a decree for Rs. 976-6-0. Upon appeal, the District Judge has modified that decree, and we have before us an appeal by the defendant as also a memorandum of cross-objection by the plaintiff. The appeal and the cross-objection raise two questions upon which the Courts below have taken divergent views. The first question relates to a sum of Rs. 168-8-6; with regard to this, the defendant contends that the claim is barred by limitation. The second question relates to a sum of Rs. 2,000; with regard to this, the Court of first instance dismissed the suit, but the District Judge has granted the plaintiff leave to abandon his claim with liberty to institute a fresh suit under Order XXIII, rule 1 of the Civil Procedure Code, 1908.

As regards the first point, there can be no doubt that the sum really accrued due more than three years prior to the institution of the suit. The plaintiff contends that the claim is not barred by limitation under Article 78 of the First Schedule to the Indian Limitation Act. He relies upon the circumstances that the defendant sent him on the 26th February 1911 a *hundi* for Rs. 300 and on the 22nd July 1911 a cheque for Rs. 50, which were dishonoured on presentation. His case consequently is that this attracts the application of Article 78, which provides that a suit by the payee against the drawer of a bill of exchange (which has been dishonoured by non-acceptance) must be instituted within

three years from the date of the refusal to accept. The suit before us, however, is not one of this description. It is a suit to recover money alleged to be due on accounts taken between the parties; to a suit of this description, Article 78 can have no possible application. On behalf of the plaintiff, this was clearly realised and an endeavour was made to support the decree of the District Judge on the ground that the delivery of the *hundi* and the cheque constituted an acknowledgment within the meaning of section 19 of the Indian Limitation Act. In our opinion, there is no foundation for this contention. The decision in *Raman* v. *Vairavan* (1) is clearly distinguishable; there the cheque was accompanied by a letter which contained an acknowledgment sufficient for the purposes of section 19. We must hold that the view taken by the Subordinate Judge in this respect was correct and his decision should not have been revised by the District Judge.

As regards the second point, no order could properly have been made under rule 1 of Order XXIII. The plaintiff sought to recover Rs. 2,000 upon certain allegations which were found untrue by the Trial Court. On appeal the District Judge came to the same conclusion, but he held that the plaintiff might be permitted to abandon the claim, with liberty reserved to him to institute a fresh suit on the same cause of action. The plaintiff subsequently presented an application to the District Judge, whereupon an order was made under rule 1 of Order XXIII. The plaintiff, however, notwithstanding this order, has preferred a cross-objection to this Court, to the effect that the view taken by the Courts below as to this sum of Rs. 2,000 is not correct. We are of opinion that, in such circumstances, the order under rule 1 of Order XXIII should not have been made.

As a last resort, the plaintiff seeks for leave to amend his plaint. We are not unmindful that under rule 17 of Order VI very wide powers of amendment are vested in the Court: but we are clearly of opinion that the application of the plaintiff for leave to amend his plaint at this stage should not be entertained. The object of the proposed amendment is to abandon the claim deliberately put forward in the Trial Court and persistently reiterated in the Court of Appeal below. If the amendment is granted, the result will follow that the plaintiff will start afresh on allegations wholly inconsistent with those made in the original plaint, and, to support the new allegations, he must bring forward evidence directly contradictory to the evidence already placed by him on the record. Such a feat he should not be encouraged to perform: *Kokilasari Dasi* v. *Mohunt Rudranand Goswami* (2), *Ghurpheknl* v. *Purmeshar Dayal Dubey* (3), *Mohesh Chunder Bose* v. *Radha Kishen Bhattacharjee* (4), *Kisandas Rupchand* v. *Rachappa Vithoba Shivant* (5), *Ramji Ram* v. *Salig Ram* (6), *Sri Rany Behary Lal* v. *Ranchheyya Lal* (7).

The result is that this appeal is allowed, the decree of the District Judge set aside and that of the Court of first instance restored, subject to this variation that interest will run at the rate of six per cent. per annum as allowed by the District Judge. This order will carry costs both here and in the Court of Appeal below.

Appeal allowed.

(1) 7 M. 392; 8 Ind. Jur. 186; 2 Ind. Dec. (N. S.) 856.

(2) 5 C. L. J. 527.
(3) 5 C. L. J. 653
(4) 6 C. L. J. 580; 12 C. W. N. 28.
(5) 4 Ind. Cas. 726; 33 B. 644; 11 Bom. L. R. 1042.
(6) 11 Ind. Cas. 481; 14 C. L. J. 188.
(7) 13 Ind. Cas. 128; 15 C. L. J. 439.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 38 OF 1917.

November 19, 1917.

Present:—Mr Lindsay, J. C.

Mir ETIZAD HUSAIN—DEFENDANT—APPELLANT

versus

Munshi BENI BAHADUR—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 51—Compensation for improvements—Purchaser for value from limited owner, position of—Equitable principles.

Where a purchaser knows or is presumed to know that the vendor can sell only under certain circum-

stances and he either knows that such circumstances do not exist or wilfully abstains from making any inquiry on the subject, the mere fact that he purchased for consideration will not suffice to show good faith and he will not be able to claim compensation under section 51 of the Transfer of Property Act for improvements effected by him. [p. 244, col 2.]

Apart from the provisions of section 51 of the Transfer of Property Act, however, an equitable right may arise in favour of the owner of a limited interest who makes improvements on the property in his possession. [p. 245, col. 1.]

But this right can only come into existence if it can be shown that the true owner stood aside and abstained from asserting his rights. There must be in such cases some equity arising out of the conduct of the true owner and further, apart from the conduct of the owner in this connection, the right cannot come into existence unless it is found that the person in possession was under a mistaken belief that he had a permanent interest in the property. [p. 245, col. 1.]

Appeal from the decree of the Second Additional Judge, Lucknow, dated the 13th December 1916, reversing that of the Additional Munsif, Lucknow, dated the 15th March 1916.

The Hon'ble Pandit *Gokaran Nath Misra* and Pandit *Harkaran Nath Misra*, for the Appellant.

Babu *Bisheshwar Nath Srivastava*, for the Respondent.

JUDGMENT.—This is a defendant's appeal arising out of a suit for ejectment brought by the plaintiff-respondent Beni Bahadur for the purpose of recovering possession of a house. There was also a claim for mesne profits.

The facts of the case are a little complicated and require to be set out at some length. The property in dispute consists of a plot of land situated in the city of Lucknow upon which there is at present standing a *pacca* house. It is said that this plot belonged originally to one Ram Prasad Kayastha who died some time in the year 1876. It is stated that at the time Ram Prasad died the only buildings standing on this plot of land were a "*kachcha dalan*" and a "*kothri*." In fact the ground appears to have been used as a small garden and these buildings were for the residence of the *mali*.

Ram Prasad left a widow *Musammat* Chhogar Kuar, who survived him for many years. It is admitted that she died in the month of December 1908. On the 14th of October 1881 *Musammat* Chhogar Kuar sold the plot of land in dispute to her brother Madho Prasad. The property was sold for Rs. 80 and in the sale-deed which was executed the property was described as consisting of "a piece of land used as a garden with a *dalan* and a *kothri*". The price paid by Madho Prasad was Rs. 80. It has been found that after Madho Prasad acquired this property he set about building a house which he erected, it is said, at a cost of Rs. 1,500 or Rs. 2,000. In the year 1900 shortly before his death Madho Prasad made a gift of this property to his *Guru*, a man named Baba Baram Bilas. Baram Bilas in his turn sold this property to Mir Buniad Husain on the 3rd of June 1902. Mir Buniad Husain was the father of the defendant-respondent Mir Etizad Husain. The plaintiff in this case Beni Bahadur claims to be the reversioner of Ram Prasad. He is, it appears, the son of Ram Prasad's sister and the Courts below have found that he is the only relation of Ram Prasad who can claim as his heir. There is no longer any dispute as to this matter.

A variety of defences were set up in the Court below but for the purpose of disposing of this appeal it will not be necessary to refer to them all. It is now conceded that the legal title to this property is with the plaintiff and the only question outstanding is whether the defendant-appellant is entitled to any compensation before an order for his dispossession is made.

The case as to compensation was dealt with by both the Courts below with reference to the provisions of section 51 of the Transfer of Property Act. The Munsif was of opinion that in the circumstances the defendant could not be ejected without compensation being paid to him by the plaintiff. It has been found that the house which now stands upon the land in dispute was constructed by Madho Prasad after his purchase from the widow; and it has also been found that since the date of the purchase by Buniad Husain a sum of about Rs. 500 has been spent on repairing the property. For various reasons the Munsif thought the case was covered by section 51 and accordingly, while giving the plaintiff a decree for ejectment, he ordered the payment of compensation to the defendant, or in case the compensation was not paid, he directed the defendant to pay to the plaintiff the value of the land. This decree has been reversed in appeal by the Additional Judge. He was of opinion that the case could not be brought

within the purview of section 51 and that consequently the plaintiff was not liable to pay any compensation as a condition precedent to his obtaining possession of the property.

The first point which has been argued before me is with reference to this question of compensation and the terms of section 51 of the Transfer of Property Act. This section lays down that when the transferee of immoveable property makes any improvement on the property, believing in good faith that he is absolutely entitled thereto, and he is subsequently evicted therefrom by any person having a better title, the transferee has a right to require the person causing the eviction either to have the value of the improvement estimated and paid or secured to the transferee, or to sell his interest in the property to the transferee. In dealing with the law as laid down in this section, the learned Judge observed that the question which had to be determined was the position which Madho Prasad occupied with respect to the land in suit. It is to be noted that the present defendant cannot be said to have improved the property for, as has been mentioned, the *pacca* house was built on the plot by Madho Prasad. Whether the repairs which were done by the defendant after the date of his purchase could be treated as improvements under this section is a matter of some difficulty. I shall refer to this point later on. The Judge came to the conclusion that Madho Prasad was not a transferee who believed, or who could have believed, in good faith that he was absolutely entitled to the property. The Judge pointed to the fact that *Musammat* Chhogar Kuar was a Hindu widow who had, therefore, only a limited interest in the property. Ordinarily she could not transfer the property except for the period of her life. The Judge found that no legal necessity for the transfer had been proved. Certain evidence was put forward on behalf of the defendant for the purpose of showing that there was a legal necessity, but this evidence has been rejected as unreliable. The learned Judge also referred to the fact that Madho Prasad being the brother of the lady must have been acquainted with the circumstances and must also be taken to know the Hindu Law relating to the power of widows to transfer the property which they have acquired from their husbands. He found that Madho Prasad must have been aware that there was no legal necessity for the sale and that in these circumstances he could not claim to be a transferee who believed in good faith that he had an absolute title to the property he had acquired. This finding of the lower Appellate Court has been criticized here on a variety of grounds ; but it seems to me that I must hold that what the Judge has found amounts to a finding of fact with which I am not competent to interfere.

The expression " good faith " is defined in section 3, clause 20, of the General Clauses Act, which lays down that a thing is deemed to be done in good faith where it is in fact done honestly, whether it is done negligently or not. Certain facts have been found by the Judge to which I have referred above, and it appears to me that on those facts it was open to him to find that Madho Prasad could not have had an honest belief that he was the absolute owner of the property. Consequently, as the Judge observes, if Madho Prasad were alive he could not have set up a claim to compensation under section 51. The conclusion of the learned Judge on this part of the case is supported by a ruling of the Madras High Court reported as *Nanjappa Goundan* v. *Peruma Goundan* (1). There it was held that where a purchaser knows, or must be presumed to know, that the vendor could sell only under certain circumstances and he either knows that such circumstances do not exist or wilfully abstains from making any inquiry on the subject, the mere fact that he purchased for consideration will not suffice to show good faith; and he will not be entitled to claim compensation for improvements effected by him. So much for the case set up by the appellant under section 51 of the Transfer of Property Act. It follows that if Madho Prasad acquired no right under this section, the defendant-appellant, who has taken a transfer of such title as Madho Prasad had, cannot lay claim to any higher rights than Madho Prasad would have had himself. It may be, as argued, that Buniad Husain gave full value for the property to the person to whom Madho Prasad had made a gift. But that does

(1) 4 Ind. Cas. 18; 32 M. 530; 6 M. L. T. 284; 19 M. L. J. 454.

not affect the legal question under consideration. If no right had arisen to Madho Prasad under section 51, then no such right could have passed by purchase to the appellant.

A further question then arises. If section 51 does not apply to the case, is there any other ground upon which compensation could be awarded to the defendant in this case? Madho Prasad certainly did not come into possession of this property as a trespasser. He was in any case the purchaser of a limited interest which would enure for the life of the widow. I think there can be no doubt that on the authorities, and apart from the provisions of section 51, an equitable right may arise in favour of the owner of a limited interest who makes improvements on the property in his possession. But this right can only come into existence if it can be shown that the true owner stood aside and abstained from asserting his rights. There must be in such cases some equity arising out of the conduct of the true owner; and further, apart from the conduct of the owner in this connection, the right cannot come into existence unless it is found that the person in possession was under a mistaken belief that he had a permanent interest in the property. This doctrine has been appealed to by the appellant's learned Counsel for the purpose of assisting the case of his client; but it seems to me that the conditions are not satisfied which would justify me in holding that an equitable right had arisen in the appellant's favour. To begin with we have the finding of the Court below that Madho Prasad could not have been under the belief that he had any permanent interest in this property. Coming now to Buniad Husain, the predecessor-in-interest of the appellant, it is probably the fact that he was under the belief that he had acquired an absolute interest in this land which would have entitled him to hold on to it as long as he chose. But then it cannot be pretended that the improvements erected on the land in dispute were made by Buniad Husain. It is true they were purchased by him but they were not made by him; and so on this ground it appears to me that the defendant-appellant has not made out a case for equitable relief.

Then again there is another point to be considered. In order to entitle the holder of a limited interest in the property to equitable relief in this manner there must, as I have said, be some conduct on the part of the true owner in virtue of which the person in possession was encouraged to make the improvements. The law in this matter has been expounded in a ruling of their Lordships of the Privy Council reported as *Beni Ram* v. *Kundan Lal* (2). After setting out an extract from a decision of the Allahabad High Court reported as *Gopi* v. *Bisheshar* (3), their Lordships observe as follows:—

"It is to be regretted that the loose and inadequate statement of the rule of equity, which is reported in *Gopi* v. *Bisheshar* (3), should have been accepted, apparently without much consideration, by the learned Judges of both Appellate Courts. The proposition, if it were carefully supplemented, might possibly be made to apply to the case where the owner of land sees another person erecting buildings upon it, and knowing that such other person is under the mistaken belief that the land is his own property purposely abstains from interference with the view of claiming the building when it is erected."

In dealing with this part of the case we have to consider the position of the present plaintiff Beni Bahadur. Up till the time of *Musammat* Chhogar Kuar's death at the end of 1908 Beni Bahadur was in no sense an owner of the property in dispute. He was the prospective heir of the property, being the nearest relative of Ram Prasad then in existence. But he cannot in any sense be described as the owner of the property; and it seems to me, therefore, impossible to apply this equitable doctrine on the footing that Beni Bahadur was the owner of the property in suit and could and should have interfered in order to prevent the appellant or his predecessor from erecting buildings on the land. It is pointed out that Beni Bahadur in the lifetime of Chhogar Kuar brought several

(2) 21 A. 496 at p. 502; 1 Bom. L. R. 490; 3 C. W. N. 502; 26 I. A. 58; 7 Sar. P. C. J. 523; 9 Ind. Dec. (N. S.) 1022.

(3) A. W. N. (1885) 100; 4 Ind. Dec (N. S.) 789.

declaratory suits relating to certain alienations which *Musammat* Chhogar Kuar had made and it is claimed to be a significant fact that he never brought any such suit with respect to the property with which we are now concerned. All the same I cannot accept the argument that Beni Bahadur was necessarily under any obligation to bring such a suit, and his omission to bring a suit of this kind cannot, in my opinion, be considered as amounting to any act on the part of the owner by reason of which the person in possession was encouraged to lay out money in improvements. Beni Bahadur in the course of his evidence was asked to explain why he had never brought any suit in the widow's lifetime regarding this property, and his answer was that he did not consider that he had any right to the property so long as *Musammat* Chhogar Kuar was alive. In short it seems impossible to treat a mere reversioner as an owner for the purpose of applying this doctrine of equity. *A* may be a reversionary heir and he may do acts which encourage the person in possession to erect buildings of a permanent character. When the reversion falls in on the death of the life-tenant, *B* is the nearest heir in existence and not *A*. Would it be possible for the person in possession to set up an equitable right against *B*, on the ground that *A* who was the previous reversionary heir had encouraged the holder of a limited interest to suppose that he was in with a permanent title? I think not. It seems to me therefore that neither under section 51, nor under this doctrine of equity to which I have referred, can the appellant be said to be entitled to compensation in this case.

It has been suggested that at any rate the lower Court ought to allow the defendant to remove the materials of the house before the plaintiff is given possession. Here again I think the argument fails. The reversioner is entitled to the property as it stands at the time of the widows's death. Here we have the fact that the widow died in 1908 and at that time the house had been built.

It has further been suggested that the appellant is entitled to the money which he laid out by way of repairs. This argument must fail for the same reason. It seems from the accounts which were put in by the defendant that the money he spent on repairs of the house was spent for the benefit of the tenant of the premises from whom the appellant was receiving rent. It is also made to appear from the accounts that the money was expended in the year 1907, that is, before the date of the widow's death. I can see no reason why the plaintiff should not have the benefit of the law which entitled him to possession of the property as it stands at the time when the succession opens. The case may be a hard one, but the defendant-appellant is in no worse position than any other person who has bought property from another holding under a defective title. He cannot set up the hardship to himself as any ground for resisting the claim of the rightful owner; and least of all when he has not been able to show that the rightful owner has done anything which would give rise to an equitable right in his (appellant's) favour.

I am satisfied, therefore, that the decision of the lower Appellate Court is correct and I dismiss this appeal with costs accordingly.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 408 OF 1915.

February 19, 1918.

Present:—Mr. Justice Teunon and Mr. Justice Newbould.

BEPIN BEHARI SEN—JUDGMENT-DEBTOR—APPELLANT

versus

KRISHNA BEHARI SEN—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 151, O. XXI, rr. 18, 19—Execution of decree for smaller sum, whether can be issued against party to whom larger sum is payable by applicant—Appeal—Appellate decree, whether supersedes original decree which it affirms.

When an appeal has been decided, the original decree becomes merged in the appellate decree and for purposes of execution as for purposes of amendment the appellate decree, even when it merely

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affirms the original decree, is to be taken as embodying and superseding that decree. [p. 248, col. 1.]

By a decree in a partition suit *A* became entitled to recover the sum of Rs. 2,130 from *B*. *A* preferred an appeal against that decree, which was dismissed and he became liable to pay to *B* Rs. 506 by way of costs of the appeal. Thereafter *A* applied for leave to appeal to His Majesty in Council but this application was rejected and he was directed to pay to *B* further costs to the extent of Rs. 80:

Held, that on the principles embodied in Order XXI, rules 18 and 19, and in section 151, Civil Procedure Code, *B* was not entitled to take out execution for the smaller sums of Rs. 506 and Rs. 80 payable to him by *A* when a larger sum payable by him to *A* against whom he sought execution was due and remained unpaid. [p. 248, col. 1.]

Appeal against the order of the Officiating Subordinate Judge, 2nd Court, 24-Pergannahs, dated the 17th May 1915.

FACTS appear from the Judgment.

Babu *Sarat Chandra Rai Chowdhury* (with him Babu *Kshitish Chandra Chakrabarty*), for the Appellant.—The decree of the Subordinate Judge of Alipur in the original suit was taken on appeal before this Court. The original decree merged in the High Court's decree. There was then an application for leave to appeal to His Majesty's Council. The costs awarded in the regular appeal as well as those in the hearing of the application for leave to appeal to the Privy Council are together less than the amount payable to my client under the original decree.

The present application for execution is not maintainable.

Refers to Order XXI, rule 19, Civil Procedure Code. *Vide Madappa Ganapa Hedge* v. *Jaki Ghosal Gabri Ghosal* (1).

Babu *Shib Chandra Palit* (with him Babu *Biswanath Bose*), for the Respondent, distinguished the case of *Madappa Ganapa Hedge* v. *Jaki Ghosal Gabri Ghosal* (1) and submitted that the provisions of Order XXI, rule 19, Civil Procedure Code, did not apply to the facts and circumstances of the present case.

JUDGMENT.—This appeal arises out of execution proceedings.

It appears that in a suit for partition brought by the present respondent under a decree made on an arbitration awarded on the 12th March 1906, the present appellant Bepin Behari Sen and his mother Thakurani Dasi Debi each became entitled to recover a sum of Rs. 2,130 from the present respondent Krishna Behari Sen. Against this decree Bepin Behari and Thakurani Dasi appealed and under the decree of this Court dismissing their appeal on the 8th July 1908 they became liable jointly and severally in a sum of Rs. 506 by way of costs to Krishna Behari. Thereafter they applied for leave to appeal to His Majesty in Council, and by the order dismissing that application on the 6th April 1909 they were directed to pay further costs to the extent of Rs. 80.

In 1913 they next brought a suit to have the decree on the award on which it was based set aside; that suit was finally dismissed in April 1915.

Meanwhile the respondent Krishna Behari had twice applied in execution in order to realise the sums awarded to him by way of costs. The first application was dismissed for non-prosecution on the 13th September 1911. The second was instituted on the 25th July 1914. To this application Bepin Behari took two objections, namely, (1) that it was barred by limitation, (2) that it should be held in abeyance pending the disposal of the suit of 1913. Both these objections were overruled on the 22nd February 1915.

The suit of 1913 having been dismissed in April on the 8th of May 1915, the judgment-debtor-appellant next objected that the sum of Rs. 586 due to the respondent by way of costs should be set off against the sum of Rs. 2,130 due to the appellant under the original decree and that the application for execution should be dismissed. This objection was overruled on the 17th May 1915.

It is against this order of the Subordinate Judge and subsequent orders bringing the property of the appellant to sale and confirming the sale thereof to the decree-holder-respondent that the present appeal is directed.

It is not disputed that the sum to which the appellant became entitled under the decree of 12th March 1906 remains due and unpaid, but on behalf of the respondent it is contended that his application is for execution of the appellate decree, that the appellate decree does not specify the sum due to the present appellant Bepin Behari and that in any case the costs (Rs. 80)

(1) 30 Ind. Cas. 893; 40 B. 60; 17 Bom. L. R. 689.

awarded to the present respondent by the order dismissing the application for leave to appeal to His Majesty in Council cannot be set off in the way proposed.

Now it is no doubt the case that notwithstanding the pendency of an appeal the decree of the Court of first instance may be executed. But when the appeal has been decided then the original decree is merged in the appellate decree and for purposes of execution as for purposes of amendment, the appellate decree, even when it merely affirms the original decree, is to be taken as embodying and superseding that decree. The respondent, therefore, cannot be allowed to take advantage of the fact that the decree as drawn up does not recite in so many words that under that decree a sum of Rs. 2,000 is payable by the plaintiff-decree-holder to the defendant-appellant. In this view Order XXI, rule 19, is applicable in terms and the respondent before us should not have been permitted to take out execution for the smaller sum due to him under the appellate decree.

By section 36 of the Code the provisions relating to the execution of decrees are made applicable to the execution of orders. The order by which the appellant before us is made liable in the sum of Rs. 80 by way of costs to the respondent was made in the course of the same litigation as the decree of which the respondent sought execution. That decree placed before the Court by the applicant for execution showed that the sum of Rs. 2,000 was payable by the applicant to the person against whom he sought execution. It is admittedly due and unpaid. Thus whether Order XXI, rule 19, be or be not applicable in terms, yet on the principles embodied in Order XXI, rules 18 and 19, and in section 151 of the Code execution in respect of this smaller sum also should have been refused.

For these reasons we set aside the orders complained of and the sale of the appellant's property.

The appeal is accordingly decreed with costs. We assess the hearing fee at five gold *mohurs*.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST RENT APPEAL No. 3 OF 1917.

April 12, 1917.

Present:—Mr. Lindsay, J. C.

HASHMAT ALI—DEFENDANT—APPELLANT

versus

THE SPECIAL MANAGER, COURT OF WARDS, KHERI, MAHEWA ESTATE—PLAINTIFF—RESPONDENT.

Right to sue, want of, plea as to—Plaintiff suing on behalf of others as well as for himself—Defendant, knowledge of—Civil Procedure Code (Act V of 1908), s. 65—Auction-purchaser, right of, to claim profits from date of sale.

Where a defendant in a suit brought by the Manager of the Court of Wards knows that the Manager is suing on behalf of the ward as well as on behalf of other persons interested in the property in dispute, he cannot resist the suit on the ground that the ward is not the sole owner of the property. [p. 249, cols. 1 & 2.]

An auction-purchaser of a share in a village is entitled to claim profits from the date of the sale, and not only from the date when mutation is effected in his name in the village papers. [p. 249, col. 2.]

Appeal from the decree of the Deputy Commissioner, Sitapur, dated the 10th November 1916.

Syed *Nabi Ullah*, for the Appellant.

Rai *Nagendra Nath Ghoshal* Bahadur, for the Respondent.

JUDGMENT.—The appellant Hashmat Ali was defendant in a suit in the Court below brought under section 108, clause 15, of the Oudh Rent Act for the recovery of profits for the years 1320 to 1323 *Fasli*. The profits were sought in respect of a 6 annas share in the village and the total sum claimed was Rs. 6,320-7-0. The Court below gave a decree in favour of the plaintiff to the extent of Rs. 3,167-10-0 with costs and future interest at 6 per cent. The first point which has been raised in appeal here is with respect to the right of the plaintiff to bring this suit. The plaintiff was the Special Manager of the Court of Wards in charge of the estate of one Jai Indar. The case for the appellant is that Jai Indar was not the sole owner of the 6-annas share in respect of which the claim was made. In order to understand the matter raised by this argument it is necessary to refer to certain facts. It appears that the defendant Hashmat Ali executed a bond in favour of Raja Balbhaddar Singh of Mahewa. After the death of the Raja a suit was

brought by his widow on the bond and a decree was obtained. While execution proceedings were pending, Rani Raghubans Kuar died and was succeeded by one Rajendra Bahadur, who became the Talukdar of the Mahewa Estate. Rajendra Bahadur took steps to execute the decree and the result was that after a number of objections raised by Hashmat Ali had been disposed of, the property was eventually brought to sale by a public auction and was purchased by Rajendra Bahadur on the 27th of May 1912. Various other objections were afterwards raised by the judgment-debtor but the sale was confirmed on the 28th of June 1912, and a sale-certificate was issued on the 21st of December 1914. By the time this sale-certificate came to be issued, Rajendra Bahadur had died and had been succeeded by his son Jai Indar whose property is under the management of the Court of Wards, and it is on the strength of this sale-certificate that the present suit has been brought by the Court of Wards as representing Jai Indar. It is to be observed that in the sale-certificate which was granted on the date above mentioned it was expressly stated by the Subordinate Judge who was dealing with the case that the certificate was being granted to the Special Manager as guardian of Jai Indar for his own benefit and also for the benefit of three other persons who were the legal representatives of the Rani. It is clear on all hands, and in fact it has been admitted by the learned Counsel for the Court of Wards, that Jai Indar is not the sole owner of the 6-annas share in respect of which the profits are claimed. It is admitted that the Court of Wards is managing the property on behalf of Jai Indar and in a way as trustee for the other three persons who now represent the deceased Rani Raghubans Kuar. It is a pity I think that these facts were not set out in the plaint, for the omission to state them has given Hashmat Ali an opportunity of raising the plea which at first sight appears to be a plausible one. On examination, however, of the facts of the case it is altogether clear that Hashmat Ali's plea has got no substance in it. He has been contesting the claim all along since the time the decree was obtained and execution was sought and he very well knew the facts. It is made to appear that the entry in the revenue papers is in favour of Jai Indar alone and having regard to the facts which I have already mentioned it appears to me that Hashmat Ali is not in the present suit in a position to contest the right of the Court of Wards to bring forward this claim, it being of course understood that they are claiming not only on behalf of Jai Indar but on behalf of the three other legal representatives of Rani Raghubans Kuar also. I am satisfied therefore that the plaintiff had the right to bring this suit and that the plea which has been raised to the contrary cannot be sustained.

The next point taken is that the plaintiff was not in a position to sue for profits accruing prior to the date on which mutation was obtained in favour of Jai Indar. Here again I think the plea must be rejected for, as the lower Court observed, the provisions of section 65 of the Code of Civil Procedure apply to the case and in virtue of those provisions it is clear that the title to the 6-annas share accrued to the auction-purchaser from the date on which the property was sold. It may or may not be the case that the revenue papers show only Jai Indar as being in possession of the share since 1916 but the entry, whatever its value may be as *prima facie* evidence, is contradicted by the other evidence on the record, which shows that Jai Indar is one of four persons who are beneficially interested in the share since the date of the purchase. It is impossible, I think, to say that a good title to this 6-annas share having accrued to Jai Indar and these other legal representatives on the date of the sale they are not to have the profits of this property from that date. I see no reason whatever for holding that the plaintiff and his co-sharers would only be entitled to recover profits from the date the mutation was made. It is argued in this connection that Hashmat Ali, being the *lambardar*, could not be made responsible to persons who are not recorded co-sharers, and it was suggested that he might before the date of this sale have paid away the profits to other persons who were so recorded. There is no virtue in this plea, for the point was never raised in Hashmat Ali's defence. He never pretended that he had paid any money to any other co-sharer

in the village and so this defence is without merit. The only other point raised is one which must be determined in favour of the appellant. The lower Court decreed the claim only in part. According to the decree which has been prepared the plaintiff has been awarded full costs and the learned Counsel who appears for the respondent admits that this is wrong. The decree will have to be corrected, for in the circumstances the plaintiff was only entitled to proportionate costs in accordance with the amount of his success. A fourth point relating to one of the items of the account between the parties was sought to be argued, but it was brought to the learned Counsel's attention that the point was not raised in the memorandum of appeal and the argument was, therefore, withdrawn. The result is that the appeal is allowed in part, that is to say, the decree of the lower Court will be corrected by insertion of the proper order giving the plaintiff only proportionate costs. In other respects the appeal is dismissed. I make no order as to costs in this Court.

Appeal partly allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2908 OF 1915.

March 14, 1918.

Present:—Justice Sir Charles Chitty, Kt., and Mr. Justice Smither.

CHANDRA KUMAR ROY CHOWDHURY AND OTHERS—DEFENDANTS NOS. 1 TO 3 —APPELLANTS

versus

ASWINI KUMAR DAS AND OTHERS— —RESPONDENTS.

Decree for rent—Execution, condition imposed upon, validity of—Civil Procedure Code (Act V of 1908), s. 11, O. IX, r. 13—Res judicata—Fraud—Suit to set aside decree obtained by fraud—Question of fraud already considered in proceedings to set aside ex parte decree, effect of.

A Court decreeing a suit for arrears of rent has no right to impose a condition as to the mode of execution of the decree by making the decree executable only against the defaulting *jama*. [p. 251, cols. 1& 2.]

The decision on the question of fraud in a proceeding under Order IX, rule 13, Civil Procedure Code, for setting aside an *ex parte* decree will operate as *res judicata* on the question of fraud raised in a subsequent suit between the same parties for setting aside the *ex parte* decree in only so far as that fraud consisted in the suppression of service of summons. [p. 251, col. 2.]

Appeal against the decree of the Officiating Additional Subordinate Judge, Backerganj, dated the 16th of August 1915, confirming the decree of the Officiating Additional Munsif, Barisal, dated the 12th of September, 1913.

FACTS appear from the judgment.

Babu *Gunoda Charan Sen*, for the Appellants.—The suit is to set aside a decree for rent for fraud. The Courts below have found that there was no fraud so far as defendant No. 12 was concerned. But the Courts have limited the execution of the decree by sale of the defaulting *jama* only. The Courts have no jurisdiction to limit the execution of the decree in this way. Arrears of rent are a first charge on the land, though the landlord is not bound to proceed against the defaulting *jama* first of all. He may, if he likes, proceed against other properties of the defaulting tenant—see *Jatindra Nath Roy* v. *Mozafer Ali Khan* (1).

My second point is that this identical question of fraud, *i.e.*, suppression of summons has been investigated in the proceeding under Order IX, rule 13. The question, therefore, cannot be re-opened in this suit. The question of fraud, so far as plaintiff No. 1 is concerned, is barred by the principle of *res judicata*.

[CHITTY, J.—These questions have been considered in *Khirode Chandra Roy* v. *Ashtulla Bee* (2). Where the whole suit is fraudulent, as in the present case, that question can be decided in a subsequent suit. The allegation of fraud so far as service of summons is considered may not be re-opened.]

Babu *Kali Prosunno Piplai* (with him Babu *Suresh Chunder Talukdar*), for the Plaintiff No. 2, Respondent.—The Court found fraud so far as service of summons was concerned. In this case two distinct kinds of fraud were alleged: (1) the suit itself was fraudulent, (2) the summons was fraudulently suppressed. The Courts found that there was fraudulent suppressions of summons. Therefore, the Court has found fraud and the decree is liable to be set aside.

(1) 16 C. W. N. xxxi (31) (*Notes portion*).
(2) 35 Ind. Cas. 557; 20 C. W. N. 845;

In view of the clear findings of fact of both Courts that plaintiff No. 2 was never in possession of the *jama*, the direction about the execution of the decree is equitable. If a person executes a *kabuliyat* in favour of another but never gets possession of land, he is not bound to pay rent. Liability to pay rent must arise from possession of land. The direction about execution should, therefore, be retained.

JUDGMENT.

CHITTY, J.—This is an appeal by defendants Nos. 1 to 3, really on behalf of themselves and defendants Nos. 4 to 11 who are their co-sharers. Aswini Kumar Das, plaintiff No. 1, brought the suit to set aside an *ex parte* decree passed against him and Kashish Chandra Das, defendant No. 12, on the ground of fraud. That decree was passed in Rent Suit No. 1502 of 1910. Aswini Kumar Das alleged that there was fraud, not only because he was not served with summons, but also because the suit against him was bad *ab initio* on the ground that there was no relationship of landlord and tenant subsisting between him and defendants Nos. 1 to 11. Defendant No. 12, Kashish Chandra Das, was made a *pro forma* defendant to the present suit and in his written statement he alleged that the return of service against him also was fraudulent and collusive. At the same time, while raising no objection to relief being granted to Aswini Kumar Das, he did not ask for any relief for himself. On the other hand he objected to having been made a party to the suit with which he said he had nothing to do. On 12th September 1913 Kashish Chandra Das was transferred on his own petition from the category of defendants to that of the plaintiffs. Both the Courts have agreed in their findings of fact. They have set aside the *ex parte* decree in the rent suit as regards Aswini Kumar Das but have held that it must stand against Kashish Chandra Das, with this reservation that the rent lands only are to be liable for the decretal amount.

Two points have been raised before us by the appellants. First of all they say that the decree against Kashish Chandra Das must be executed in the ordinary way and that the Courts deciding this suit had no right to impose a condition as to the mode of execution of that decree. In this contention the appellants are clearly right and the decree of the lower Appellate Court cannot be supported in this respect. It is not seriously argued for Kashish Chandra Das that it can be supported on that ground. The learned Pleader for Kashish Chandra Das has endeavoured to raise questions as to the findings of fact of the lower Court regarding his client and the service of summons upon him, but we do not think that in second appeal we can go into those questions.

The second point raised by the appellants was that the question of fraud raised by the plaintiff No. 1, Aswini Kumar Das, was *res judicata* inasmuch as he had brought an application under Order IX, rule 13, Civil Procedure Code, to set aside the *ex parte* decree against him on the ground that service of the summons had been fraudulently suppressed, and that application had been dismissed. This might be a good ground if the allegations of the plaintiff with regard to fraud were confined to the service of summons against him. They were not, however, confined to that but were directed to the whole suit as being bad, Aswini Kumar Das alleging that there was no relationship of landlord and tenant as between him and defendants Nos. 1 to 11. The question was considered in the case of *Khirode Chandra Roy* v. *Ashtulla Bee* (2), to the judgment in which case I was a party. There it was pointed out that if the fraud was confined to the non-appearance of the defendant in a suit it might be *res judicata* under section 108 of the Code of 1882, *i. e.*, Order IX, rule 13 of the present Code, but not so when the question was whether the whole suit was bad *ab initio*.

I would accordingly allow the appeal on the first ground and set aside so much of the decree of the lower Appellate Court as directs the execution of the rent decree to be confined to the *jama*. The decree must stand against Kashish Chandra Das as a personal decree. The appeal against Aswini Kumar Das fails. Defendants-appellants must have their costs of this appeal against plaintiff No. 2, Kashish Chandra Das, but they must pay the costs of plaintiff No. 1, Aswini Kumar Das.

SMITHER, J.—I agree.

Appeal allowed.

BHAGWATI PRASAD SINGH *v.* PARMESHWAR DUTT.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND RENT APPEAL No. 21 OF 1917.

June 11, 1917.

Present:—Mr. Lindsay, J. C.

The Hon'ble Maharaja Sir BHAGWATI PRASAD SINGH, K. C. I. E., TALUQDAR OF BALRAMPUR, DISTRICT GONDA—PLAINTIFF—APPELLANT

versus

PARMESHWAR DUTT AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—*Erroneous decision on question of law, whether* res judicata.

An erroneous decision on a question of law between the parties to a suit may nevertheless amount to *res judicata* in a subsequent suit between the same parties.

In a previous suit between the parties it was decided on an issue of law that the defendants were liable to pay interest on arrears of rent. In a subsequent suit for arrears of rent and interest the claim for interest was resisted on the ground that the defendants were *thikadars* and were, therefore, not liable under the provisions of section 141 of the Oudh Rent Act to pay interest on arrears:

Held, that the matter, having been in issue in the former suit and having been heard and finally determined, was conclusive in the subsequent suit as to the liability of the defendants to pay interest, even although the earlier decision was a wrong decision in law.

Appeal from the decree of the District Judge, Gonda, dated the 8th December 1916, modifying an order of the Assistant Collector, Gonda, dated the 29th September 1916.

Mr. *Shahid Hussain*, for the Appellant.

Babu *Ram Chandra*, for Respondents Nos. 1 and 3.

JUDGMENT.—These two appeals (Nos. 20 and 21 of 1917) can be disposed of by one judgment. They were dealt with in one judgment by the lower Appellate Court. The simple question for determination is whether in the circumstances disclosed the plaintiff appellant who is the *taluqdar* is entitled to claim interest from the defendants respondents on arrears of rent. The claim for interest was resisted on the ground that these defendants were *thekadars* and, therefore, were not liable under the provisions of section 141 of the Oudh Rent Act to pay interest on arrears. Accordingly the learned Judge held that it was for the plaintiff to show that there was some agreement or contract to pay interest. It was held by the first Court which dealt with the cases that the question of the liabiliy to pay interest was *res judicata* between the parties. The learned Judge thought that this opinion of the Court of first instance was wrong on the ground that in the present suits the array of parties was not the same. He further thought that the decision of the Assistant Collector in the earlier suits could not be *res judicata*, because arrears of rent become due every year and any question connected with the payment of interest on such arrears is a recurring question which cannot be settled once and for all by any judgment. This opinion of the learned District Judge is not correct. It is admitted in the first place that the previous litigation to which reference was made by the Assistant Collector was between the same parties. It is also admitted that in the previous litigation it was decided on an issue of law between the parties that the present defendants-respondents were liable to pay interest on arrears of rent. The question must be taken to be *res judicata* between the parties. In view of the authorities of this Court it cannot be maintained that an erroneous decision on a question of law may not amount to *res judicata*. I am aware that some of the High Courts in India entertain another opinion; but so far as this Court is concerned the rule is settled and I need only refer to a Bench judgment of this Court reported as *Chaudhri Ganga Singh* v. *Lachmi Narain* (1), in which Mr. Scott quoted with approval a previous decision of a Judge of this Court reported as *Mohammad Bahadur* v. *Ram Pershad* (2). The matter, having been in issue in the former suit and having been heard and finally determined, is conclusive in the present suits as to the liability of these defendants-respondents to pay interest, although it may be, as argued, that the earlier decision was a wrong decision in law.

The result is that these two appeals must be allowed. I set aside the decree of the Court below and restore the decrees of the Court of first instance. The appellant is entitled to his costs both here and in the lower Appellate Court.

Appeal allowed.

(1) 10 O. C. 145.
(2) 8 O. C. 37.

BHAIRO PRASAD SAHU v. RAM CHANDRA PRASAD.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 452 OF 1917.

March 14, 1918.

Present:—Mr. Justice Jwala Prasad.

BHAIRO PRASAD SAHU AND ANOTHER—DEFENDANTS 1ST PARTY—APPELLANTS

versus

RAM CHANDRA PRASAD—PLAINTIFF AND ANJANI KUMAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXII, r. 3 (4)—Minor—Guardian ad litem, *appointment of—Notice, service of, on natural guardian—Hindu Law—Joint family—Guardian, mother, whether is—Fraud—Negligence of guardian* ad litem, *effect of—Decree set aside on ground of fraud, effect of.*

Under the Hindu Law the mother is the natural guardian of a minor in the absence of the father, irrespective of the family being joint or separate. [p. 254, col 1.]

Order XXXII, rule 3, clause 4, of the Civil Procedure Code requires that a notice for the appointment of a guardian *ad litem* should be served upon the natural guardian of the minor. [p. 254, col. 1.]

Where a guardian *ad litem* of a minor defendant is guilty of negligence and no attempt is made by him to protect the interests of the minor in the suit, the decree obtained in the suit will not bind the minor. [p. 254, col 2.]

Where a decree which cannot be split up is set aside on the ground of fraud at the instance of one of several judgment-debtors, the entire decree must be set aside. [p. 255, col. 1.]

Appeal from a decision of the District Judge, Mozufferpore, dated the 8th February 1917, affirming a decision of the Munsif, First Court, Mozufferpore, dated the 20th June 1916.

Mr. *Saroshi Charan Mitter*, for the Appellants.

Messrs. *Rajendra Prasad* and *Audh Behari Chaubey*, for the Respondents.

JUDGMENT.—The defendants are the appellants in this case. This appeal arises out of a suit brought by the plaintiff-respondent to set aside two *ex parte* decrees obtained against him by the appellants on the ground of fraud and gross negligence on the part of the guardian. The plaintiff is a minor. The decrees sought to be set aside are (1) dated the 8th of June 1912 and (2) 18th of November 1914. Prior to the obtaining of the aforesaid decrees the defendants-appellants had brought a suit in 1907 against the father of the present plaintiff for rent in respect of the property in suit, alleging that the rent was at the rate of Rs. 1-7 0 per annum. The plaintiff's father contested the suit and the suit of the defendants-appellants was dismissed on merits on the 13th January 1908. Thereafter the appellants brought a suit for assessment of rent on the 30th September 1909, being suit No. 1322 of 1909 against the father of the plaintiff and his uncle Anjani Kumar. The appellants claimed assessment at the rate of Rs. 48 in place of their claim in the former suit at the rate of Rs. 1-7-0 per annum. The defendants in that case, namely, the plaintiff's father and his uncle, filed written statements taking pleas similar to those taken in the former suit of 1907, namely, that the land in dispute was the *lakheraj* of the defendants and that there was no relationship of landlord and tenant between the parties. The case after several adjournments was fixed for hearing on the 27th of May 1910, but on the 16th of May 1910 the father of the present plaintiff died and the appellants applied for the substitution of the plaintiff in place of his deceased father and named defendant No. 2, his uncle, as guardian *ad litem*. The defendant No. 2 was subsequently appointed guardian *ad litem* of the present plaintiff.

It has been held by the Courts below that no notice was served upon the natural guardian of the minor, *viz.*, his mother, and that the uncle of the plaintiff did not give his consent for his appointment as the plaintiff's guardian *ad litem*. Ultimately the plaintiff's guardian defaulted and did not prosecute the suit, which was decreed *ex parte* on the 8th June 1912 in favour of the appellant.

The second decree concerned in this appeal which the plaintiff seeks to set aside was obtained in a suit brought by the appellants against the plaintiff-respondent and his uncle in 1913, being No. 542 of that year. This suit was for recovery of rent for the years in suit from the plaintiff and his uncle on the basis of the aforesaid *ex parte* decree, dated the 8th June 1912. The uncle was not made guardian in this case, but one Babu Mathura Prasad was appointed guardian *ad litem* for the plaintiff. The said guardian *ad litem* filed a written statement in consultation with the mother of the plaintiff impugning the claim of the appellant as false and fraudulent, yet the case of the plaintiff was not prosecuted and the Pleader

guardian also made default, the result of which was that the suit was decreed *ex parte* against the plaintiff and his uncle on the 18th November 1914.

The Courts below have concurrently held that the guardian of the plaintiff in respect of the decree obtained in June 1912 was guilty of fraud and gross negligence and that absolutely no attempt was made by the guardian to defend the action of the appellants against the minor and to protect his interests. The lower Courts have also held that the requirements of Order XXXII, rule 3, clause 4, and rule 4, clause 3, were not complied with in the appointment of the guardian in the case. There is a further finding that the defendants-appellants were guilty of fraud in obtaining the appointment of the guardian and the decree. On the basis of those findings of facts the Courts have concurrently held that the decree obtained by the appellants was tainted with fraud and liable to be set aside.

On behalf of the appellants it has been strenuously contended that the irregularities in the appointment of the natural guardian were not material in this case inasmuch as the family was a joint Mitakshara one in which the uncle of the plaintiff as the *karta* represented the interest of the minor and was, therefore, properly appointed a guardian by the Court. The contention is obviously without any substance. The guardian of an infant has been expressly named in the Mitakshara to be the parents and that the father has preference over the mother and after the death of the father, the mother is the natural guardian of the infant. The guardianship of an infant is irrespective of whether the family is joint or separate. The learned Vakil for the appellants has not been able to show any direct authority on the point for his contention that the mother in a joint Hindu family is not the natural guardian of the minor. Order XXXII, rule 3, clause 4, requires that the notice for the appointment of a guardian *ad litem* should be served upon the father "or other natural guardian of the minor," the reason being that the natural guardian is the best person to have a voice in the appointment of the guardian *ad litem*. Again the first Court held that the minor's father was separate from his uncle. This finding was not upset by the lower Appellate Court. Thus on the finding of the first Court the uncle was not the *karta* of the minor plaintiff. The mother was the only guardian of the minor. I agree with the view of the Courts below that the rule of the Code of Civil Procedure has been contravened. Again there can be no doubt, and in fact it has not been seriously contested, that Order XXXII, rule 3, clause 4, has not been at all complied with in this case, inasmuch as no consent of the guardian was obtained for his appointment. This provision newly added to the present Code of Civil Procedure is wholesome and is intended to safeguard the interests of the minor by obtaining the actual consent of the guardian *ad litem* for his appointment and thus ensuring that he has taken upon himself the onerous duty of defending the interests of the minor.

It has then been contended that the aforesaid non compliance with the provisions of the Code amounts only to irregularities which would not vitiate the decree obtained in the case. Reliance has been placed on *Walian* v. *Banke Behari Pershad Singh* (1), but that authority does not at all help the appellant. In that case it was expressly held that the interests were duly protected and all possible care that a diligent person would take was taken by the guardian and hence the mere irregularities in the appointment of the guardian would not vitiate the proceedings. But where the guardian is guilty of negligence and no attempt has been made by him to protect the interests of the minor, the decree so obtained will not bind the minor. This is reiterated in the recent case of *Bhagwan Dayal* v. *Param Sukh Dass* (2). It has to be seen in the circumstances of the present case whether there has been any negligence on the part of the guardian appointed. The decision between the parties in the former litigation, dated the 13th January 1908, referred to in the early part of the judgment, will clearly show that the appellants' claim for rent against the father of the plaintiff was dismissed on contest. That was a good and substantial defence

(1) 30 I. A. 182; 7 C. W. N. 774; 30 C. 1021; 5 Bom. L. R. 822; 8 Sar. P. C. J. 512 (P. C.)

(2) 27 Ind. Cas. 623; 37 A. 179; 13 A. L. J. 179.

to be put forward in any Court of Justice The guardian in this case did not attempt to put forward that defence and to place the judgment in that case before the Court but suffered the case to be decreed *ex parte* against the minor. This is sufficient to show that there was the greatest possible negligence on the part of the guardian *ad litem* of the minor plaintiff. The appellants are guilty of the procurement of the appointment of such a guardian without any notice to the natural mother as required by law.

The result is that I agree with the view of the Courts below and I hold that the appellants are guilty of fraud and that the guardian is guilty of negligence and that the decree is not binding upon the plaintiff-respondent and is liable to be set aside.

The second decree of 1914 is a decree for rent based upon the fraudulent decree of 1912. The Pleader guardian of the minor plaintiff also did not produce the most valuable evidence afforded by the aforesaid decision of the inter-party case, dated the 13th January 1903. Then the mother of the plaintiff in this case was not at all informed and no notice was served upon her for the appointment of the proposed guardian. Thus the minor's interests in this case also were not protected. This decree, based as it is upon the fraudulent decree of 1912, should also be set aside.

It is next contended by the learned Vakil for the appellants that the entire decrees cannot be set aside and that only the decrees against the minor should be set aside keeping them in fact as against the uncle of the minor, Anjani Kumar, who was also defendant in the aforesaid cases. The liabilities of the defendants under the decrees are indivisible. Therefore, the decrees are not liable to be split up, and if they are set aside as against one of the defendants, they must be set aside as against the other. The principle has been well laid in the case of *Bhura Mal* v. *Har Kishan Das* (3) and later in the case of *Jadubansa Narain* v. *Mohunt Hari Charan Bharati* (4).

(3) 24 A. 383; A. W. N. (1902) 76.
(4) 6 C. L. J. 228.

Lastly it is argued on behalf of the appellants that the suits should be revived and tried *de novo* on the plaintiff's guardian *ad litem* having been properly appointed. I am unable to accept this contention. There is no provision in the Code of Civil Procedure for such a procedure. The decrees in question are set aside as having been tainted with fraud and gross negligence of the guardian. The analogy of Order IX, rule 13, of the Code of Civil Procedure and the other cognate rules in that Chapter does not apply when a decree is set aside in a regular suit on the ground of fraud. The applications for the setting aside of *ex parte* decrees and for the restoration of suits dismissed for default are made in the same Court and give rise only to miscellaneous proceedings in the same suit. The setting aside of an *ex parte* decree or of the order dismissing a suit for default naturally revives the original suit. Such cannot be the result when a final decree is set aside on the ground of fraud or gross negligence by means of a separate and independent suit.

The result is that all the contentions of the learned Vakil for the appellants fail and the appeal is dismissed with costs

Appeal dismissed.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE NO. 282 OF 1915.

February 27, 1917.

Present:—Mr. Justice Chapman and Mr. Justice Roe.

JAGAN BHAGAT THROUGH HIS NEXT FRIEND AND UNCLE THAKUR BHAGAT AND OTHERS—APPELLANTS

versus

Sheikh ARJANI MANDAL AND OTHERS —RESPONDENTS.

Muhammadan Law—Pre-emption—Ceremonies, performance of, time of.

A right to pre-emption is based entirely upon the Muhammadan Law. It has been accepted by Hindus in certain districts in consequence of their close contact with Muhammadans in those districts. [p. 256, col. 2.]

To create a right of pre-emption it is necessary that the Muhammadan ceremonies be performed immediately upon hearing of the sale. The date of performance is not an equitable question, so that

JAGAN BHAGAT v. ARJANI MANDAL.

ceremonies performed not immediately upon hearing of the sale but within a reasonable time are not good ceremonies and do not create a right of pre-emption [p. 256, col. 2.]

In a pre-emption suit the plaintiff stated that though the sale took place on the 10th of June, he heard of it only on the 8th of August, and forthwith performed the necessary ceremonies. It was found as a matter of fact that the plaintiff heard of the sale in July of the year, and then performed the ceremonies after being advised by a Pleader to do so:

Held, that the ceremonies were performed too late to create a right of pre-emption.

Appeal from a decision of the Subordinate Judge, Godda, dated the 8th April 1915.

Mr. *Naresh Chandra Sinha*, for the Appellants.

Mr. *Atul Krishna Ray*, for the Respondents.

JUDGMENT.

ROE, J.—This appeal arises from a decree of the Subordinate Judge of Godda dismissing the plaintiffs' claim to pre-empt the property in suit. The plaintiffs are co-sharers to the extent of two-thirds of this property, the remaining one-third has been sold to the defendants. The sale is dated the 10th June 1913.

The plaintiffs' case is that they heard first of the sale on the 8th August 1913 and forthwith performed the necessary Muhammadan ceremonies by crying aloud in the presence of witnesses that they were the buyers of the property and by going to the spot and inviting the attention of the vendors to the fact that they claimed pre emption.

There are three main issues before us:—*Firstly*, whether the law of pre-emption prevails in the Sontal Parganas at all among Hindus;

Secondly.—Whether the plaintiffs made any claim to pre-empt on the 8th August; and

Thirdly.—Whether the 8th of August was as they state the date on which they first heard of the sale.

I do not think it necessary to go into the first and second questions, for the reason that it is patent on the record that the 8th of August was not the date on which the plaintiffs heard that the property had been sold to the defendants. It is proved beyond possible doubt that the defendants entered into possession of the property in June. It is idle to suppose that the plaintiffs would not have received information of this entry into possession earlier than August. Moreover, the plaintiffs themselves betray their case in the most disingenuous way. They were asked from whom they got the information as to the manner in which the *talab i mowasibat* should be performed and said "about two or three days before performing the ceremony, we sent a man to Bhagalpore and he there found out about the ceremony from a Pleader at Bhagalpore." The inference is obvious that they heard of these sales sometime in July, if not earlier, and sent a man into Bhagalpore for advice as to what to do in the matter, and received the advice that they should go through the ceremonies necessary to pre-emption; they proceeded to go through those ceremonies at the earliest possible opportunity, after the return of their messenger from Bhagalpore. In my view that date was too late for the performance of the ceremonies. Mr. Naresh Chandra Sinha suggests that the date of the preformance is an equitable question only and that if the ceremonies are performed within a reasonable time, they are good ceremonies and should create a right of pre emption. With that point of view I am not in agreement at all. A right to pre-emption is based entirely upon the Muhammadan Law. It has been accepted by Hindus in certain districts in consequence of their close contact with Muhammadans in those districts. To create a right of pre-emption it is necessary that the Muhammadan ceremonies be preformed immediately upon hearing of the sale.

I would dismiss the appeal with costs.

CHAPMAN, J.—I agree.

Appeal dismissed.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 866 OF 1916.
CASE REFERRED No. 117 OF 1916.
March 9, 1917.

Present:—Justice Sir William Ayling, KT., and Mr. Justice Napier.

BEZWADA KOTAYYA AND OTHERS—ACCUSED

versus

KONATHALAPALLI VENKAYYA—COMPLAINANT.

Criminal Procedure Code (Act V of 1898), ss. 247, 403—Acquittal of accused on default of prosecution—Fresh complaint, whether barred—Autrefois acquit, *plea of, when available.*

A judgment of acquittal following on complainant's default of prosecution under section 247, Criminal Procedure Code, does not entitle the person acquitted to plead *autrefois acquit* on a fresh prosecution on the same facts and section 403 does not operate as a bar to the Court taking cognizance of a second complaint. [p 257, col. 2]

The word 'tried' in the early part of section 403 (1) should not be treated as surplusage, and the section does not apply to a case where even the particulars of the offence were not stated to the accused under section 242. [p. 257, col. 2]

Guggilapu Peddaya, In re, 9 Ind. Cas. 253; 34 M. 253; 9 M. L. T. 93; 12 Cr. L. J. 41, not followed.

Panchu Singh v. *Umar Mahomed Sheikh*, 4 C. W. N. 346; *Bishun Das Gosh* v. *King-Emperor*, 7 C. W. N. 493, *Kedar Nath Biswas* v. *Adhin Manji*, 7 C. W. N. 711, *Suraiya Sastri* v. *Venkata Rao*, 2 Weir 457, distinguished.

Case referred for the orders of the High Court, under section 438 of the Criminal Procedure Code, by the District Magistrate, Kistna, in his letter, dated the 30th November 1916.

The Public Prosecutor, for the Crown.

ORDER.—The complainant in this case, K. Venkayya, presented a complaint to the Taluq Magistrate, Nandigama, on 8th August 1916 against accused B. Kottayya and others, charging them with an offence under section 426, Indian Penal Code. The case was duly taken on file and posted for hearing, and eventually adjourned to 20th September 1916; on which date, in consequence of the absence of complainant, an order of acquittal was passed under section 247, Criminal Procedure Code.

Subsequently on 22nd September 1916, complainant presented a fresh complaint of the same offence based on the same facts and explained his absence on 20th September 1916 to the satisfaction of the Magistrate. The Magistrate thereupon took cognizance of this second complaint and directed the issue of process to the accused.

The sole question is whether section 403, Criminal Procedure Code, is a bar to the Magistrate's taking cognizance of the second complaint by reason of the order of acquittal passed on 20th September 1916.

In our opinion it is not. Section 403 only bars the re-trial of a person, who has once been tried and convicted or acquitted, and in this case, it does not appear that the accused were tried on the first complaint. The trial of a summons case cannot be said to begin until the particulars of the offence are stated to the accused under section 242, Criminal Procedure Code, and there is nothing in the record to indicate that this was done. In fact, from the Magistrate's explanation it may be safely inferred that it was not. No trial having even commenced on the first complaint, section 403 does not bar the Court from taking cognizance of the second complaint.

Our attention has been drawn to the ruling in *Guggilapu Peddaya, In re* (1) in which a different view of section 403 has been taken; but with all respect, we feel unable to concur in the reasoning of the learned Judge who decided that case. In our opinion some meaning must be attached to the word "tried" in the early part of section 403 (1). It should not be treated as mere surplusage, as the learned Judge would seem to do. It would have been quite simple to word the section thus:

(1) "A person who has once been convicted or acquitted by a Court of competent jurisdiction of an offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence, for which a different charge from the one made against him might have been made under section 236, or for which he might have been convicted under section 237."

This would clearly include an acquittal under section 247 at the very outset before anything had been done in the case. But since the word "tried" has been inserted, we must give it due weight. We are unable to see that this construction renders the provisions of section 247 nugatory or that any inference can be drawn from the omission

(1) 9 Ind. Cas. 253; 9 M. L. T. 93; 12 Cr. L. J. 41; 34 M. 253.

to refer to section 247 in the explanation to section 403. None of the three Calcutta cases quoted in *Guggilapu Peddaya, In re* (1) appear to us to be in point. In *Panchu Singh* v. *Umar Mahomed Sheikh* (2) the Court simply deals with the power of the District Magistrate to direct further enquiry under section 437, Criminal Procedure Code, and the effect of section 403 is not considered at all. *Bishun Das Ghosh* v. *King-Emperor* (3) deals with exactly the same point and the order in the first proceedings was one under section 258, not section 247. The judgment in the last case of *Kedar Nath Biswas* v. *Adhin Manji* (4) simply follows the two previous rulings and deals also with an order under section 437, Criminal Procedure Code. Assuming that it is not within the power of a District Magistrate or Sessions Judge to direct a Magistrate to make further enquiry into a case which has been acquitted under section 247, Criminal Procedure Code, it does not follow that the Magistrate may not himself entertain a fresh complaint on the same facts. He is only debarred from doing so by section 403, which is not even referred to in any of these rulings.

The case relied on by the District Magistrate in his Order of Reference, *Suraiya Sastri* v. *Venkata Rao* (5), is easily distinguishable. The accused in that case not only appeared, but "answered to the charge."

Another good reason for declining to treat the word "tried" as mere surplusage is, that it is essential to a plea of *autrefois acquit* under English Law. The law is stated in Russell on Crimes at page 1983 of the 7th Edition: "At common law a man who has once been tried and acquitted for a crime may not be tried again for the same offence if he was in jeopardy upon the first trial. He was so in jeopardy if (1) the Court was competent to try him for the offence, (2) the trial was upon a good indictment, (3) the acquittal was on merits, that is, by verdict on the trial or in summary cases by dismissal on the merits followed by a judgment or order of acquittal". It is clear that the mere fact of a judgment of acquittal is not in England sufficient to entitle the person acquitted to plead *autrefois acquit*. The matter was exhaustively considered by the Court of King's Bench and the law was laid down as follows by the Lord Chief Justice: "The true meaning of this great fundamental maxim is that a man shall not twice be put in peril after a verdict has been returned by the Jury, that verdict having been given on a good indictment and one on which the prisoner could be legally convicted and sentenced. It does not, however, follow that if from any particular circumstance a trial has proved abortive, that the case should not again be submitted to the consideration of a Jury and determined as right and justice may require". The law being so clear in England and its requirements having been reproduced in the Indian law, we are satisfied that we cannot eliminate the word "tried" from the section. The accused has not been tried and the Magistrate acted in accordance with law in taking the complaint on his file. The papers will be returned.

Answered accordingly

M. C. P.

(2) 4 C. W. N. 346.
(3) 7 C. W. N. 483.
(4) 7 C. W. N. 711.
(5) 2 Weir 457.

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22 C. W.

CALCUTTA HIGH COURT.
CRIMINAL APPEAL No. 713 OF 1917.
January 29, 1918.
Present:—Mr. Justice Richardson and Mr. Justice Beachcroft.
ELAHI BAKSHA KAZI—APPELLANT
versus
EMPEROR—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XVIII, r. 5, non-compliance with provision of, whether makes deposition inadmissible—Object of provision—Deposition not read over to witness, whether admissible in evidence—Evidence Act (I of 1872), s. 80.

The provision in Order XVIII, rule 5, Civil Procedure Code, requiring a deposition to be read over to the witness is in its nature directory; non-compliance with it does not make the deposition entirely inadmissible in evidence (even in a prosecution for perjury in respect of the deposition) and the deposition can be proved in some way other than by calling in aid the provisions of section 80 of the Evidence Act. [p. 260, cols. 1 & 2.]

ELAHI BAKSHA *v.* EMPEROR.

In the matter of the petition of Mayadeb Gossami, 6 C. 762; 8 C. L. R. 292; 3 Ind. Dec. (N. s.) 494, not followed.

Per *Beachcroft, J.*—The object of the provision of rule 5 of Order XVIII, Civil Procedure Code, requiring a deposition to be read over to a witness is to ensure accuracy. Non-compliance with it may create doubts as to whether the record correctly represents what the witness said, but it cannot affect the admissibility of the document in evidence if the making of the document is otherwise proved. [p. 261, cols. 1 & 2.]

Appeal against the conviction and sentence passed by the Additional Sessions Judge, Dacca, dated the 26th September 1917.

Babus *Dasarathi Sanyal* and *Upendra Lal Roy*, for the Appellant

Mr. *Monnier*, for the Crown.

JUDGMENT.

RICHARDSON, J.—The appellant was tried before the Additional Sessions Judge of Dacca and a Jury on charges of abetment of forgery and abetment of the use of forged documents framed under sections 467 and 471, Indian Penal Code, read in each case with section 109 of the same Code. The Jury returned a unanimous verdict of guilty on both the charges and the learned Sessions Judge accepted the verdict and sentenced the appellant for each offence to six years' rigorous imprisonment, directing, however, that the sentences should run concurrently. The charges relate to a series of seven bonds. The case for the prosecution is that these seven bonds were forged by or with the connivance of one Sridam in order to take the place of seven genuine bonds. It appears that Sridam and his brothers had borrowed money from Nakari Gope, the father of Mohim Chandra Gope, the complainant in the present case. It is alleged that on the 3rd *Aswin* 1316 (September 1909) Sridam executed seven bonds in favour of Nakari, on which Nakari's son Mohim, Nakari himself having in the meantime died, instituted a suit on the 15th August 1913. The suit was against Sridam and his brothers. On the 18th November 1913 the latter filed their written statement and with it they filed the bonds which are alleged to be forged. The endorsements on the back of those bonds, purporting to show that the bonds were satisfied by payment on the 31st *Chaitra* 1319, are also said to be forgeries. Mohim's suit was tried by the Munsif, who found that the bonds produced by the plaintiff were genuine and that the bonds produced by the defendants with the endorsements were forged. After that decision Mohim presented an application for leave to prosecute Sridam and his brothers for forgery and other offences. The learned Munsif who tried the suit refused to grant the sanction. Mohim then moved the District Judge who, under section 476, Criminal Procedure Code, directed that Sridam and his brother should be prosecuted for certain offences including forgery. A motion against that order was made to the High Court, but the Court refused to entertain it. Then followed further proceedings, the result of which was that Sridam and his brothers were tried for forgery and that Sridam was convicted of the offence. The order of the District Judge under section 476, Criminal Procedure Code, also directed the prosecution of the present appellant Elahi Baksha Kazi. The latter was tried for perjury and was acquitted of that offence. He was then placed on his trial on the charges of which he has now been convicted.

The learned Pleader for the appellant has contended before us that the trial in the Court below is vitiated by the reception of evidence which is not admissible under the law. The contention relates to the deposition of the appellant in the suit brought by Mohim, and the point taken is that the formalities required by rules 5 and 6 of Order XVIII, Civil Procedure Code, were not observed. It is not disputed that the evidence was given on oath. But it is said that after the deposition had been written down by the Munsif, it was not read over to the witness as rule 5 requires or at any rate that it was not read to the witness in the presence of the Judge. Upon that it is argued that the deposition is not legally a deposition at all and that the Judge was wrong in allowing it to go to the Jury. In support of the contention reference is made to the cases of *Mayadeb Gossami, In the matter of the petition of* (1) and *Kamatchinathan Chetty* v. *King-Emperor* (2). If as a matter of fact the appellant's deposition was not interpreted and read over to him in the prescribed manner, the cases cited support the contention advanced, unless the rule laid down is to be confined, as it

(1) 6 C 762; 8 C. L. R. 292; 3 Ind. Dec. (N. s.) 494.

(2) 28 M. 308; 2 Cr. L. J. 756.

seems to have been in the past, to prosecutions for perjury. Our attention, however, has also been drawn to the case of *Bogra, In re* (3), where a different note, and as it seems to me, the true note is struck. The cases of *Mayadeb Gossami, In the matter of the petition of* (1) and *Kamatchinathan Chetty* v. *King-Emperor* (2) have been followed in other cases, for instance, *Emperor* v. *Jogendra Nath Ghose* (4). Speaking for myself, however, with great respect I am not sure that I clearly understand the principle of those decisions. Under section 80 of the Indian Evidence Act the deposition of a witness taken in accordance with law and purporting to be signed by a Judge or Magistrate proves itself. No other proof is required than the production of the deposition. I should have thought that a provision requiring a deposition to be read over to a witness was in its nature directory, and that if it were not complied with in a particular case, the deposition, while it might perhaps lose the benefit of section 80 of the Evidence Act, might still be proved in some other way. No doubt section 91 of the same Act says that in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of such matter except the document itself. But even if a deposition comes within that enactment, no question arises of proving the contents of a deposition except by the production of the deposition itself. The question is how is the deposition to be proved. There is no provision in the Code of Civil Procedure which expressly precludes a deposition from being received in evidence unless it has been read over to the witness in the presence of the Judge. In the case of a document which requires registration but is not registered, it is inadmissible in evidence not by reason of the provisions of section 91 of the Evidence Act, but by reason of the express provisions on the subject contained in the Registration Act. As at present advised I can see no reason why even in a prosecution for perjury failure to comply with the provisions of rules 5 and 6 of Order XVIII should render a deposition entirely inadmissible in evidence, or why, if section 80 cannot be called in aid, the deposition should not be proved, for instance, by the Judge who took it down or by the admission of the deponent. If it can be proved in some such way, section 91 will have no application. But it is not necessary to determine this question in the present case, because the learned Pleader for the appellant has not been able to satisfy me on the record as it stands that the deposition of the appellant was not in fact read over to him as the Code requires. The Munsif was put in the witness-box for the prosecution. The Pleader for Sridam's brother was also examined. Neither was asked in cross-examination whether the appellant's deposition was read over to him after it had been recorded by the Code. The deposition bears the signature of the Munsif. It also bears the signature in Bengali of the appellant. The presence of the appellant's signature at the end of the deposition certainly supports the inference that the document was read over to him. There is nothing in the record to show that this was not done. The signature was presumably affixed in token that the deposition had been correctly recorded. No doubt the words which sometimes appear at the end of a deposition "read over and admitted to be correct" do not appear in the present case before the appellant's signature. But the Code does not require that those words should be inserted. From my experience of the practice of the Courts below I may be more disposed to doubt whether the reading over of the deposition took place in the presence of the Munsif. But it still remains that there is no suggestion in the evidence that the law was not complied with. In my opinion, as the record stands, there is no ground for the contention that this deposition was not admissible in evidence. The point, I may add, was not taken in the Sessions Court.

As to the substance of the matter, there is no shadow of a suggestion that the appellant did not say what he is recorded as having said. The objection taken to the trial is an entirely technical one, and it is conceded that apart from this technical objection, the propriety of the appellant's conviction cannot be contested. In view of the charge of the learned Sessions Judge there appears to be no doubt

(3) 7 Ind. Cas. 414; 34 M. 141; 8 M. L. T. 117; (1910) M. W. N. 435; 20 M. L. J. 943; 11 Cr. L. J 482.

(4) 24 Ind. Cas. 571; 42 C. 240; 18 C. W. N. 1247; 15 Cr. L. J. 483.

and in fact no dispute that the appellant was the writer of the documents which have since been found to be forged documents and if his deposition was, as I hold, properly received in evidence, the Jury had ample grounds for finding that the part which he took was a fraudulent and dishonest part.

The learned Pleader for the appellant has asked us to use our powers under section 428, Criminal Procedure Code, and to examine or to direct the examination of the Peshkar of the Munsif's Court at the time when the appellant's deposition was recorded in the civil suit. In support of that application the learned Pleader has filed a copy of the deposition given by the Peshkar in the course of the trial for perjury. I have read that deposition and come to the conclusion that no useful purpose would be served by directing additional evidence to be taken at this late stage.

In the result, I would affirm the conviction. As regards sentence I think that four years' rigorous imprisonment would sufficiently meet the ends of justice. I would, therefore, reduce the sentence from six years to four years' rigorous imprisonment under each charge and maintain the order that the sentences are to run concurrently. With this modification, the appeal should be dismissed.

BEACHCROFT, J.—I agree. I have always felt doubt as to the correctness of the decision in the case of *Mayadeb Gossami, In the matter of the petition of* (1) and take this opportunity of endorsing the opinion expressed by my learned brother on the point decided in that and other similar cases.

Section 91 of the Evidence Act is based on the principle that the only proper evidence of the contents of a document is the document itself. And the object of the provision in Order XVIII, rule 5, Code of Civil Procedure, requiring a deposition to be read over to a witness is to ensure accuracy. I confess I do not see why on principle a Court should be precluded from ascertaining what is in a document, from the document itself, merely because the contents of the document may not in fact be correct. Failure to take the necessary precautions to ensure accuracy may create doubts as to whether the record correctly represents what the witness said, but, in my opinion, it cannot affect the admissibility of the document in evidence if the making of the document is otherwise proved.

Sentence reduced.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 85 OF 1917.
CASE REFERRED No. 9 OF 1917.
May 4, 1917.

Present:—Sir John Wallis, KT., Chief Justice.

In re DUDEKULA LAL SAHIB—ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 247, 403, 494—Penal Code (Act XLV of 1860), ss 341, 447—Withdrawal from prosecution before service of summons, effect of—Acquittal of accused, whether operates as bar to further proceedings—Autrefois acquit, *plea of.*

The statutory acquittal under section 494 of the Criminal Procedure Code in a summons-case operates as a bar to further proceedings on the same facts. [p 266, col. 2]

The provisions of section 403 clearly imply that every order of acquittal, so long as it is in force, is a bar to further proceedings except in the circumstances specified in the section itself, and the words in sub-section (1) do not affect an order of acquittal under section 494 or section 247 of the Criminal Procedure Code. [p. 262, col. 2; p. 263, col. 2.]

The Police filed a charge-sheet under section 447 of the Penal Code against a person before a Magistrate with second class powers, whereupon a summons was issued but before it was served the Public Prosecutor, with the consent of the Court, withdrew from the prosecution under section 494 of the Criminal Procedure Code and the accused was acquitted as required by that section. Thereafter the person on whose field the offence of criminal trespass was alleged to have been committed, preferred upon the same facts a complaint charging the accused with offences under sections 143, 447 and 341 of the Penal Code. The accused was convicted and sentenced separately for each of the offences:

Held, (*Napier, J.* dissenting) that the previous order of acquittal operated as a bar to further proceedings and that the conviction was, therefore, bad in law and must be set aside [p 266, col. 2; p. 267, col. 1.]

Per *Napier, J.*—Section 403 of the Criminal Procedure Code is intended to reproduce what is the law in England, namely, the plea of *autrefois acquit*, but in order to plead *autrefois acquit* successfully in India, the accused must have been put in peril either before the Jury or the Magistrate. [p. 265, col. 1.]

DUDEKULA LAL SAHIB, *In re.*

Case referred for the orders of the High Court, under section 438 of the Criminal Procedure Code, by the District Magistrate, Guntur, in his letter, dated the 20th January 1917.

This case coming on for hearing on the 20th March 1917 after service of notice on the accused and Counsel not appearing on his behalf, upon perusing the letter of reference and the records submitted therewith, and upon hearing the arguments of the Public Prosecutor on behalf of the Crown, and the case having stood over for consideration till the 17th April 1917, the Court (Abdur Rahim and Napier, JJ.) made the following

ORDER.

ABDUR RAHIM, J.—The question of law which we are asked to consider in the letter of reference arose under the following circumstances:—The Police had filed a charge-sheet under section 447 of the Indian Penal Code against a certain person before a Magistrate with second class powers; a summons was issued, but before it was served the Public Prosecutor with the consent of the Court withdrew from the prosecution under section 494, Criminal Procedure Code, and the accused was then acquitted as required by that section. Thereafter the person on whose field the offence of criminal trespass was alleged to have been committed, preferred upon the same facts a complaint charging the accused with offences under sections 143, 447 and 341 of the Indian Penal Code. That case was tried and the accused convicted and sentenced separately for each of the offences. The convictions were on appeal confirmed but the sentences reduced. The District Magistrate under section 438 of the Criminal Procedure Code has asked us to revise the conviction and sentence under section 447, on the ground that the acquittal under section 494 in this case, where no charge was required to be framed, operated as a bar to further trial for the same offence.

The effect of an order under section 494 in a summons case does not appear to have been the subject of any decision so far as the present question is concerned. I had, however, sitting singly to consider the effect of an acquittal under section 247 in a case of *Guggilapu Feddaya, In re* (1) and held that it operated as a bar to further proceedings for the same offence so long as the order remained in force. But a Divisional Bench consisting of my learned brother and Ayling, J. have in a recent case, Criminal Revision Case No. 866 of 1916 [*Bezwada Kotayya* v. *Konathalapalli Venkayya* (2)] held otherwise. It seems to me that no distinction can be drawn between an acquittal under section 247 and one under section 494 for the purposes of the present question; and I need hardly say that in deference to the views expressed by Ayling and Napier, JJ., I have carefully reconsidered the matter. But even a more detailed examination of section 403 and the other provisions of the Criminal Procedure Code and of the authorities has only confirmed me in my former opinion.

The question turns on the construction of section 403. Its sub-section (1) says that "a person *who has once been tried by a Court* of competent jurisdiction for an offence and convicted or acquitted" is not liable to be tried again for the same offence, while sub-sections (2) and (4)—sub-section (3) does not throw much light on the question as all convictions must be after trial, in dealing with certain cases where the previous acquittal or conviction would not bar further trial, speak of 'a person acquitted or convicted of any offence,' dropping the words 'who has once been tried.' It can hardly be doubted that by the words "a person who has once been tried by a Court of competent jurisdiction for an offence and 'convicted,' in sub-section (1) and "a person 'acquitted' or 'convicted' of any offence" in sub-sections (2) and (4) the Legislature contemplated the same set of facts. Now, what is the sense in which the Legislature has used the two phrases? In the first place, it must be taken to be a clear implication of sub-sections (2) and (4) that in cases other than those mentioned therein, the provisions of sub-section (1) should apply and the person who has been 'acquitted' or 'convicted' should not be tried again. Then the explanation to the section is important in ascertaining what is intended

(1) 9 Ind. Cas. 253; 34 M. 253; 9 M. L. T. 93; 12 Cr. L. J. 41.

(2) 45 Ind. Cas. 257; 40 M. 977 *(Foot Note.)*

by sub-section (1). It mentions the orders which are not to be regarded as acquittals for 'purposes of the section' and this can have little signification, if all orders of acquittal passed in accordance with the express provisions of the Code were not intended to have the effect defined by the section, *viz.*, the barring of further proceedings. There is no attempt made to discriminate between different orders of acquittal.

An examination of the other provisions of the Criminal Procedure Code shows at once the solicitude evinced by the Legislature on the question of the form of orders which the various Criminal Tribunals are to pass in different kinds of proceedings in given circumstances, with a view mainly to indicate their respective effects and to provide suitable remedies in case of wrong orders of each category. The list of the orders terminating proceedings given in the explanation seems to be exhaustive and of these the main classes are orders of 'discharge' and 'acquittal.'

In summons-cases the proceedings against an accused person commence with the issue of process (Chapter XVII) on the Magistrate taking cognizance of the offence in one of the ways mentioned in the previous chapters. But if in a case of 'complaint' he refused to take cognizance, his order would be one dismissing the complaint (section 203). If the Magistrate took cognizance and issued process, the proceedings are to be terminated by an order either of 'acquittal' or 'conviction' (section 245), unless the proceedings are stopped under section 249. The order of 'acquittal' is to be passed if after hearing the evidence the Magistrate finds the accused not guilty (section 245), or if the complainant does not appear (section 247), or upon withdrawal of the complaint by the complainant (section 248), or upon the Public Prosecutor withdrawing from the prosecution (section 494).

In warrant-cases tried by a Magistrate the accused is to be 'discharged' where no case is made out and so no charge need be drawn (section 253) or the Public Prosecutor withdraws from the prosecution before a charge is framed (section 494); he is to be 'acquitted' if the Magistrate finds him not guilty after a charge has been drawn (section 258) or the Public Prosecutor withdraws from prosecution (section 494, after the framing of the charge. Similarly also in sessions cases the Legislature has carefully provided when an order terminating proceedings is to have the effect of a 'discharge' and when it will operate as an 'acquittal' (see sections 209, 213, 305, 307, 333 and 494). Then we find that express provisions are made for the setting aside of orders of discharge (see sections 436, 437, 438 and 439) and of acquittal either under section 417 or under the general powers of revision of the High Court (section 439). All this leaves no room for doubt that the Legislature intended that a person once 'acquitted' shall not be liable to be prosecuted for the same offence so long as the acquittal is not set aside by the High Court. Even in cases of discharge it has been ruled that no fresh proceedings can be had with respect to the same matter unless the order has been first set aside as provided for in the Criminal Procedure Code. It is suggested in the judgment of Ayling and Napier, JJ., in Criminal Revision Case No. 866 of 1916 [*Bezwada Kotayya* v. *Konathalapalli Venkayya* (2)] that it does not follow from their construction of section 403 that an order of acquittal when there has been no decision on the merits, such as for instance an acquittal under section 247, would be nugatory, but, so far as I can find, they do not point out, nor can I see for myself, what other effect it can have if it is to be no bar to further proceedings for the same offence.

Not only do the provisions of section 403 itself clearly imply that every order of acquittal so long as it is in force is a bar to further proceedings except in the circumstances specified in the section itself, but I do not think that the words of sub-section (1) necessarily deny that effect to an order of acquittal under section 494 or section 247. In summons-cases the 'trial' commences as soon as the Magistrate has taken cognizance of the matter and issued process. The mere fact that Chapter XX is headed 'of the trial of summons-cases by Magistrates' and section 242 lays down that the first thing that a Magistrate has to do when the accused appears or is brought

before him is to ask him to show cause why he should not be convicted, does not indicate that the 'trial' did not commence at an earlier stage within the meaning of the Code. In fact Chapter XVII shows that the proceedings before the Magistrate commence with the issue of process, and that the draftsman did not think of distinguishing between 'commencement of proceedings' and 'commencement of trial,' will be apparent from the way both the phrases are used in the marginal notes of section 271 and in the heading. The word 'tried' or 'trial' has not been defined anywhere. If the trial of a summons-case commences as soon as the process is issued, is there any good reason for saying that an order of acquittal would not come within the meaning of sub-section (1) of section 403, unless it was passed at a particular stage? It seems to be conceded that if the accused on being questioned under section 242 denied that he committed the offence and he is acquitted, then sub-section (1) of section 403 would apply. But such an order may be made without any decision on the merits, on the ground of absence of the complainant (section 247) or withdrawal from prosecution (section 248 or section 494). It would follow, therefore, that section 403, sub-section (1), does not require that there should have been a finding on evidence that the accused is not guilty, and if it is not correct to say that in summons-cases proceedings commence only after the accused has been questioned under section 242, it seems to me that the only possible meaning we can give to the words "who has once been tried" is 'against whom proceedings have been commenced in Court, *i. e.*, against whom the Court has taken cognizance of an offence and issued process.' On comparing sub-section (1) with the sub sections (2) and (4) it is clear that the draftsman intended to assign the same scope to the phrase in question in sub-section (1) as to the phrase 'a person convicted or acquitted' in sub-sections (2) and (4) so far as this matter is concerned, though it was not a happy idea of his to use different expressions to signify the same thing. I think that if we are not to frustrate the clear intentions of the Legislature we must not construe the words 'who has once been tried' in sub-section (1) in any sense other than what I have suggested.

The decided cases, so far as they go, support the view of the law which I expressed in *Guggilapu Peddaya, In the matter of* (1). One important case which was not then brought to my notice is reported as *Suraiya Sastri* v. *Venkata Rao* (3). There it was held by Kernan and Wilkinson, JJ., that a second charge for the same offence against an accused person, who was erroneously "discharged," but who ought to have been "acquitted" on withdrawal by the Public Prosecutor from the prosecution under section 494, Criminal Procedure Code, at the Court of Session, was bad. If a narrow meaning were to be given to the word "tried" in section 403, it could not be said that the 'trial' had commenced at the date of withdrawal, because up to commitment the proceedings are described in the Criminal Procedure Code as "enquiry" and the word "trial" is used only in connection with proceedings after commitment. The Public Prosecutor withdrew from the prosecution before any charge was framed in the Sessions Court, according to the practice then obtaining. This makes it clear that the charge framed by the Committing Magistrate could not have been read to the accused and he could not have answered to any charge in the Sessions Court, when the Public Prosecutor withdrew on the ground that the sanction on which the prosecution was based was bad. The ruling in *Suraiya Sastri* v. *Venkata Rao* (3) related to a summons case and it was held there that since the accused had appeared and answered to the charge, apparently meaning that he had been questioned under section 242, Criminal Procedure Code, he had been "tried" within the meaning of section 403, but it was not laid down that if he had not appeared and been questioned, section 403 would not apply. In *Panchu Singh* v. *Umor Mahomed Sheikh* (4) an order of "dismissal" in a summons-case under section 247, Criminal Procedure Code, with respect to the case of an accused person who did not appear, was treated as a bar to the revival of the charge against him. The two cases in

(3) 2 Weir 457.
(4) 4 C. W. N. 846.

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Bishun Das Ghosh v. *King-Emperor* (5), *Kedar Nath Biswas* v. *Adhin Manji* (6), it may be said, do not specifically deal with the question under consideration, because it is not stated that the fresh proceedings were quashed on the ground that section 403, Criminal Procedure Code, applied. The ground of the decisions, however, was that the acquittal of persons other than petitioners on the same allegations had not been set aside in accordance with the law.

I do not propose to discuss the provisions of English Law relating to "*autrefois acquit*", as the system of Criminal Procedure in this country is obviously so different from that of England that to draw any sort of inference from the state of law on the subject in England, where no such clear distinctions exist between different kinds of orders terminating proceedings and which does not provide similar measures for rectifying wrong orders of acquittal and discharge, would to my mind be only misleading.

I, therefore, agree with the District Magistrate that the conviction and sentence under section 447 of the Indian Penal Code are bad in law and should be set aside.

My learned brother holds a different view of the law. The paper will, therefore, be placed before his Lordship the Chief Justice for such orders as to the disposal of the case as he may think fit to pass. I may mention that as the question involved is one of importance, it is desirable, in my opinion, that it should be decided by a Full Bench.

NAPIER, J.—I adhere to the opinion expressed by me in Criminal Revision Case No. 866 of 1916 [*Bezwada Kotayya* v. *Konathalapalli Venkayya* (2)] that it is impossible to treat the words "once been tried by a Court of competent jurisdiction" in section 403, Criminal Procedure Code, as surplusage, or to apply the word 'tried' to a case where a man has not even been served with the summons. I have no doubt that the section is intended to reproduce what is undoubtedly the law in England, namely, that to plead *autrefois acquit* successfully the accused must have been put in peril either before the Jury or the Magistrate.

(5) 7 C. W. N. 493.
(6) 7 C. W. N. 711.

As my learned brother takes a different view the case should, I think, go before a third Judge under sections 439 and 429 of the Criminal Procedure Code but, as my learned brother thinks otherwise, the matter will be laid before the Chief Justice for orders.

This case coming on for hearing on the 1st May 1917 under sections 439 and 429 of the Code of Criminal Procedure and Counsel not appearing on behalf of the accused, upon perusing the letter of reference and the records submitted therewith, and upon hearing the arguments of the Public Prosecutor on behalf of the Crown, and the case having stood over for consideration till this day, the Court made the following

ORDER.—Two learned Judges having differed in a criminal revision case, section 439 of the Code of Criminal Procedure read with section 429 requires the case to be decided by a third Judge and precludes any further appeal under the Letters Patent or any reference to a Full Bench under the Rules of the Court.

With reference to this case I have arrived at the same conclusion as Mr. Justice Abdur Rahim.

If sections 403 and 494 of the Code of Criminal Procedure had been originally enacted at one and the same time, I should find it very difficult to come to that conclusion. But seeing that the Code of Criminal Procedure, which is founded on the English Law of Criminal Procedure, has been repeatedly modified in the successive Codes of 1861, 1872, 1882 and 1898, when an apparent conflict arises between what would appear to be the intention of the Legislature in one section and what would appear to be its intention in another section, the best method of ascertaining what the intention of the Legislature really is appears to me to be to examine what is the English rule upon the subject and how far that rule has been adopted and what modifications have been subsequently introduced in the successive Codes.

Now in English Law a plea of *autrefois acquit* or *convict* can only be raised in bar of subsequent proceedings when the conviction or acquittal has been for the same offence in a trial had before a Court

of competent jurisdiction. The Attorney-General at any stage of a criminal prosecution may enter "*a nolle prosequi*" and bring the proceedings to an end. But that does not bar fresh proceedings against the accused. Consequently in England when the prosecution desire not to go on with the case, the practice is not to tender further evidence and for the Judge then to direct the Jury to acquit. That rule of English Law was embodied in the Code of Criminal Procedure of 1861 in section 55 as follows: "A person who has once been tried for an offence and convicted or acquitted of such offence shall not be liable to be tried again for the same offence,"—words which with certain explanations are still retained in section 403 of the present Code. Under that Code Public Prosecutors were directed by the Calcutta Court not to withdraw the graver charge and proceed upon the lesser charge, because such a course would have the effect of depriving the accused of the benefit of acquittal on the graver charge (5 Sutherland's Criminal Letters 4). Then came the Code of 1872, section 61: "A Public Prosecutor may, with the consent of the Court, withdraw any charge against any person in any case of which he is in charge; and upon such withdrawal, if it is made whilst the case is under inquiry, the accused person shall be discharged. If it is made when he is under trial, the accused person shall be acquitted." This was an entirely new departure, because it entitled the accused to an acquittal by Statute on the withdrawal by the Public Prosecutor and without any reference to the evidence at the trial. It has never been doubted that when the Public Prosecutor withdraws under this section and the accused is acquitted, he cannot be subsequently charged for the same offence. Yet, it seems difficult to bring such an acquittal within the language of section 460 of that Code (now section 403) and say that he is a person who has been "tried" for an offence and convicted or acquitted. Supposing the Public Prosecutor to intervene immediately after the case is taken up by the Sessions Judge and to withdraw and the accused then to be acquitted, I find great difficulty in saying that the accused has been "tried" and acquitted within the meaning of section 403 of the present Code. It seems to me that in section 61 of the Act of 1872 the Legislature introduced a fresh form of statutory acquittal under that section, which was intended to have the same operation as an acquittal in accordance with the English rule under section 460 (now section 403).

So much for the Code of 1872. It was only in the Code of 1882 that the alteration was made which has given rise to the present case. Section 494, dealing with the withdrawal by the Public Prosecutor, provided that "if the withdrawal is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted."

The reference in the latter part was clearly to summons-cases which deal with more trivial offences, and it seems to me the intention of the Legislature was that the withdrawal by the Public Prosecutor at any stage in those trivial cases was to have the same effect as his withdrawal under the previous part of that section, that is to say, that there was to be a final bar of fresh proceedings.

A similar change was introduced as regards this class of cases into what is now section 247 of the Code, as regards non appearance of the complainant in a summons-case.

In the Code up to that time such failure to appear by the complainant had merely led to a dismissal of the complaint. But in 1882 to make the law more stringent it was provided, as it still is, that on the non-appearance of the complainant the Magistrate might acquit the accused unless he chose to adjourn. Here, again, I think that the intention of the Legislature was that the acquittal should operate as a final bar of further proceedings. The history of the legislation shows, to my mind, a distinction between what I may call the common law plea of *autrefois acquit* as embodied in section 403 of the Code, and the statutory acquittals which have been introduced in sections 494, 247 and 345.

It has not been suggested in this case that the withdrawal from the prosecution by the Public Prosecutor was irregular, and in these circumstances I agree with the conclusion

arrived at by Mr. Justice Abdur Rahim that the conviction and sentence are bad in law and should be set aside.

Conviction set aside.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 262 OF 1917.

January 18, 1918.

Present:—Mr. Stuart, A. J. C., and Pandit Kanhaiya Lal, A. J. C.

RAM SUDH—PRISONER—APPELLANT

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 164 (3) —Confession—Certificate as to voluntary confession, omission of, effect of—Admissibility of confession.

Where a Magistrate in recording a confession refuses to make the memorandum referred to in section 164 (3), Criminal Procedure Code, on the ground that in his opinion the confession has not been voluntarily made, such confession cannot form part of any judicial record and is, therefore, inadmissible in evidence. [p. 268, col 2.]

Emperor v. *Kadar Ghulam Mahmad*, 8 Bom. L. R. 950; 5 Cr. L. J. 4, followed.

Appeal against the order of the Sessions Judge, Gonda, dated the 7th September 1917.

FACTS of the case appear from the following order, dated the 8th November 1917, and the Order of Reference, dated the 21st December 1917, passed by Lindsay, J. C.:—

"The appellant in this case is Ram Sudh, a Lonia who has been convicted by the learned Sessions Judge of Gonda on a charge of having murdered his wife. The principal piece of evidence against the accused is a confession recorded by a Magistrate on the 11th of July. The record of his confession is a long one, and it appears that after the statement was made the Magistrate put a number of questions to the accused before he closed the making of the record of his statement. Under law a certificate is required to be attached to a statement made in these circumstances, and the Magistrate has appended a certificate in which he expresses his opinion that the confession made by the accused was not a voluntary confession. A question of law, therefore, arose before the learned Judge for disposal. His view was that he was not bound by this expression of the Magistrate's opinion and for a variety of reasons which I shall have to consider later on, the Judge came to the conclusion that the statement made by the prisoner was admissible; and he has relied upon it for the purpose of convicting the accused. While I am disposed to agree with the learned Judge's view that the opinion expressed by a Magistrate after taking the statement of confession made by an accused man is not conclusive upon the Court, nevertheless it has to be conceded that the opinion is a matter which has to be carefully weighed when dealing with the question whether the statement should be availed of for the purpose of convicting the accused. In cases where there has been an omission to furnish the certificate required by the section, the practice is to call the Magistrate and examine him as a witness; and similarly I think in a case like this if the learned Judge had reasons to doubt the soundness of the opinion which the Magistrate had expressed, he ought to have sent for the Magistrate and examined him as a witness. I think, before I dispose of this appeal, my proper course is under section 428, Criminal Procedure Code, to send the case back to the learned Judge with directions to take the statement of the Magistrate touching the grounds of the opinion he has expressed in the certificate attached to the record of confession. The evidence, after it has been taken, will be submitted to this Court along with the record. The evidence, of course, will be taken in the presence of the accused. Let the case be put up again as soon as the evidence has been certified to this Court." (8th November 1917.)

"I think it desirable that this appeal should be referred for disposal to a Bench of two Judges. It is the appeal of a man named Ram Sudh, who was convicted in the Court of the Sessions Judge of Gonda on a charge of murder and sentenced to transportation for life. The case was up before me on the 8th of November last and it appeared at that time that the learned Judge had relied upon a confession made by Ram Sudh for the purpose of finding him guilty. This confessional state-

ment had been recorded by a Magistrate who, after it had been taken down, put a certificate at the bottom of it declaring his belief that the statement was not a voluntary one. The learned Judge in dealing with this point stated that he did not consider himself bound conclusively by the certificate attached by the Magistrate to the record of confession. I observed at the time that the Magistrate had not been called as a witness at the Sessions trial for the purpose of deposing to the grounds of the belief entertained by him that the statement was not a voluntary one; and so by my order of the 8th of November I directed the learned Sessions Judge to record the evidence of the Magistrate and to call upon him to explain for what reasons he thought the statement made before him by this accused-appellant was not a voluntary statement. The learned Judge has now recorded the evidence of the Magistrate and it has been called into this Court. In the statement which the Magistrate has now made before the Sessions Judge as a witness he gives certain reasons for considering that the statement made by the accused was not a voluntary one. The question whether the confession to which this evidence of the Magistrate relates ought to be used in evidence against the accused, seems to me to be a somewhat difficult one and in the circumstances I deem it advisable to have the case referred to a Bench for disposal. The appeal is a jail appeal and no one appears on behalf of the appellant. Let the case be laid before a Bench as soon as may be after the Christmas holidays." (21st December 1917.)

The Government Pleader, for the Crown.

JUDGMENT.—This appeal has been referred by the Judicial Commissioner for disposal to a Bench of two Judges. The reason why the reference was made is as follows:—The appellant made a confession before Mr. Sinha, a Deputy Magistrate. Mr. Sinha refused to record the memorandum to which reference is made in section 164 (3), Code of Criminal Procedure. He was of opinion that the confession was not voluntarily made. The point for decision is whether in these circumstances the confession is admissible in evidence. The view taken by the learned Sessions Judge is that it is for the trial Court to decide whether a confession has or has not been voluntarily made and that, if the Court is satisfied that a confession has been voluntarily made, it ought to be admitted in evidence, although the officer who recorded it is of a contrary opinion and has refused to append the necessary certificate. In *Emperor* v. *Kadar Ghulam Mahmad* (1), a case which was decided by a Bench of the Bombay High Court, the view was taken that the word "record" in section 164 (3), Criminal Procedure Code, must necessarily mean "making a part of a judicial record" and not merely "writing out." We are in agreement upon that point with the learned Judges who decided that case. It follows that Mr. Sinha was precluded from making the confession part of any judicial record. He had written out the confession and the act of writing out could not be undone, but the confession could not be placed upon the record. The Committing Magistrate should not have accepted it as part of the record and the Sessions Judge should not have considered it. It is no more admissible than a confession would have been which had been recorded by a Police Officer.

With regard to the merits of the appeal it is clear that, once the confession is excluded, there is not sufficient evidence to justify a conviction on any charge.

We, therefore, accept the appeal, set aside the conviction and sentence and direct that the appellant be set at liberty.

Appeal allowed.

(1) 8 Bom. L. R. 950; 5 Cr. L. J. 4.

CALCUTTA HIGH COURT.

CIVIL REVISION No. 11 OF 1918.

March 11, 1918.

Present:—Justice Sir Charles Chitty, KT., and Mr. Justice Smither.

PREM CHAND GORAI—PETITIONER

versus

SONATAN SAHA *alias* SONAULLA SAHA—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 195—Sanction for prosecution granted by successor of Judge who heard case—Delay, effect of.

PREM CHAND *v.* SONATAN SAHA.

On the application of the defendant in a Small Cause Court suit, the successor-in-office of the Judge who had decreed the suit granted, after an inordinate delay, sanction for the prosecution of the plaintiff for perjury in respect of a false statement in his deposition. This sanction was affirmed on appeal to the District Judge:

Held, that as the Court record of the deposition was not read over to the plaintiff and he was not cross-examined on the statement, and as the sanction was granted after a long delay by a Judge who did not try the case, the sanction should be revoked, especially as this sanction, if not revoked, would be used by the defendant *in terrorem* both as regards execution under the decree passed against him and as regards the suit which he had brought for setting aside that decree and which was pending. [p. 270, col. 2.]

Per *Smither, J.*—When a person wants to prosecute criminally, he must not be dilatory. [p. 270, col. 1.]

Sir *B. C. Mitter* and Babu *Monmatha Nath Mukherjee*, for the Petitioner.

Mr. *Norton* and Babu *Taradas Chatterjee*, for the Opposite Party.

JUDGMENT.

CHITTY, J.—On the 18th December 1916 the petitioner, Prem Chand Gorai, filed a suit in the Small Cause Court at Midnapore against Sonatan Shaha *alias* Sonaulla Saha to recover a sum of Rs. 497 for the price of goods sold and money advanced on an account between the parties. The suit was heard by the Subordinate Judge, Babu S. C. Chakravarti. From the record it appears that the plaintiff stated in examination-in-chief that he paid an income tax of of Rs. 250. The Subordinate Judge in his judgment remarked that it was unlikely that the plaintiff as a Mahajan of standing would prefer a false claim for so small an amount as Rs. 497. There is nothing to indicate that this remark had a direct reference to the statement of the plaintiff regarding income tax, though of course that may have been the case. The Subordinate Judge passed a decree in favour of the plaintiff on 28th March 1917. On 30th March 1917 the plaintiff decree holder applied for execution, but the judgment-debtor's property was not attached and that execution case was dismissed in default of the decree-holder taking further action. Babu S. C. Chakravarti was then transferred, and on the 15th May 1917 the defendant applied to his successor, Babu H. K. Bose, for sanction to prosecute the plaintiff for perjury for stating that he paid an income tax of Rs. 250 whereas in fact he paid nothing at all. It is conceded that at the time in question the plaintiff was paying no income tax. The plaintiff, in reply, stated that his answer must have been incorrectly recorded and that what he said or intended to say was that his income was Rs. 250 a month and not that he paid an income tax on that amount. The proceedings being in a Small Cause Court the deposition of the witness was not read over to him, nor was he at all cross-examined in regard to this answer or his credit generally. The question of sanction was before the Subordinate Judge, Babu H. K. Bose, for close upon 7 months when on 11th December 1917, after this inordinate delay, sanction was granted. An application to the District Judge to revoke it was rejected and the petitioner has now applied to us to exercise over revisional powers and set it aside.

For several reasons I think that the Rule should be made absolute. In the *first* place, I think that there is reason to doubt whether the statement was made as recorded. The only evidence of its having been so made that could be at all relied upon is the Court record. It is obvious that oral statements of the opposite party such as appear in the affidavit now filed before us are of little value. The accuracy of the Court record is open to this comment that the deposition was not read over to the witness (it is true that the law does not require it), and that the statement did not attract the attention of the cross-examining Pleader, and so the plaintiff had no opportunity of correcting it, if it was inaccurate. *Secondly*, it was not the trying Judge who thought that the plaintiff should be prosecuted. The matter was brought before his successor by the defendant, the unsuccessful party in the suit, and Babu H. K. Bose, after allowing the matter to drag on for nearly 7 months, has granted the sanction because the statement is false, without any consideration of the surrounding circumstances, of which indeed he was not in a position to judge. *Thirdly*, we find that in July 1917, the defendant filed a suit to set aside this decree. It appears to me obvious that this sanction, if granted, will be used by the defendant *in terrorem* both as regards execution under the existing decree, and as regards the suit now pending. This appears to me to be a case in which

the personal element bulks largely, and I do not think that the Courts should assist the defendant by putting this weapon into his hands. In any view of the case I think that criminal proceedings should not be allowed to commence until the decision of the defendant's suit. But I think that the interests of justice do not require the prosecution of the petitioner at all and I would, therefore, make the Rule absolute and revoke the sanction.

SMITHER, J.—I think we should, *at this stage*, rely upon the presumption that the record is correct: but as it is now about a year since the evidence was given, and as I find, on examining the record, that the applicant for sanction was himself responsible for much of the delay that occurred before sanction was granted, I agree in the order passed. When a person wants to prosecute criminally he must not be dilatory.

Rule made absolute.

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 1060 OF 1917.

December 22, 1917.

Present:—Mr. Justice Scott-Smith and Mr. Justice Shadi Lal.

EMPEROR—PETITIONER

versus

MUHAMMAD HUSSAIN—CONVICT—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 233, 235, 537—Penal Code (Act XLV of 1860), ss. 71, 218—Joinder of charges—Police Officer preparing incorrect record consisting of several documents—Separate charge in respect of each document, whether necessary—Irregularity.

Accused, a Police Inspector, was charged in one trial with having prepared certain documents incorrectly in order to screen one *H.* and to save him from legal punishment. He was convicted of an offence under section 218 of the Penal Code. The documents set forth in the charge were a *ruqqa* addressed to the officer in charge of the Police station, a first information report based upon the *ruqqa*, seven Police diaries relating to the investigation held in the case and the final report to the Magistrate:

Held, (1) that the various documents formed part of one continuous whole, the same purpose, namely, the saving of *H.* from legal punishment, running through them all, and that, therefore, the offences having been committed in the same transaction they could all be tried in the same trial under section 235 of the Criminal Procedure Code; [p. 271, col. 1.]

(2) that the documents in question together comprised the Police record of an investigation into a charge and that the accused being charged with having prepared an incorrect Police record, there was nothing defective in framing a single charge in respect of all the documents; [p. 271, col. 2.]

(3) that even if it were held that the accused should have been charged with separate offences in regard to each document, the trial was not illegal merely because one charge was framed in regard to all the documents, the irregularity being covered by section 537 of the Criminal Procedure Code. [p. 271, col. 2.]

Criminal revision from the order of the Sessions Judge, Ambala, dated the 14th May 1917.

Mr. *Mul Chand*, Public Prosecutor, for the Petitioner.

Messrs. *Beechey* and *Vaughan*, for the Respondent.

JUDGMENT.—Muhammad Hussian, an Inspector of Police, Karnal, was tried by a First Class Magistrate and convicted of an offence under section 218, Indian Penal Code, and sentenced to a fine of Rs 500. His appeal was heard by the Sessions Judge of Ambala, as was also an application by Government for enhancement of sentence. The learned Sessions Judge held that the charge was defective and that the accused had been somewhat prejudiced thereby, and setting aside the conviction and sentence ordered a re-trial. From this order an application for revision has been made on behalf of Government, and Muhammad Hussain has also applied for revision on the ground that instead of a re-trial having been ordered he should have been acquitted.

The facts are sufficiently set forth in the judgment of the learned Sessions Judge; and need not be repeated at length. Briefly, the charge against Muhammad Hussain was that he prepared certain documents incorrectly in order to screen one Habiba, son of Mamun, and to save him from legal punishment. The documents set forth in the charge were *P. R.*, a *ruqqa* addressed to the officer in charge of the Police station; *P. S.*, a first information report which was based upon *P. R*, *P. Q.*, seven Police diaries relating to the investigation held in the case; and *P. W.*, the final Police report

to the Magistrate which is known as the *chalan*.

The objection taken to the charge is that the accused was charged with ten, or at least four, distinct offences in the same charge, which, therefore, contravenes the provisions of section 233 of the Criminal Procedure Code.

Two contentions were raised before the learned Sessions Judge :—

(1) That the preparation of each document was a separate offence, and that there should have been separate charges regarding each ; and

(2) That the offences could not all be tried together in the same trial.

As regards the second objection the Sessions Judge held that section 235 of the Criminal Procedure Code was applicable, as the various acts attributed to the accused comprised one series, so connected together as to form the same transaction. His view was that the various acts were so related to one another in point of purpose as to constitute one continuous action. The same purpose ran though all the offences, namely, to save Habiba, son of Mamun, from legal punishment, and, therefore, they must be considered as parts of the same transaction. We have no difficulty in agreeing with the learned Sessions Judge that the various acts form parts of one continuous whole, the same purpose, namely, the saving of Habiba, son of Mamun, from legal punishment running through them all. They were all prepared with the same object.

As the offences, if any, were committed in the same transaction, they could all be tried in the same trial under section 235 of the Criminal Procedure Code. But it is urged that there should have been a separate charge in regard to each document which accused was said to have framed incorrectly.

The first point argued by Mr. Mul Chand on behalf of the Crown is that all the documents in question form parts of one record. Now, what the accused is really charged with having done is having prepared an incorrect Police record. There is no definition of the word "record" in the Indian Penal Code, but it is sometimes used as including a number of documents. For instance, the judicial record of a case includes all the depositions of witnesses and all the documentary evidence in the case. The documents in question in the present case, commencing with the *ruqqa* addressed by the accused to the officer in charge of the Police station and ending with his final report to the Magistrate, comprised, in our opinion, the Police record of the investigation into a charge against a number of persons that they had committed an offence under section 401, Indian Penal Code. On this ground alone we hold that there was nothing defective in the charge. The case appears to be such as is provided for by section 71, Indian Penal Code. The alleged offence of preparing an incorrect Police record is one made up of parts, namely, the preparation of the different documents comprising that record; the incorrect preparation of each one of them would be itself an offence.

Mr. Mul Chand has further argued that even if there ought to have been a separate charge in regard to each document under section 233 of the Criminal Procedure Code, the error was not so fatal as to vitiate the trial, but was a mere irregularity within the meaning of section 537 of the Criminal Procedure Code. In support of this argument he has referred us to *Musai Singh* v. *Emperor* (1), wherein it was held that a single head of charge, relating to three offences of the same kind, is defective for duplicity and not misjoinder; but a trial under such charge is not bad unless the accused has been prejudiced thereby.

Mr. Beechey, on the other hand, has cited *Asgar Ali Biswas* v. *Emperor* (2), wherein it was held that a single charge relating to several distinct offences is illegal having regard to section 233 of the Criminal Procedure Code.

The ruling in *Musai Singh* v. *Emperor* (1) is, however, a later one, and was followed in *Ram Subhag Singh* v. *Emperor* (3). In that case it was held that the first portion of section 233, Criminal Procedure Code, is not so imperative as to render a trial null and void if the

(1) 22 Ind. Cas. 1008; 41 C. 66; 18 C. W. N. 183; 15 Cr. L. J. 224.

(2) 20 Ind. Cas. 609; 40 C. 846; 17 C. W. N. 827; 14 Cr. L. J. 449.

(3) 30 Ind. Cas. 465; 19 C. W. N. 972; 16 Cr. L. J. 641.

direction enjoined therein is disobeyed. It was also pointed out that in the case of *Subrahmania Ayyar* v. *King-Emperor* (4) the Privy Council did not decide that a defect under section 233, Criminal Procedure Code, is fatal to the trial. They, in effect, stated that a disregard of the second part of section 233, by joining charges beyond the limits specified in section 234, vitiated the trial. It was further remarked in *Ram Subhag Singh* v. *Emperor* (3) that the object of the section is that an accused person shall not be convicted of an offence of which he has not been charged. This object is not frustrated, and the accused is not prejudiced, if the accusations against him are written in one sentence or on one sheet of paper instead of in two sentences or on two sheets of paper.

We agree with the decision in *Ram Subhag Singh* v. *Emperor* (3) and with that reported as *Musai Singh* v. *Emperor* (1), and hold that, even if it be considered that the accused should have been charged with separate offences in regard to each document, the trial was not illegal merely because one charge was framed in regard to all the documents. We, therefore, allow the revision and setting aside the order of the learned Sessions Judge remand the appeal to him for decision in accordance with law. The application for revison on behalf of Muhammad Hussain is rejected.

Revision allowed.

(4) 25 M. 61; 28 I. A. 257; 11 M. L. J. 233; 3 Bom. L. R. 540; 5 C. W. N. 866; 2 Weir 271; 8 Bar. P. C. J. 160 (P. C.).

PATNA HIGH COURT.

CRIMINAL REVISION No. 351 OF 1917.

December 20, 1917.

Present:—Mr. Justice Roe and Justice Sir Ali Imam, Kt.

RAM CHARITRA SINGH AND OTHERS—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Evidence Act (I of 1872), ss. 155, 157—Criminal Procedure Code (Act V of 1898), s. 162—Statements made to Police, whether can be used as corroboration—Hostile witness, whether can be impeached by reference to Police diary

Statements of witnesses made to the Police should not be used to corroborate them except in very special circumstances. [p. 278, col. 1.]

The evidence of a witness who is hostile to the Crown may be impeached by reference to the Police diary. [p. 278, col. 1.]

If in the course of a trial a witness is called upon to say that he saw the offence committed by the accused and when called upon says that the offence was committed by an entirely different person, it is only fair that the Crown should be allowed to use section 155 of the Evidence Act to disabuse the jury of the effect made by a wilfully false statement. There is nothing in section 162 of the Criminal Procedure Code to prevent this course being adopted. That section provides only for facilities to the accused to obtain copies of Police papers. [p. 278, col. 1.]

Revision against the order of the Sessions Judge, Patna, dated the 25th August 1917, affirming that of the Sub-Divisional Officer, Dinapore, dated the 28th July 1917.

Messrs *S. Sinha* and *H. L. Nandkeolyar*, for the Petitioners.

The Assistant Government Advocate, for the Crown.

JUDGMENT.

ROE, J.—In this case we are asked to set aside the conviction and sentences on two grounds, *firstly*, that the statements made before the Police in the course of the enquiry have been used as substantive evidence in the case, and, *secondly*, that the Police diaries have been used for the purpose of impeaching a Crown witness or rather one who should have been examined as a Crown witness but was examined by the Court and not by the Crown.

The first argument seems to us to be based upon a misappreciation of the finding in the judgments of the Sub Divisional Magistrate and the Sessions Judge. We are unable to find anywhere in the two judgments any use of the statements made as substantive evidence in the case.

The second argument is based upon section 162 of the Code of Criminal Procedure and it is urged that that section overrides the provisions of the Evidence Act, sections 155 and 157. The case quoted in support of this contention is *Emperor* v. *Akbar Badu* (1). But even in that case Mr. Justice Heaton said that "it may be that what the witnesses said was admissible by way of corroboration within the terms of section 157 of the Evidence Act." All that he did protest against was the record being loaded with statements of this

(1) 7 Ind. Cas. 933; 34 B. 599; 12 Bom. L. R. 663; 11 Cr. L. J. 542.

description and to that extent we are, if we may say so, in cordial agreement with him. Statements of witnesses made to the Police should not be used to corroborate them except in very special circumstances, but even in the case quoted there is no authority for the proposition that the evidence of a witness who is hostile to the Crown may not be impeached by reference to the Police diary. If in the course of the trial a witness is called upon to say that he saw the offence committed by the accused and when called upon says that the offence was committed by an entirely different person, it seems only fair that the Crown should be allowed to use the Evidence Act, section 155, to disabuse the Jury of the effect made by a wilfully false statement. There is certainly nothing in section 162 to prevent this course being adopted, and, as we understand it, the section provides only for facilities to the accused to obtain copies of Police papers. The Legislature has not thought fit to make provision for equal facilities to the prosecution, for the reason that the papers are always in the hands of the prosecution. I would reject this application and direct that the petitioners surrender to their bail and serve out the remainder of their sentences.

IMAM, J.—I agree. I would only wish to add that the contention of the learned Counsel that the statement made by Dhuku Singh before the Police was used in this case against the accused is not borne out by an examination of the judgments of the lower Courts. It appears that this man Dhuku Singh was called as a Court witness. The trying Magistrate called him as such, because it was alleged at a very early stage of the trial that Dhuku had been gained over by the defence. When examined in Court, he made statements that were inconsistent with the statements that he made before the Police in the course of the Police investigation. The subsequent appearance of the Sub-Inspector for examination on the point was as to whether he had or had not made these statements. It appears that this was done, not with a view to substantiate the offence against the accused, but to clear the doubt as to whether or not the prosecution was right in condemning this man Dukhu as a witness who had turned hostile since his examination by the Police. I have carefully considered the judgment of the trying Magistrate as also that of the learned Judge who heard the appeal, and I find that there is nothing in the two judgments to show that the statements made by Dhuku before the investigating officer have been used as evidence against the accused. On the contrary, I find in the judgment of the learned Judge who heard the appeal that these statements were used only for a certain purpose, and that was to ascertain the fact as to whether the allegation of the prosecution as to the hostility of Dhuku was established or not. In the circumstances the petition must be rejected.

Petition rejected.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 424 OF 1917.

July 27, 1917.

Present:—Mr. Justice Scott-Smith and Mr. Justice LeRossignol.

HARJI AND ANOTHER—CONVICTS—APPELLANTS

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Evidence—First report, value of—Report made by accused, admissibility of.

A first report is generally very valuable corroborative evidence of the testimony of the person who makes it; but where it is made by an accused, it is not admissible in evidence at all and constitutes no corroboration either of the case against himself or of that against any other co-accused. [p. 274, col. 1.]

Where, therefore, the whole of the evidence was disbelieved by the Sessions Judge but the accused were convicted on the strength of a report made by one of themselves:

Held, that inasmuch as the conviction was based on material which was inadmissible in evidence, it could not stand. [p. 274, col. 1.]

Appeal from the order of the Sessions Judge, Karnal, dated the 29th March 1917, convicting the appellants.

Mr. *Nanak Chand*, for the Appellants.

Lala *Mul Chand*, R. S. (Public Prosecutor) for the Respondent.

JUDGMENT.—Four brothers Harji, Kala Hira and Gokal, sons of Ram Jas, were committed to the Sessions Court charged

with the murder on the night of the 24th January 1917 of Sudhan Jat of their village.

The story for the prosecution was that early in the night of the occurrence the accused discovered that one of their she-buffaloes was missing, that they suspected the deceased and his brother Udmi of its theft and thereupon proceeding towards their house, found Sudhan asleep in the lane in front of his cattle shed. Sudhan was at once murdered with *gandasas* with which the accused had provided themselves, and then all four culprits, going to the house where Udmi was asleep, called him out and when he opened the door struck at him and wounded him on the head. The learned Sessions Judge agreeing with the assessor came to the conclusion that the story as told by the prosecution witnesses was entirely false, but also in agreement with the assessors he held that a report made by Hira, one of the accused at the Thana, almost simultaneously with the first information report justified the conviction of Harji and Kala. Hira and Gokal accordingly have been acquitted whilst Harji and Kala have been sentenced to transportation for life and the two latter have appealed to this Court.

Now the report made by Hira, whose authorship Hira denied, but of which we agree with the learned Sessions Judge that he was the maker, sets forth that Harji and Kala had a fight with Sudhan and Udmi, whom they found in the act of leading away a she-buffalo and its young belonging to Kala. Now this first report made by Hira is not evidence. First reports may be and generally are very valuable corroborative evidence of the testimony of the person who makes them, but in this case Hira, the maker, was not a witness but an accused person and consequently his report to the Police constituted no corroboration of either the case against himself or of that against his brothers. In fact his first report was not admissible in evidence at all. As the whole of the rest of the evidence has been discredited by the learned Sessions Judge and the assessors, it follows that there is nothing on which the conviction can properly repose. The learned Counsel for the Crown admits that this position is correct, but he has asked us to maintain the conviction on the evidence which was rejected by both the Judge and the assessors in the Court below.

We have accordingly studied the evidence in detail and quite apart from the fact that the Sessions Judge has noted with regard to nearly all the chief witnesses in the case that their demeanour in the witness-box was very unsatisfactory, we have come to the conclusion that the evidence in this case is not trustworthy and that though there can be little doubt but that some of the four brothers were concerned in the murder of Sudhan, there is no legal acceptable evidence as to how, when and where and by whom Sudhan was killed. The offence appears to have taken place at about 9 or 10 P.M., yet the report to the *thana* was made at only 3 o'clock the next morning, inspite of the fact that the *thana* is only five *kos* distant and that the rival parties are said to have raced to make their respective reports. Again, in the first report no mention is made of any eye-witness, whilst regarding *Musammat* Basanti it is said that she saw the culprit running away. In Court, however, Pirbhu and Har Nath came forward as eye-witnesses of the whole affair and so does *Musammat* Basanti. So also does *Musammat* Jio, who says she was on the spot before *Musammat* Basanti. As Jai Lal who made the report to the *thana* is said to have seen those witnesses near the corpse before starting to make his report, it is impossible that if these witnesses had really seen what they profess now to have seen they would not have mentioned the fact to Jai Lal and that the circumstance would not have found mention in his report. Another remarkable circumstance in this case is that though the Police diaries show that the evidence of all these witnesses was recorded on the first day of the enquiry, the witnesses themselves have stated, almost without exception, that their statements were not recorded on the first day of the enquiry and we note on refering to the diaries that they reached the Sadar on a belated date, a circumstance into which the Sessions Judge should have made enquiry. The learned Sessions Judge says that there appears to be some substratum of proof in the statement of Akhi

Ram, but the statement in itself is not conclusive or very convincing and the learned Sessions Judge has not indicated with any precision what portion of this man's statement he regards as containing some fraction of truth. It is a matter for surprise to us that Udmi, the brother of the deceased, who was very lightly hurt indeed, did not himself proceed to the *thana* and we are not greatly impressed by the argument advanced by the learned Counsel that his reason for holding back was his apprehension that the culprits might waylay him on the road.

It is a matter for regret that the Police do not appear to have investigated the version of the affair told by Hira. Had this been done and the spot indicated by Hira closely examined, it is possible that the truth of the affair might have been elucidated.

The result of this case is very unsatisfactory, but holding as we do that the opinion of the lower Court regarding the credibility of the prosecution evidence is sound and that the material upon which it convicted the appellants was inadmissible in evidence, we have no alternative but to accept the appeal and acquit the appellants and we order accordingly.

Appeal accepted.

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 1107 OF 1917.

March 8, 1918.

Present:—Mr. Justice Chitty and Mr. Justice Smither.

BROJENDRA NATH BAKSHI—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Stamp Act (II of 1899), s. 64—Failure to stamp document—Fraudulent intent.

Mere non-payment of a proper stamp duty does not make a person liable to prosecution under section 64 of the Stamp Act, unless it is proved that he had an intention to defraud the Government of its stamp revenue.

Criminal revision from the order of the Sub-Divisional Officer, Goalando.

FACTS appear from the judgment.

Babu *Manmatha Nath Mukherjee*, for the Petitioner.—In this case the Sub Divisional Officer of Goalando granted sanction to prosecute the petitioner under section 64 of the Stamp Act, although no *prima facie* case showing the fraudulent intention of the petitioner had been made out. As the petitioner never refused to pay the requisite stamp duty, he cannot be said to have intended to defraud or to deprive the Government of its stamp revenue, and as the proceeding under section 64 was taken without giving the petitioner any chance of paying the necessary and proper stamp duty he is not liable to prosecution. Refers to sections 27, 40 and 64 of the Stamp Act. Mere non payment of the full amount of the stamp duty payable is not enough, the prosecution must also establish a fraudulent intention on the part of the petitioner, and that has not been done in this case.

Mr. *Orr*, Deputy Legal Remembrancer, for the Crown.—The petitioner is an educated District Court Pleader, and he was fully aware of the Stamp Law, and he did not give the requisite stamp duty merely because he had in his mind an intention to avoid paying the proper stamp. Further this motive of the petitioner is also borne out by the exceedingly low rate of rent, *viz.*, Rs. 15 per annum, settled in perpetuity for 500 *bighas* of land.

JUDGMENT.—In this case we do not think that any *prima facie* case of an intention to defraud on the part of Brojendra Nath Bakshi has been made out which would justify his prosecution under section 64 of the Indian Stamp Act. The fact that a sum of money had been advanced by his father for the marriage expenses of the grantees of the *kabuliyat* was fully set out in the *kabuliyat*. The only thing that was not set out was the precise amount advanced and the rate of interest which it was intended to carry. The petitioner should have been asked to specify those amounts in order that the stamp duty might be assessed. Instead of giving him that chance the authorities at once proceeded against him under section 64. The stamp duty, so far as we can judge, would not have been more than Rs. 18 for the whole amount of principal and interest. We are not satisfied that there was any intention on the part of the petitioner to defraud the Government of that trifling sum. The Rule is accordingly made

absolute and the proceedings against the petitioner are quashed.

Rule made absolute.

PATNA HIGH COURT.

CRIMINAL REVISION No. 56 OF 1918.

March 6, 1918.

Present:—Mr. Justice Jwala Prasad.

BUNDI SINGH AND OTHERS—ACCUSED —PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 522—Criminal force, use of—Show of criminal force, whether enough.

The dispossession contemplated by section 522 of the Criminal Procedure Code must be accompanied by criminal force and as a result of the criminal force used, and the mere show of criminal force is not enough for an order under that section. [p. 277, col 1.]

The foundation of an order under section 522 of the Criminal Procedure Code should be the finding of the Court to the effect that the person in whose favour the order is made has been dispossessed of a specific property by use of criminal force, which forms the material ingredient in the matter of criminal conviction. [p. 276, col. 2.]

Criminal revision from an order of the Deputy Magistrate, Palamau.

Messrs. *Akbari* and *Harihar Prasad Sinha*, for the Petitioners.

JUDGMENT.—We are concerned in this case only with the order under section 522 of the Code of Criminal Procedure passed by the Deputy Magistrate of Palamau, directing that the disputed Bhunder be restored to the possession of the complainant Mr. De. The order was passed on a conviction of the petitioners under sections 143 and 379 of the Indian Penal Code. On appeal the Judicial Commissioner of Ranchi set aside the conviction under section 379, on the ground that the charge of theft laid by the complainant's servants was exaggerated and was not true. The conviction under section 143 was, however, upheld. There is no reference to the order under section 522 by the Judicial Commissioner in his judgment and hence that order of the Deputy Magistrate remains. The petitioners have, therefore, come to this Court aggrieved by the said order of the Deputy Magistrate.

The conviction under section 143 is based upon the following finding of the Judicial Commissioner, which substantially is also the finding of the Deputy Magistrate:—

"I consider this evidence as establishing the fact that Mr. De's servants were actually in possession of this Bhunder. The evidence further satisfies me that the accused after some previous threats turned up in a body and threatened all the servants of the Bhunder, whereupon the servants left the village and came to Court where they lodged a complaint. During the interval between their departure and the Police coming on the scene, Bundi Singh (one of the accused) again established himself in possession of the Bhunder."

The above finding clearly shows that the dispossession took place subsequent to the complainant's servants having left the village and gone to the Court to complain of the offence under section 143 of theft committed by the petitioners. There is no finding that the dispossession took place during the course of the offence under section 143 of which the petitioners were convicted. There is also no finding that the dispossession took place on account of any force having been used by the petitioners. The conviction under section 143 in itself is not one which is attended by 'criminal force'. The common object mentioned in the charge under section 143 is to take forcible possession of the complainant's master's Bhunder and to remove the grains stored therein. The offence under section 143 is not necessarily attended by 'criminal force' and in this particular case there is no finding that it was so attended. No "criminal force", as defined in sections 349, 350 of the Criminal Procedure Code, was at all held to have been used by the petitioners. It was held so far back as in *Mohunt Luchmi Dass* v. *Pallat Lall* (1) that 'the foundation of an order under section 534 (corresponding to the present section 522) should be the finding of the Court to the effect that the person in whose favour the order is made has been dispossessed of a specific property by use of criminal force, which forms the material ingredient in the matter of criminal conviction'. The leading

(1) 23 W. R. Cr. 54.

case of *Ram Chandra Boral* v. *Jityandria* (2) reiterated that principle. All the High Courts appear to be in agreement in respect of the interpretation of the expression used in section 522 'attended by criminal force' and later in the section 'by such force any person has been dispossessed of any immoveable property'. The result of the authorities has been that the dispossession must be accompanied by 'criminal force' and as a result of the 'criminal force' used, and further 'the mere show of criminal force' is not sufficient for an order under section 522. It may be mentioned here that the inequity of such an interpretation of the section and perhaps of the expression used by the Legislature has been felt by more Judges than one, notably in the case of *Chhakoo Mandal* v. *Emperor* (3), where the anomaly of the position has been fully dealt with. The words in the section put a peaceful man, who yields to the threats and show of force and gives up possession of a property, to a great disadvantage and hardship. The Full Bench case of *Mohini Mohan Chowdhry* v. *Harendra Chandra Chowdhry* (4) felt that the construction put upon the section is too narrow. I may say that I am in full accord with the views of the learned Judges who decided the above cases and would go further than that and hold that the interpretation works as a hardship, but as all the Courts have followed it, I feel bound to accept it. More so, because the rule of construction of a Statute does not permit a Court to use words not expressly mentioned in the section. To give effect to the inequitous position felt by the Judges already adverted to will necessitate the reading into the section the words 'or by show of criminal force'. I, therefore, in concurrence with the views held by all the Courts, hold that the order in this case passed by the Deputy Magistrate under section 522 is illegal and without jurisdiction. It is accordingly set aside.

Rule made absolute.

(2) 25 C. 434; 2 C. W. N. 305; 13 Ind. Dec. (N. s.) 288.

(3) 11 C. W. N. 467; 5 Cr. L. J. 278.

(4) 31 C. 691; 8 C. W. N. 536; 1 Cr. L. J. 453 (F. B.).

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 972 OF 1917.

January 31, 1918.

Present:—Sir Henry Rattigan, Kt., Chief Judge, and Mr. Justice LeRossignol.

HIRA LAL—CONVICT—APPELLANT

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 155, 164, 172—Police Officer investigating non-cognisable offence—Diary, whether necessary to be kept—Statements recorded under s. 164—Procedure.

A non-cognisable case can, under section 155 of the Criminal Procedure Code, be investigated by a Police Officer only under the orders of a Magistrate of the first or second class who has power to try such case or commit the same for trial. But when such order is given and the Police Officer proceeds in accordance therewith to make an investigation, such investigation is made under Chapter XIV, which includes both sections 153 and 172. [p. 281, col. 1.]

It is incumbent upon a Police Officer, who investigates a non-cognisable case under the orders of a Magistrate, to keep the diary for which provision is made in section 172 of the Criminal Procedure Code, and the omission to keep such diary deprives the Court of the very valuable assistance which such diaries can give, if legitimately used. [p. 281, col. 1.]

The indiscriminate use of the provisions of section 164 of the Criminal Procedure Code is to be deprecated. No statement should be recorded under that section unless the person making it is a free agent and voluntarily agrees to have his statement taken down. [p. 281, cols. 1 & 2.]

Appeal from the order of the Special Magistrate of the 1st Class, appointed under section 14 of the Criminal Procedure Code, with jurisdiction to try cases throughout the Punjab, dated Ludhiana, the 8th November, 1917, convicting the appellant.

Messrs. *Beechey* and *Lal Chand Mehra*, for the Appellant.

Mr. *Herbert*, Assistant Legal Remembrancer, for the Respondent.

JUDGMENT.—In consequence of a resolution passed by nineteen members of the Gurdaspur Bar Association on the 18th of April 1917, and of various rumours that were rife concerning the conduct of Mr. Ephrain Tej Bhan, Senior Subordinate Judge and Magistrate, 1st Class, Gurdaspur, the District Magistrate acting under section 155, Criminal Procedure Code, empowered Sardar Bahadur Sukha Singh, Deputy Superintendent of Police, C. I. D., to investigate into matters, and as a result of those enquiries the Local Government on the 24th August 1917 granted sanction

under section 197 (1) of the Code for the prosecution of the said Mr. Bhan in respect of offences under section 161, Indian Penal Code, alleged to have been committed by him, and under the provisions of section 197 (2) of the Code directed that the trial of the accused should be held in the Court of Mr. D. J. Boyd at Ludhiana. By Punjab Government Notifications No. 3648—S., dated 25th August 1917, and No. 1950—A., dated 25th October 1917, Mr. D. J. Boyd was appointed under section 14 of the Code a Special Magistrate with all the powers of a Magistrate, 1st Class, in regard to cases generally throughout the Punjab for a period of three months with effect from the 25th August 1917.

On the 27th August Sirdar Bahadur Sukha Singh filed a complaint against Mr. Bhan and one Hira Lal Kapur in respect of offences committed by them under sections 161, 162 and 163, respectively, of the Indian Penal Code. The complainant was duly examined upon his complaint on the same date, Mr. Bhan being present in person, and at the conclusion of the complainant's examination the Magistrate directed that a summons should issue to Hira Lal Kapur to answer charges under sections 162 and 163, Indian Penal Code. The trial commenced on the 4th September 1917, and after forty-three witnesses for the prosecution and the two accused had been examined the Magistrate on the 24th of September discharged Mr. Bhan and framed the following two charges against Hira Lal Kapur, namely:—

"*First.*—That you, on or about the 26th day of May 1916, at Simla did accept Rs. 300 from Mahant Vaishnu Das as a motive or reward for inducing, by corrupt or illegal means or by personal influence, Ephrain Tej Bhan, a public servant, to show favour to the said Mahant Vaishnu Das in the exercise of his official functions as Senior Subordinate Judge trying the civil case "*Vaishnu Das* v. *Ram Das*" and thereby committed an offence punishable under section 162 or 163 of the Indian Penal Code within my cognizance."

Secondly.—"That you, on or about the 26th day of May 1916, at Simla did abet the acceptance of Rs. 3,000 by Mrs. Ephrain Tej Bhan as a motive for inducing, by corrupt or illegal means or by personal influence, her husband Ephrain Tej Bhan, a public servant, to show favour to Mahant Vaishnu Das in the discharge of his official functions as Senior Subordinate Judge trying the civil case '*Vaishnu Das* v. *Ram Das*' and thereby committed an offence punishable under section 162/109 or 163/109 of the Indian Penal Code, and within my cognizance."

After the charges were framed the witnesses for the prosecution were cross-examined, many of them at inordinate length, and thirty witnesses for the defence were also examined and cross-examined. On the 8th November the Magistrate passed an order convicting Hiral Lal Kapur upon both charges and sentenced him to one year's rigorous imprisonment and a fine of Rs. 300 or in default three months' rigorous imprisonment upon the first charge and to one year's rigorous imprisonment and to a fine of Rs. 200 or in default three months' rigorous imprisonment upon the second charge, the order directing that the substantive terms of imprisonment should run concurrently.

Hira Lal Kapur presented an appeal to the Sessions Judge, Ludhiana, against his conviction and sentences, but upon the representation of the learned Sessions Judge that he had personal reasons for not desiring to hear the appeal it was transferred along with other appeals of a somewhat similar character to this Court by an order of the Chief Judge under section 526, Criminal Procedure Code, and it has been heard by us as a Division Bench, Mr. Beechey and Mr. Lal Chand Mehra addressing us on behalf of the appellant and Mr. Herbert, Assistant Legal Remembrancer, on behalf of the Crown.

The case for the prosecution depends mainly upon the evidence of the three witnesses Beli Ram (P. W. No. 4), Vaishnu Das (P. W. No. 5) and Harbhaj Rai (P. W. No. 6), which is to the following effect:—

Vaishnu Das is a Mahant who claims to succeed to a certain *gaddi* in the Gurdaspur District to which property of very large value is attached, and he brought a suit to establish his right against his rival, one Ram Das. The suit was instituted in 1909 and after many hearings eventually came in its later stages before Mr. E. T. Bhan, who was then Senior Subordinate

Judge at Gurdaspur. In the summer of 1915 Vaishnu Das and his supporters had reason to suspect that the defendants and their party had bribed the Subordinate Judge, and it was decided that they should also raise money and approach the Judge for a similar purpose. Accordingly in November 1915 a sum of Rs. 5,000 was raised by Vaishnu Das and his *sewaks* and later on Vaishnu Das asked Sardar Bhadan Singh, who was said to have bribed the same Judge in another case, to advise him as to the means of effecting his object. Harcharan Singh, Sardar Bhadan Singh's brother, suggested to Vaishnu Das the advisability of getting into touch with a Mrs. or Miss Das, a Christian lady living in Lahore, who was said to be a friend of Mr. and Mrs. Bhan. Negotiations with this lady ensued but nothing came of them. In the meantime Vaishnu Das recollected that one Beli Ram P. W. No. 4, one of his *sewaks*, had told him that Hira Lal Kapur would be able to render assistance to Beli Ram if the latter at any time had business in Bhan's Court. Vaishnu Das accordingly sent for Beli Ram and spoke to him on the subject and then deputed him and Harbhaj Rai (P. W. No. 6), whom he described as his Munshi, to interview Hira Lal Kapur at Lahore. The two proceeded to Lahore and Beli Ram told Hira Lal Kapur the object of their visit and asked him to give the help he had promised either by writing a letter of recommendation to Mr. Bhan or by personal interview with the latter. Hira Lal Kapur replied that he was ready to help but that mere *sifarish* would effect nothing, and that if Vaishnu Das was prepared to spend money something could be done. Beli Ram did not approve (so he says) of bribery and took no further part in the conversation, but Harbhaj Rai informed Hira Lal Kapur that he and his friends could raise Rs. 5,000, if necessary, Hira Lal Kapur stated that in that event he would arrange for Rs. 4,500 to be given to Mr. Bhan and that he would keep Rs. 500 for himself. The couple then left Hira Lal Kapur and Beli Ram took no further part in the transactions. Harbhaj Rai, however, informed Vaishnu Das of what he had heard from Hira Lal Kapur and stated that the latter had arranged to send one Faqir Chand in a day or two to Gurdaspur to find out when the money could be handed over to Mr. or Mrs. Bhan. It is alleged that Faqir Chand came twice to Gurdaspur for this purpose but that nothing could be done through him. Later Vaishnu Das and Harbhaj Rai heard that Mrs. Bhan was going to Simla, *via* Lahore, and as Hira Lal had told Harbhaj Rai that in "big matters" money was given through Mrs. Bhan, Vaishnu Das sent Harbhaj Rai with Rs. 5,000 to Hira Lal at Lahore. Hira Lal informed him that Mrs. Bhan had not come to Lahore and asked him whether he had really got the Rs. 5,000, whereupon notes for Rs. 5,0 0 were shown to him and he replied "all right, when she comes to Lahore we shall arrange the matter here." Harbhaj Rai returned with the money to Gurdaspur and informed Vaishnu Das of what had happened. Three to four days later the two again proceeded to Lahore under the impression that Mrs. Bhan had arrived there. They saw Hira Lal, and found that Mrs. Bhan had gone to Simla, whereupon Vaishnu Das asked Hira Lal Kapur whether he would go to Simla with him and help him in the matter of bribery. Hira Lal Kapur expressed his readiness to go next day and stated that he would send a telegram that day informing Mrs. Bhan of his coming. Vaishnu Das then handed Harbhaj Rai Rs. 40 in notes for Hira Lal Kapur's expenses to Simla and himself returned by the night train to Gurdaspur in order to get the money. The following morning Harbhaj Rai, Hira Lal Kapur and the latter's servant Ram Singh started by the mail train from Lahore, Hira Lal travelling in second class and the others in the servants' third class compartment. At Amritsar station Harbhaj Rai got out and Vaishnu Das travelled by the same train in an intermediate carriage. At Tara Devi station the registers kept for plague purposes bearing entries dated 26th May 1916 show that Hira Lal Kapur, Vaishnu Das and Ram Singh were passengers by the train which arrived at Simla at 7 A.M. that day. It is said that on their arrival a servant of Mrs. Bhan met Hira Lal Kapur and gave him a note, which Hira Lal Kapur read and gave back to the man after writing something on it. The three then proceeded to the "Hindu Hotel", where Hira Lal Kapur entered their names in the Hotel register. After breakfast Hira Lal Kapur and Vaishnu Das proceeded to the house

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where Mrs. Bhan was staying; the former entered the house and in about one-half hour the servant who had met the party at that station came out and told Vaishnu Das that he was wanted. He went and found Hira Lal and Mrs. Bhan seated in a room and states that at the request of Hira Lal he handed Rs. 3,000 in notes tied up in *malmal* to Mrs. Bhan. Hira Lal told him in Mrs. Bhan's presence that he was "to arrange quickly" the balance of Rs. 1,500. Vaishnu Das agreed to give it within a week but remarked that it would be more convenient to pay it at Gurdaspur. Mrs. Bhan observed that the sum was small considering the value of the case and that the other side were ready to pay larger sums, but that she would write to her husband and tell him that she had seen Hira Lal and Vaishnu Das and had received the money. Hira Lal Kapur and Vaishnu Das then left the house and on the way Hira Lal Kapur asked for the Rs. 300 for himself and Vaishnu Das handed the same over to him. They returned to the hotel and left Simla by the 6 P. M. train that evening. Vaishnu Das returned to Gurdaspur and subsequently recovered Rs. 1,500 which he had lent to a Vakil for a few days and thereafter proceeded with Harbhaj Rai to Lahore with the balance of the money. Hira Lal Kapur returned with them to Gurdaspur by the train which arrived at midnight and next morning, as the early train was leaving the station, Hira Lal informed Vaishnu Das that he had seen Mr. Bhan, who had said that he had not yet seen the file of the case, that he meant to take leave in July and thought of writing his judgment at Simla, where Vaishnu Das was directed to take the balance of Rs. 1,500 as Mr. Bhan might have to make some enquiries from him there. On the 16th June 1916, Vaishnu Das received a *parwana* directing him to appear in Court as some enquiries had to be made from him, and in compliance therewith he proceeded to the Court with Harbhaj Rai and his Pleader, Lala Moti Ram. On their arrival they found that the other party had already put in an appearance and had brought a band which was waiting in the garden of the Kutchery. To Vaishnu Das's surprise Mr. Bhan gave judgment forthwith, dismissing his suit as utterly false and expressing his readiness to entertain applications for sanction to prosecute witnesses who had given evidence in Vaishnu Das' favour. On the 17th June 1916 Vaishnu Das wrote a postcard, Exhibit H. D. 10, to Hira Lal Kapur to the effect that "the inauspicious day that was dreaded" had arrived and calamity had fallen upon him as judgment had been given and his suit dismissed. On the 18th June 1916 a postcard, Exhibit H. P. 13, which admittedly bears the signature of Hira Lal Kapur, was written in reply and is to the effect that the postcard has been received and that the writer is extremely sorry to hear that the labour of eight years has been lost, that no greater calamity could be conceived, that they must trust in God, and that a copy of the judgment should be obtained so that the reasons for it might be ascertained.

From the decision of Mr. Bhan, Vaishnu Das preferred an appeal in October 1916 to the Chief Court but admittedly made no complaint to the authorities as regards the conduct of the Subordinate Judge.

Before proceeding to deal with the case on its merits it is necessary to refer to one or two points of a general nature upon which Mr. Beechey laid great stress.

In the first place the learned Counsel expressed great indignation at the course adopted by Government in taking no action against Mrs. Bhan and urged that it was most unfair to that lady to make accusations against her indirectly and yet to abstain from putting her in the dock. As to this it is only necessary to say that Mrs. Bhan has herself not protested against the omission on the part of the authorities to prefer a charge against her, and that Mr. Beechey, who does not in any sense represent her, can hardly complain of a procedure which enabled his client to call Mrs. Bhan as a witness for the defence. Her evidence for what it is worth would have been lost to the appellant had the lady been a co-accused in the case. Apart from this, moreover, as it is obvious that the sole evidence against Mrs. Bhan would have been that of Vaishnu Das and it is in the highest degree improbable that a conviction would have been obtained upon that evidence standing by itself and uncorroborated, it appears to us, therefore, that Government were well advised in not harassing the lady by a prosecution which must have failed.

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In the next place, Mr. Beechey urged that the Police Officers who made the investigation in this and the other cases against Mr. Bhan acted in contravention of the provisions of section 172, Criminal Procedure Code, in omitting to record their proceedings in the usual Police diaries. In our opinion there is force in this contention. It was urged by Mr. Herbert that it is not the practice for the Police to keep diaries when investigating non-congnisable cases, and we have no doubt whatever that it was on this account and without any ulterior or sinister purpose that diaries were not kept in the cases with which we are now dealing. At the same time section 172 of the Code provides that "every Police Officer making an investigation under this chapter shall day by day enter his proceedings in the investigation in a diary," etc. A non-cognisable case can, under section 155 of the Code, be investigated by a Police Officer only under the orders of a Magistrate of the first or second class who has power to try such case or commit the same for trial. But when such order is given and the Police Officer proceeds in accordance therewith to make an investigation such investigation, is obviously made under Chapter XIV which includes both sections 155 and 172. In our opinion, it is incumbent upon the Police Officer who investigates a non-cognisable case under the orders of a Magistrate to keep the diary for which provision is made in section 172, and we might add that in any event the omission to keep such diary deprives the Court of the very valuable assistance which such diaries can give, if legitimately used, in the judgment of Edge, C. J., in *Queen-Empress* v. *Mannu* (1).

Next Mr. Beechey complained of the action of the Police Officers having the statements of the principal witnesses recorded at the earliest possible opportunity under section 164 of the Criminal Procedure Code. The indiscriminate use of the provision of that section is undoubtedly to be deprecated and we agree with the view expressed by Plowden, J., in *Lalu* v. *Queen-Empress* (2) that no statement should be recorded under that section unless the person making it is a free agent and voluntarily agrees to have his statement taken down. In a case such as that with which we are dealing the investigation by the Police was of a difficult character and we cannot accept the contention that they had no justification for taking a course they did, and we are certainly not satisfied that the persons whose statements were recorded were unwilling to make those statements or were forced to do so.

Turning now to the merits of the case, we find that the direct evidence given by Vaishnu Das and Harbhaj Rai is corroborated in many material points and that the prosecution have succeeded in establishing the guilt of the appellant. The corroboration to which we refer can be summarised as follows:—

(*i*). The evidence of Beli Ram (P. W. No. 4), who proves that the idea of bribing Mr. Bhan emanated from Hira Lal. This witness cannot be regarded as an accomplice in the offence, for, as he himself tells us, he at once declined to take any further part in the proceedings after the suggestion of a bribe had been made. He is, however, a person in no way inimical to Hira Lal, who admittedly on a former occasion applied to him for assistance in the case between Hira Lal and Pandit Rambhaj Datt. He had no motive, therefore, for giving false evidence in this case and the postcards written by him to Vaishnu Das and Harbhaj Rai (Exhibit H. P. 14, dated 29th April 1916, and Exhibit H. P. 15, dated 30th May 1916) materially corroborate the evidence he has given in the case.

(*ii*). The evidence of a number of *sewaks* or disciples, who depose that the idea of bribing Mr. Bhan was discussed and money raised to enable Vaishnu Das to give the bribe. A number of bonds and a *bahi* were produced to support this evidence (see Exhibits H. P. 17—26).

(*iii*). The evidence of Gurdit Singh (P. W. No. 2), the Secretary of the Gurdaspur Bar Association, which proves that Vaishnu Das made a statement to the witness in February or March 1917 to the effect that a bribe had been given by Vaishnu Das. The gist of this statement was taken down in writing by Gurdit Singh (see Exhibit

(1) 19 A. 390; A. W. N. (1897) 174; 9 Ind. Dec. (N. S.) 254.
(2) 2 P. R. 1893 Cr.

H. P. 12), but Mr. Beechey argues that this statement is not admissible in evidence. In our opinion this objection is valid, as the statement was not made at or about the time when the bribe is alleged to have been given, but it is unnecessary for the prosecution to refer to the exhibit itself, inasmuch as the searching cross-examination of Vaishnu Das has with extraordinary thoroughness brought upon the record practically all that was contained in that document. It is proved, therefore, that Vaishnu Das informed Gurdit Singh of what had occurred and that this information was given a considerable time before the Police investigation.

(*iv*). The register of travellers who passed the inspection post at Tara Devi on the 26th May 1916 has entries showing the names of Lala Hira Lal Kapur and Mahant Vaishnu Das, travellers to Simla (Exhibit H. P. 2).

(*v*). The C. I. D. confidential diary kept by H. C. Zafar Hussain (P. W. No. 38) has similar entries regarding Hira Lal Kapur and Mahant Vaishnu Das, the former travelling second class and the latter intermediate. The entry regarding Vaishnu Das runs as follows:—*Mahant Vaishnu Das, chela Brahm Das, Bairagi, Gurdaspur se aya, aur Hindu Hotel thereg i, waste mulaqat Tej Bhan, Senior Sub-Judge, aya.*

(*vi*). Exhibit H. D. 10, a postcard written on the 17th June 1916 by Vaishnu Das to Hira Lal Kapur, and Exhibit H. P. 13, a postcard dated 18th June 1916 addressed to Mahant Vaishnu Das and signed by Hira Lal Kapur, prove the great interest that Hira Lal Kapur was taking in the case in which Vaishnu Das was concerned.

(*vii*). The evidence of Harbans Singh (P. W. No. 35) and his Hotel registers (Exhibits H. P. 4 and 5) prove that Hira Lal Kapur and Vaishnu Das went together to the Punjab Hotel at Simla on the morning of the 26th May 1916, that Hira Lal wrote the name of Vaishnu Das in the register as one of his party, that they all left on the evening of the same day and that Hira Lal Kapur paid the expenses of the party.

(*viii*). Finally, it is in evidence that Hira Lal Kapur and Mr. Bhan were well known to each other. Ganga Parshad (P. W. No. 43) proves that Hira Lal had charge of Mr. Bhan's house in Lahore in 1914-15, a fact which is further proved by the two cheques drawn by Hira Lal Kapur in favour of Mr. Bhan (Exhibits 35 and 36 and letter Exhibit H. F. 38 and cheque H. P. 39) as explained by Faqir Chand D. W. No. 2.

For the defence it is urged that this case has been engineered against Hira Lal by Pandit Ram Bhaj Datt and his brother Jaswant Rai, a Gurdaspur Pleader, and by Sardar Bahadur Sukha Singh all of whom bear enmity towards the appellant. We have carefully considered all that Mr. Beechey had to urge with regard to this alleged enmity on the part not only of the three persons above named but also of the Gurdaspur Pleaders and Barristers as a whole, but we are unable to find any real foundation for the charge brought against those persons. There is nothing to show that Pandit Rambhaj Datt took any part in getting up this case against Mr. Bhan and Hira Lal Kapur, and the part which Jaswant Rai, as one of the Gurdaspur Pleaders, took in the proceedings was very minor and in no way suggests any particular animosity on his part. No attempt was made to show that any of the other members of the Gurdaspur Bar Association were inimically disposed towards Hira Lal Kapur, whatever may have been their feelings against Mr. Tej Bhan.

As regards Sardar Bahadur Sukha Singh, the allegation is that he lent his aid to this conspiracy against Hira Lal Kapur, because the latter (1) in 1906 published an article in his vernacular paper, the "Samachar," severely reflecting on Sukha Singh's official conduct in a certain case; (2) was responsible for the eviction of Sardar Sukha Singh from a house which he had taken in *Kucha Saroopo*, Lahore, some 2 or 3 years ago; and (3) had in October 1916 given grave offence to Sukha Singh by insisting on his withdrawing from a tent in front of which the members of the "Serving Club" (of which Hira Lal was president) were about to be photographed.

It is difficult to deal seriously with these absurd allegations, and we do not think we need say more than

that, as regards the first, the article was written about 12 years ago, mentions no Police Officer by name and that Sukha Singh was not the only Inspector concerned in the proceedings; as regards the second, that Sukha Singh has explained that he left the house because plague had broken out in the neighbourhood and that the sole witness who deposes to his alleged involuntary eviction is one Mul Chand, the brother-in-law of Hira Lal; and as regards the third, that the witness who refers to it (Bhagat Singh, P. W. No. 25) admits that Sukha Singh on hearing that objection was taken to his presence in the tent, got up and went away and that there was no further conversation on the subject. It is putting a premium on our credulity to ask us to believe that for reasons such as these a responsible Police Officer of Sukha Singh's standing would deliberately join a conspiracy to ruin Hira Lal who was not, moreover, the person against whom investigation was primarily directed.

So far then as we can gather from the materials before us, there was no such conspiracy on the part of the Pleaders and Sukha Singh, and no attempt was made to show that Vaishnu Das, Harbhaj Rai and Beli Ram or any of them had any reasons to implicate an innocent man in this case. As a matter of fact Hira Lal had in June 1917 (after the Police investigation had commenced) taken Harbhaj Rai into his employment and there is nothing on the record to justify the suggestion that Vaishnu Das, Harbhaj Rai and Beli Ram perjured themselves by falsely and maliciously dragging into the case a man, who, for ought the Police knew, had no connection with it. The investigation was directed against Mr. Tej Bhan and it was against him and not against any other individual that the Police were searching for evidence.

The result of our conclusions then is that there is no foundation for the contention that Hira Lal has been implicated falsely owing to enmity, and the sole question that remains is whether the witnesses who give evidence against him are to be believed. Two of them no doubt are accomplices, but the evidence of these two is materially corroborated by the evidence of Beli Ram, who is in no sense an accomplice, and by the admitted facts that Hira Lal did go up to Simla on the 26th May, stayed at the same hotel there with Vaishnu Das, returned to Lahore on the same date and in the same train by which Vaishnu Das travelled and subsequently corresponded and sympathised with Vaishnu Das about the result of the latter's case. Hira Lal explains that he suddenly decided to visit Simla and by a curious coincidence actually went there on the very day that Vaishnu Das arrived, because he had thought of opening an agency there for the benefit of one Mohkam Chand, the son of Lala Hari Chand, a Magistrate at present in Lahore. In support of this explanation he called four witnesses, (1) Balmokand (D. W. No 7), a member of his own brotherhood; (2) Munshi Ram (D. W. No. 11) his servant (who, however, deposes that the agency was to be opened for his benefit); (3) Kartar Singh (D. W. No. 21) another servant of his; and (4) Kahan Chand (D. W. No. 22) whom he has recently appointed Editor of his vernacular paper. On the other hand Fakir Chand (D. W. No. 2), who has for many years been a trusted employee of his and whom he is said to regard as a son, admits that until Hira Lal's return on the 27th May he had not heard of the idea of opening a Simla agency and neither Mohkam Chand nor Lala Hari Chand (who would have been a witness of great weight) was called to corroborate the story that Lala Hari Chand had asked Lala Hira Lal to start this agency for the benefit of his son. Furthermore, it is an extraordinary fact that after taking the trouble and incurring the expense of a journey to Simla from Lahore at the end of May, Hira Lal on his arrival there merely spent an hour or two in wandering aimlessly about the place and though anxious to secure premises for the business, paid no visits to any of the house or estate agents in Simla. His explanation is indeed absurd and we have no hesitation in rejecting it.

The result is that we are satisfied that Lala Hira Lal Kapur did accept Rs. 300 from Vaishnu Das as a motive or reward for inducing by corrupt or illegal means or by personal influence Mr. Tej Bhan, a public servant, to show favour

to the said Vaishnu Das in the exercise of his official functions as Senior Subordinate Judge and that he thereby committed an offence punishable under section 162, Indian Penal Code.

As regards the second charge it is not proved that Mrs. Tej Bhan actually accepted the Rs. 3,000, but we have no doubt that Hira Lal Kapur did attempt to abet the acceptance by her of the said sum with a view to inducing her by such corrupt or illegal means or by personal influence to induce her husband Mr. Tej Bhan, a public servant as aforesaid, to show favour to Vaishnu Das in the exercise of his official functions. Hira Lal Kapur is thus guilty upon the second charge of an offence punishable under sections 163/116, Indian Penal Code, and is, therefore, liable to three months' simple imprisonment and fine. We alter the conviction accordingly and in lieu of the sentence awarded by the Magistrate, we sentence Hira Lal Kapur under sections 163/116, Indian Penal Code, to three months' simple imprisonment and to a fine of Rs. 200 or in default of payment to a further period of 2 weeks' simple imprisonment. The substantive sentence of imprisonment in this latter case to run concurrently with the substantive sentence of imprisonment upon the first charge.

The conviction and sentence upon the first charge are upheld.

Appellant must surrender to his bail and undergo the sentence of imprisonment awarded to him.

Sentence reduced.

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 634 OF 1917.

December 13, 1917.

Present:—Mr. Justice Chitty and Mr. Justice Smither.

ROKUN ALI—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Evidence Act (I of 1872), ss. 24, 123, 124, 162—Confession made to Superintendent of Excise, admissibility of—State document, posting register, whether is—Official communication—Privilege—Opium Act (I of 1878), s. 9.

A confession made by an accused person on his trial for illicit possession of opium to a Superintendent of Excise is admissible in evidence, provided no inducement, threat or promise was held out or made to the accused in order to procure the confession. [p. 286, col. 1.]

An entry in a register of postings showing that certain Customs Preventive Officers were ordered to be at their stations at a particular hour does not refer to matters of State and is not excluded from disclosure under section 123 or 162 of the Evidence Act. [p. 285, col. 1.]

A statement made by a subordinate officer to his superior officer regarding the apprehension of a certain accused person within the hearing of various people cannot be withheld from the Court under section 124 of the Evidence Act. [p. 285, cols. 1 & 2.]

Criminal appeal against the order of the 4th Presidency Magistrate, Calcutta.

Mr. *Camell* and Babu *Monmotho Nath Mukerjee*, for the Appellant.

Mr. *B. C. Mitter* and Babu *Jnan Chunder Guha*, for the Crown.

JUDGMENT.

CHITTY, J.—The appellant Rokun Ali was convicted by the 4th Presidency Magistrate of an offence under section 9 of Act I of 1878, that is to say, of being in possession of opium without a license, and was sentenced to nine months' rigorous imprisonment and a fine of Rs. 300. The case for the prosecution depended on the evidence of the Excise Officers—Inspector Dinesh Chandra Sen Gupta, Sub-Inspector, Kiran Chandra Guha and Mojjum Hossain. There is also the evidence of Abdul Aziz the diver, who recovered a bundle of opium from the river, and of Tookal Ali Guasi, a Jamadar. On the second day of hearing Rai Sahib S. K. Raha, the Superintendent of Excise, was also called and he spoke to an admission made by the appellant, in which he confessed to being in possession of the opium and explained that he was taking it for shipment on a steamer on account of a Chinaman, whom he suggested the Superintendent should endeavour to arrest. The appellant called on his behalf a number of Customs Officers—three of whom deposed, directly contrary to the story for the prosecution, that the appellant had been arrested not in the boat, as alleged by the Excise Officers, but on the shore, and that no opium was in fact found in the boat. The learned Presidency Magistrate disbelieved the evidence of these witnesses, pointing out a number of discrepancies in their statements and also finding that they had come forward to give false evidence in consequence of their jealousy

and chagrin at having been deprived of the case by the Excise Officers. The only question before us is whether the evidence of the Excise Officers is to be preferred to the statements of the appellant and his witnesses.

A question, however, of law arose with regard to the admissibility of two pieces of evidence with which it will be convenient first to deal. Mr. Fitzgerald, the Inspector of Customs, was called and was asked to corroborate the statements from the posting register in order to show that the Preventive Officers were in fact at or near Prinsep's Ghat on the night in question, *i. e.*, 22nd and 23rd August. This was disallowed. The recollection of the learned Counsel and Pleader on either side is not the same with regard to what took place in the Police Court; but it appears from Mr. Fitzgerald's statement that he declined to put in the book as it was a confidential book. The defence now say that this plea of privilege was put forward by him at the instance of the prosecution. However that may be, it is obvious that no question of privilege could arise in respect of this posting register. There might be entries in that book which were privileged and could not be disclosed, but the entry in question is merely a note of the times when particular Preventive Officers were ordered to be at their stations. It is obvious, therefore, that it did not refer to matters of State which could be excluded from disclosure under section 123 or 162 of the Evidence Act The other question was also one of privilege in regard to Mr. Boyd's evidence. Mr. Boyd, the Superintendent of the Customs Preventive Service, was called and the defence wished to find out from him whether or not Inspector Dinesh Chandra Sen Gupta had made a particular admission on the morning of the 24th, when admittedly Mr. Boyd and Mr. Raha had a conference and the witnesses Dinesh Chandra Sen Gupta, Thomson and Fitzgerald were present. Mr Boyd appears to have stated that he treated what took place at that interview as confidential; in other words, he claimed privilege under section 124 of the Evidence Act. As to this, again, there can be no question of privilege. What took place between Mr. Raha and Mr. Boyd might possibly be privileged under that section, but that one of the subordinate officers had made a statement regarding the events of that particular night in the hearing of the various people at that conference could not possibly be withheld from the Court under that section. We accordingly intimated that we would record the evidence of these two witnesses on the two points referred to. They were called before us on Tuesday last and further examined. Their examination did not carry the case any further as neither of them remembered what had taken place, nor could they say definitely that Dinesh Chandra Sen Gupta had, in fact, made any such statement. The posting register was produced and put in. That, too, does not carry the case very much further, as it only shows orders that particular officers should be at particular places at particular times. There seems to be no reason to suppose that these Customs Officers were not at or near Prinsep's Ghat sometime or another on the night in question. They obviously interfered to some extent in the proceedings, but that does not mean that they were there precisely at the point of time, *i.e.*, 9 P. M. or just before, when the appellant was arrested by the Inspector of Excise.

The evidence of the prosecution witnesses shows that, acting on the information of an informer, the Inspector of Excise came up from Babu Ghat in a boat to Prinsep's Ghat arriving there just before 9 P. M. Just off the Prinsep's Ghat he came alongside the boat in which were the appellant and two other Mohammadans. The other two Mohammadans at once jumped into the river and swam away. The appellant is said to have taken up a bundle in the boat and thrown it into the water. He was then arrested by the Inspector and another bundle containing opium was found in the boat. He was then put under arrest and brought to the shore. On the shore another man was certainly arrested but he was let go for want of anything to incriminate him. The appellant was detained at the Ghat, to which the Inspector's taxi had come, for some hours, while the Exise Officers sent for divers and endeavoured to recover the bundle which was thrown into the river. It was not recovered that night and the appellant was accordingly removed in custody. Early the next morning the divers, after long operations, were successful and the second bundle was recovered and was found to contain a large quantity of opium. The amount of opium seized altogether amounted to between 50 and 60 seers.

The appellant's case, as stated in his plea to the Magistrate on 26th September, was that he had been arrested on the shore and that no opium was, in fact, found on the boat. To corroborate this plea the witnesses for the defence were called. The only question is whether they can possibly be believed.

The evidence for the prosecution is perfectly clear and it cannot be disputed that the opium was found on that night in the manner stated by them. The only question really is whether the appellant was the man who threw one of the bundles into the river and was arrested on the boat in possession of the other one. There seems to be no reason to disbelieve the statements of these witnesses who have given their evidence very fairly. It was argued that if there were discrepancies in the defence evidence there were equal discrepancies in that for the prosecution. The discrepancies, however, which the learned Counsel endeavoured to point out, seem to be really no discrepancies at all. They amount rather to a statement by one witness on a particular point and an admission to another witness that he did not see or had no knowledge of the fact deposed.

There is also the important evidence for the prosecution of the Superintendent of Excise. It was stated that the confession made by the accused to him on the 24th was inadmissible in evidence. There is, however, no suggestion of anything like inducement, threat or promise which would shut it out under section 24 of the Evidence Act. Then it was argued that the evidence of that confession was produced at a very late stage. The first hearing of the case was on 26th September. On that day in the cross-examination of the Inspector Dinesh Chunder Sen Gupta it was elicited not only that the appellant had made an admission to him but also that he had made a further admission to Mr. Raha. Mr. Raha was not that day present in Court. He attended, however, at the next hearing, *i. e.*, 3rd October and gave evidence with regard to this confession by the accused. There does not seem to have been such delay as would cast a doubt on the accuracy of the Superintendent's statement. There is no reason to suppose that he was called at the later stage to bolster up what might be a failing case, nor that he would deliberately come forward to perjure himself for the mere sake of obtaining a conviction against the appellant.

Turning to the evidence of the defence, the learned Presidency Magistrate has pointed out a number of inconsistencies in their statements which are more serious. It is unnecessary for us to recapitulate them at this stage. It is sufficient to say that the view that the Magistrate has taken on this point appears to be quite correct.

The most important witness called for the defence is Mr. Thomson. I am sorry to have to say it, but it does appear to me that he has deliberately come to support what was a false case. The evidence which he gave is altogether improbable and incredible. At one time he says that the Excise Officer offered to give him the case and be a witness against the accused. At another time he says that he found no opium in the boat, that the accused was not arrested in the boat, that he was arrested on the shore, that there was really no case against the accused and there was, therefore no case for either the Excise Authorities or the Customs Authorities to take up. At the same time he says that he complained to Mr. Boyd that he had been done out of a big haul by the Excise Officers. If there was no such case, it does not appear how he could have been "done out of a big haul." Also he does not explain how or why, if there was a case against some man other than the appellant, the appellant should have been arrested and a false case preferred against him while the true culprit was let go. The reason for these Customs Officials coming forward is not far to seek. The Magistrate at once detected it and his opinion appears to be correct. They were disappointed that the Excise Officers should have made this capture and thus deprived the Customs Officers of a possible reward. We ascertained from Mr. Boyd that rewards are given in those cases, and that, while there is no fixed scale for rewards, the officers may reasonably expect to be rewarded, more or less, in proportion to the quantity of the opium or other article seized.

There is another witness to whom we should refer, *viz.*, the taxi-driver. It is to be regretted that the Inspector of Excise did not take the number of his taxi-cab;

but it does not appear that the witness Raham Ali was really the driver of the taxi which was at Prinsep's Ghat on that night. It would be very easy no doubt to get a taxi-driver to come forward and give evidence to this effect. He does not verify his statements in any way. So also the defence witness No. 7, Jadu Nandan Roy, Constable, who states that the accused was made over into his custody. It is an extraordinary thing, if he was there at that time and had the accused in his charge, that he made no report of the circumstance, nor is it shown that he was in point of fact on duty at Prinsep's Ghat. He states that he really was on duty that night at Baba Ghat, that he came to Prinsep's Ghat and there saw the Inspector Dinesh Chunder Sen Gupta and the others.

On the whole evidence, there can be no doubt that the conviction of the accused is correct, and, under the circumstances, the punishment does not appear to be too severe. The appeal is accordingly dismissed. The accused must surrender to his bail and serve out the remainder of his sentence.

SMITHER, J.—I agree that the appeal should be dismissed.

Appeal dismissed.

PATNA HIGH COURT

CRIMINAL REVISION No. 477 OF 1917.

February 26, 1918.

Present:—Mr. Justice Jwala Prasad.

MUSHARI RAM MANHARI—

PETITIONER

versus

RAJ KISHORE LAL AND OTHERS—

OPPOSITE-PARTY.

Criminal Procedure Code (Act V of 1898), ss. 202, 203, 204—Process, issue of, postponed—Reasons, recording of—Accused allowed to appear and cross-examine prosecution witnesses before issue of process, legality of—Procedure, error of, whether vitiates proceeding—Revision—High Court, power of.

It is imperative for a Magistrate to give reasons under section 202 of the Criminal Procedure Code before postponing the issue of process against the accused. [p. 288, col. 1.]

It is not right for a Court in a judicial enquiry before process has been issued against the accused to allow the latter to attend at the preliminary enquiry and cross-examine the prosecution witnesses. [p. 288, col. 1.]

An error of procedure does not vitiate a proceeding or an order passed therein, unless it occasion a failure of justice. [p. 288, col. 2.]

Criminal revision against an order of the Sessions Judge, Monghyr, dated the 12th November 1917, upholding that of the Deputy Magistrate, Purneah, dated the 31st August 1917.

Messrs. *Pugh* and *Sambhu Saran*, for the Petitioner.

The Government Advocate, for the Opposite Party.

JUDGMENT.—This is an application against the order of the Sessions Judge of Monghyr, dated the 12th November 1917, upholding an order of the Deputy Magistrate of that District, dated the 31st August 1917, dismissing the complaint of the petitioner under section 203, Criminal Procedure Code. The grounds urged in support of the petition are as follows :—

Firstly, that the Magistrate should not have postponed the issue of process against the accused and held the enquiry under section 202 of the Criminal Procedure Code without recording his reasons for distrusting the complaint of the petitioner.

Secondly, that the Magistrate acted illegally in allowing the accused to be present during the enquiry and to be represented by Counsel in order to examine the prosecution witnesses and also in examining defence witnesses. The complaint was lodged in the Court of the Magistrate in charge, Mr. A. Majid, on the 13th August 1917 and was made over to N. S. E. Hussain for disposal, with a suggestion that a local enquiry should be quickly made under Government Standing Order, as the complaint was against Police Officers. On the 14th August 1917, Mr. Hossain examined the complainant on oath and passed the following order :—"I will hold a local enquiry on the 16th instant. Send a copy of the complaint to the S. P. for the needful".

It is contended by the learned Government Advocate that this amounts to a recording of reasons for not issuing process against the accused, as the Magistrate thought in his mind that a local enquiry was necessary in order to satisfy himself as to the necessity of issuing any process. Reading the above order regarding the holding of the local enquiry in conjunction with the

order of the Magistrate in charge of the 13th August suggesting a local enquiry to be made, it appears to me that the Deputy Magistrate acted upon the suggestion offered to him and not because he distrusted the complaint of the petitioner. I do not think that in the circumstances of the case he exercised any judgment in the matter and held upon a consideration of the complaint and the statement made on oath by the petitioner that it was a case in which process against the accused ought not to issue. It was to my mind an automatic order made by him. This no doubt is a contravention of the requirements of section 202, which is imperative in requiring the Magistrate to give reasons before postponing the issue of process. The point is so well settled that I need hardly quote authorities in support of it.

The second point urged by the learned Counsel for the petitioner also appears to be well founded. It is not at all right for the Court that in a judicial enquiry, before a process has been issued against the accused under section 204, Criminal Procedure Code, the accused should be required to attend at a preliminary enquiry and to cross-examine the prosecution witnesses. So far as the accused is concerned, it is clear that it is unfair to call upon him to appear and to undergo the trouble and expense of conducting the case, unless the Magistrate had found upon the complaint in the enquiry made by him that there was a *prima facie* case and that he should be summoned as an accused in the case. And what is true as to the accused is also true so far as the complainant is concerned. It was pointed out in the case of *Emperor* v. *Bhika Hussein* (1) that there is no justification to call upon the accused to be present at a judicial enquiry under section 202. It was observed as follows :—" Now that would be as unfair to the complainant as the converse procedure would be to the accused." There can be no manner of doubt that the procedure adopted by the Magistrate was unwarranted by the Code. In this matter also it appears to me that the Magistrate was misled by the wrong interpretation of the meaning of the Government Circular regarding investigation into a complaint made against Police Officers of certain grades. I agree with what has been said in the ruling quoted above regarding the Government Circular at page 887 that it was never intended that the Circular was in any way to affect the procedure prescribed by the Code of Criminal Procedure. I, therefore, agree with the contention of the learned Counsel for the petitioner that the procedure adopted by the Magistrate was against the procedure prescribed by law.

The question then arises, whether it is a case in which this Court should interfere in revision and set aside the order of dismissal passed by the Magistrate and direct a fresh enquiry into the complaint of the petitioner. Both the errors complained of relate to the procedure adopted by the Magistrate in ordering and conducting the enquiry before him under section 202. It is a well-settled principle of law that errors of procedure would not vitiate the proceeding or order passed therein unless it has occasioned failure of justice. In the present case on behalf of the prosecution witnesses, numbering about 10, were examined by the Magistrate and no complaint has been made by the learned Counsel for the petitioner before me that any evidence on behalf of the prosecution was shut out. The learned Sessions Judge has carefully considered the evidence in the case and has written a lengthy judgment consisting of over three typed pages. He has also left out of consideration the evidence adduced by the defence in the case and on a consideration entirely of the evidence offered by the complainant has come to the conclusion that the complainant has failed to make out any case against the accused. The case has, therefore, been considered on merits and I do not think that the petitioner was in any way prejudiced on account of the errors referred to above. The principle enunciated in the case of *In the matter of Turibullah* (2) appears to me to apply to this case. None of the cases referred to on behalf of the petitioner shows that all the evidence on behalf of the prosecution was taken by the Magistrate and the case was disposed of on a full consideration of the evidence. I therefore, reject the application.

Rule discharged.

(1) 15 Ind. Cas. 484; 16 C. W. N. 885 at p. 888; 13 Cr. L. J. 484

(2) 4 C. L. R. 338.

SIVANARAYAN MUKHOPADHYA *v.* RASIK PATRA.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 2176 AND 2177 OF 1915.

May 30, 1917.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Walmsley.

SIVANARAYAN MUKHOPADHYA—PLAINTIFF—APPELLANT IN BOTH

versus

BHUTNATH GUCHAIT AND ANOTHER—DEFENDANTS—RESPONDENTS IN NO. 2176 OF 1915.

RASIK PATRA AND OTHERS—DEFENDANTS—RESPONDENTS IN NO. 2177 OF 1915.

Landlord and tenant—Custom, reasonableness of—Custom of remission of entire rent on inundated lands, validity of.

A custom set up by a tenant that the entire rent in respect of a certain quality of land must be remitted when the lands are inundated, irrespective of the extent of the flood or its destructive effect on the crops, is vague and unreasonable and therefore cannot be valid according to law. [p 290, cols. 1 & 2.]

Where the validity of a custom is challenged on the ground that it is against reason, the reason referred to is not to be understood as meaning every unlearned man's reason but artificial and legal reason warranted by authority of law. Consequently when it is said that a custom is void because it is "unreasonable," what is meant is that the unreasonable character of the alleged custom conclusively proves that the usage, even though it may have existed from time immemorial, must have resulted from accident or indulgence and not from any right conferred in ancient times. [p. 290, col. 1.]

A custom which is prejudicial to a class and is beneficial only to a particular individual is repugnant to the law of reason.[p. 290, col 1.]

The test applied is whether the custom alleged to exist could have a lawful commencement. [p. 290, col. 1.]

Appeals against the decrees of the District Judge, Hooghly, dated the 15th June 1915, affirming those of the Munsif, 2nd Court, Hooghly, dated the 27th March 1914.

Sir *Rash Behari Ghose*, Babus *Dwarka Nath Chakraharty*, *Surendra Nath Roy*, *Surendra Chandra Sen*, *Biraj Mohan Mazumdar* and *Satyendra Nath Roy*, for the Appellant.

Babus *Bepin Behari Ghose* and *Krishna Kamal Maitra*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiff in a suit for recovery of arrears of rent. The case for the plaintiff is that rent is payable at the rate of Rs. 77-10-0 per annum for the disputed holding, which comprises 25 *bighas* 18 *cottahs* and 2 *chhataks* of land. The defendants allege that the area comprises two classes of land, namely, 3 *cottahs* and 7 *chhataks* of *nihaja* lands, for which a rent of Re. 1 is payable and 25 *bighas* 14 *cottahs* and 11 *chhataks* of *hajabad* lands, for which a rent of Rs. 76-10-0 is payable. It is thus clear that there is no dispute between the parties either as to the area or the annual rent payable in respect thereof. The defendants, however, set up a customary right to abatement of rent on account of the *hajabad* lands. They assert that the *nihaja* lands are free from inundation and are always subject to payment of rent, while the *hajabad* lands are liable to inundation and are exempt from payment of rent when the crops thereon are destroyed by inundation. They allege that this custom has prevailed in the estate of the plaintiff as also in adjacent estates from time immemorial and from generation to generation. The custom is formulated in the following terms in the written statement: "In the years of inundations, the Zemindar never gets rent on account of the *hajabad* portions, nor do the tenants pay them; in the years of inundations, the tenants only pay rents for the *nihaja* portions." The defendants assert that, during one of the four years for which rent is claimed, there was inundation and they are entitled to reduction of rent, not as a matter of favour but on the basis of customary right. On these pleadings, the point arose for determination, "whether there is any custom in Mauza Kumdhara (where the defendants' lands are situate) of remitting rent in the years in which there is *haja* or inundation." The Courts below have found on this question in favour of defendants and have partially decreed the claim accordingly. On the present appeal, the decision of the District Judge has been assailed on the ground that the custom alleged is unreasonable and uncertain and that there is no evidence to show that it is compulsory on the landlord to allow abatement of rent on account of inundation.

It has not been disputed before us on behalf of the tenants that the alleged custom, in order that it may be deemed valid in law, must be proved to be reasonable and certain

DANBY v. TAFAZUL HUSSAIN.

[*Tyson* v. *Smith* (1) and *Mahamaya Debi* v. *Haridas Haldar* (2)]. The landlord-appellant urges that the custom is unreasonable. As explained in the second of the two cases just mentioned, if the validity of a custom is challenged on the ground that it is against reason, the reason referred to is not to be understood as meaning every unlearned man's reason, but artifical and legal reason warranted by authority of law. Consequently, when it is said that "a custom is void because it is unreasonable," what is meant is that the unreasonable character of the alleged custom conclusively proves that the usage, even though it may have existed from time immemorial, must have resulted from accident or indulgence and not from any right conferred in ancient times [*Salisbury* v. *Gladstone* (3)]. It is obvious that a custom which is prejudicial to a class and is beneficial only to a particular individual is repugnant to the law of reason. On this principle, it has been ruled that a custom in a manor that the commoner cannot turn in his cattle until the lord has put in his own, is bad, for it is injurious to the multitude and beneficial only to the lord [*Tanistry's case* (4)]. Similarly, it is no good custom that the lord of the manor shall detain a distress taken upon the demesne till a fine at his will is paid for the damage. Various other instances of customs between landlords and tenants, which have been considered unreasonable and consequently unenforceable in law, will be found collected in Viner's Abridgment (Volume VII, pages 180-185, Customs E. G.). The test applied is whether the custom would have a lawful commencement. Now, in the case before us, the custom pleaded is that the rent must be abated when the lands are inundated; in other words, the entire rent for the *hajabad* lands must be remitted, irrespective of the extent of the destructive effect of the inundation on the crops. The alleged custom is obviously unreasonable. It is also uncertain, if the landlord is bound to grant a remission without reference to the actual effect of the flood on the holding. The custom pleaded is thus of a very vague character, and, read literally, would lead to this ridiculous and unreasonable result that the entire rent for what is called the *hajabad* lands must be suspended irrespective of the extent of the flood or its actual destructive effect. We are of opinion that the alleged custom does not afford a valid defence to the claim.

The result is that this appeal must be allowed and the suit decreed with costs in all the Courts. This judgment will govern the other appeal in which a similar order will be drawn up.

Appeals allowed.

(1) (1838) 9 Ad. & El. 406; 1 P. & D 307; 1 W. W. & H. 749; 112 E. R. 1265; 48 R. R. 539.

(2) 27 Ind. Cas. 400; 42 C. 455; 19 C. W. N. 208; 20 C. L. J. 183.

(3) (1861) 9 H. L. C. 692 at p. 701; 34 L. J. C. P. 222; 8 Jur. (N. S.) 625; 4 L T. 849; 9 W. R. 930; 11 E. R. 900; 131 R. R. 403.

(4) (1674) Davis 29; 80 E. R. 516.

PATNA HIGH COURT.

PRIVY COUNCIL APPEAL No. 6 OF 1916.

December 13, 1916.

Present:—Sir Edward Chamier, KT., Chief Justice, and Mr. Justice Sharfuddin.

G P. DANBY AND OTHERS—

DEFENDANTS—APPELLANTS

versus

Syad Shah TAFAZUL HUSSAIN—

PLAINTIFF - RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 109, O. XLI, r. 23—Decree reversed on preliminary point—Remand for re-trial on merits, whether "final order"—Leave to appeal to Privy Council.

An order of the High Court, setting aside a decision of the lower Court that the trial of the suit is barred by *res judicata* and remanding the suit for re-trial on the merits, is an ordinary order of remand which does not decide any of the questions between the parties, except that the suit is not barred by the rule of *res judicata*, and is not a "final order" within the meaning of section 109 of the Civil Procedure Code in respect of which leave to appeal to the Privy Council can be granted. [p. 292, col. 1.]

Saiyid Muzhar Hossein v *Musammat Bodha Bibi*, 17 A. 412; 5 M L. J. 20, 22 I. A. 1; 6 Sar. P. C. J. 550; 8 Ind. Dec (N. S.) 397, *Habibun-ni-ssa* v. *Munwar-un-nissa*, 25 A. 629; A. W. N. (1903) 159, relied upon.

Rahimbhoy Habbibhoy v. *Turner*, 15 B. 155; 18 I. A. 6; 15 Ind. Jur. 35; 5 Sar. P. C. J. 639; 8 Ind. Dec. (N S.) 101; *Ananda Gopal Gossain* v. *Nafar Chandra Pal Chowdhry*, 35 C. 618; 13 C. W. N. 545; 8 C. L. J. 168, distinguished.

Application under Order XLV, rule 2, for leave to appeal to His Majesty in Council against the judgment and decree in First Appeal No. 78 of 1914, passed by

DANBY v. TAFAZUL HUSSAIN.

Roe and Jwala Prasad, JJ., dated the 10th July 1916 reported as 36 Ind.Cas. 650.

Mr. *Pugh* (with him Mr. *Abani Bhusan Mukerjee*), for the Appellants.

Mr. *P. R. Das* (with him Mr. *Chander Shekhar Banerjee*), for the Respondent.

JUDGMENT.

CHAMIER, C. J.—This is an application by some of the defendants in the suit for leave to appeal to His Majesty in Council against an order of this Court setting aside the decision of the Subordinate Judge that the trial of the suit was barred by the rule of *res judicata* and remanding the suit for re trial on the merits. The plaintiff in the present suit, Syed Tafazul Hussain, was a party defendant to a previous suit brought upon a mortgage. It appears that he was made a party to that suit because he set up a deed of gift in respect of the village. His case was that the mortgagor had no right to mortgage the village in question. In the opinion of the learned Judges who decided the appeal to this Court the question of the title of the plaintiff to the village in suit was not decided by the Court which tried the mortgage suit. It is contended that the order of remand passed by this Court is a final order within the meaning of section 109 of the Code of Civil Procedure. The question what is and what is not a final order within the meaning of this section or the corresponding section of the Code of Civil Procedure, 1882, has been considered in several cases. The first case to which I need refer is that of *Saiyid Muzhar Hossain* v. *Musammat Bodha Bibi* (1). The case of the plaintiff there was that one Ibn Ali had by his Will given the property in suit to certain persons who had conveyed it to the plaintiff. Several defences were put forward. One was of a preliminary nature, namely, that there was a misjoinder, and that was overruled. The next defence went to the foundation of the plaintiff's claim, being a denial that Ibn Ali made any valid gift to the persons through whom the plaintiff claimed. The Subordinate Judge took evidence and heard the case. He decided against the plaintiff on the question of Ibn Ali's Will and that made it unnecessary for him to decide the other issues. The plaintiff appealed and the High Court decided that Ibn Ali had made a valid gift, and they remanded the case under section 562 of the Code of Civil Procedure, 1862, to be disposed of on the other issues according to law. The defendant applied to the High Court for leave to appeal but leave was refused on the ground that the order was not final. On an application for special leave to appeal, their Lordships of the Privy Council held that leave ought to have been given. They pointed out that all the questions in the suit except that of the Will of Ibn Ali were of a subordinate character and with reference to a statement in the High Court's order that it was the established practice of the Court to treat such orders of remand as not being final, their Lordships said: "Probably the practice referred to is quite correct. But then the remand contemplated by section 562 is one made in a case where the first Court has disposed of the suit on a preliminary point so as to exclude evidence of essential facts. That is not the present case. The only preliminary point was the misjoinder. To establish the Will of Ibn Ali was the first step in the plaintiff's case and on her failing in that, her whole suit failed."

In the case of *Habib-un-nissa* v. *Munawar-un-nissa* (2) the first Court had dismissed the plaintiff's suit on the ground of limitation. On appeal the High Court held that the suit was within time and remanded the suit for retrial under section 562 of the Code of Civil Procedure. After referring to the case of *Saiyid Muzhar Hossein* v. *Musammat Bodha Bibi* (1), their Lordships refused to give leave to appeal, saying that the appellate order of the High Court reversing the decree of the Court of first instance on the question of limitation left the parties open to contest their rights and claims on every other point. What was said in that case appears to me to apply forcibly to the present case. The order of remand passed by this Court leaves it open to the parties to contest their rights and claims on every point in the case. The applicant has relied upon two cases. The first is that of *Rahimbhoy Habibbhoy* v. *Turner* (3), in which a Court had passed a decree directing the taking of accounts against the defendant. Their Lordships held that the defendant was entitled to appeal. They said: "It is true that the decree that was made

(1) 17 A. 112; 5 M. L. J. 20; 22 I. A. 1; 6 Sar. P. C. J. 550; 8 Ind. Dec. (N. S.) 397.

(2) 25 A. 629; A. W. N. (1903) 159.

(3) 15 B. 155; 18 I. A. 6; 15 Ind. Jur. 35 5 Sar. P. C. J. 639; 8 Ind. Dec. (N. S.) 104

does not declare in terms the liability of the defendant, but it directs accounts to be taken which he was contending ought not to be taken at all, and it must be held that the decree contains within itself an assertion that, if a balance is found against the defendant on those accounts, the defendant is bound to pay it. Therefore the form of the decree is exactly as if it affirmed the liability of the defendant to pay something on each of these claims if only the arithmetical result of the account should be worked out against him." That case is obviously distinguishable from the present case. The second case relied upon by the applicant is that of *Ananda Gopal Gossain* v. *Nafar Chandra Pal Chowdhry* (4). In that case the plaintiffs in the suit had purchased a *patni mahal* sold for its own arrears with power to annul all encumbrances and they brought a suit apparently to establish their right to hold the property free of a *dar-patni* right set up by some of the defendants. The Subordinate Judge dismissed the suit, holding that the plaintiffs had failed to prove the service of notices in the manner required by section 167 of the Bengal Tenancy Act. On appeal the High Court held that the service of notices in the manner required by the Act had been proved and they remanded the cases for trial on the merits. The defendant applied for leave to appeal and the High Court allowed the application, saying that the cardinal point in the suit was whether the notices had been properly served. That case is also clearly distinguishable from the present case, for in that case the decision of the question of the service of the notices, practically speaking, put an end to the case. In the present case we have an ordinary order of remand which does not decide any of the questions in dispute between the parties except that the suit is not barred by the rule of *res judicata*. It appears to me that if we were to give leave to appeal in the present case, we should have to give leave to appeal in every case in which this Court reverses the decision of a Subordinate Judge on a preliminary point and remands the case for trial on the mertis. I would dismiss this application with c[illegible] Hearing fee three gold *mohurs*.

SHARFUDDIN, J.—I agree.

Application refused.

(4) 35 C. 618; 12 C. W. N. 545; 8 C. L. J. 168.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 2 OF 1916.

January 16, 1918.

Present:—Mr. Stuart, A. J. C., and Pandit Kanhaiya Lal, A. J. C.

Mahant BASDEO BAN—PLAINTIFF—APPELLANT

versus

RAM SARAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Trust—Dedication, proof of—Trustee, power of, to transfer trust property—Hindu Law—Temple property—Mahant, *alienation by—Limitation Act (IX of* 1908*), Sch. I, Art.* 134*—Alienation of* asthan *property by* mahant*—Suit by succeeding* mahant*—Limitation.*

Where there was no clear proof of dedication in regard to a village, but it was found that for more than 200 years the village had been incorporated with a particular *asthan*, had been held by its *mahant* from time to time and had been treated as a part of the *asthan* property:

Held, that under these circumstances a dedication either by the *mahant* to whom the village had originally been granted or by one of the persons who succeeded him might be presumed. [p. 293, col. 2.]

Where a tenure is in the nature of a trust for a charitable purpose, the trustee has no right to transfer the same except for legal necessity. [p. 293, col. 2, p. 294, col. 1.]

Article 134, Schedule I, of the Limitation Act governs a suit instituted by a succeeding *mahant* of an *asthan* for possession of property appertaining to the *asthan* by setting aside an alienation for valuable consideration made by the preceding *mahant* in respect of that property. If such a suit is brought beyond 12 years from the date of such an alienation, it is barred by time to the extent of the interest which the alienation purports to convey, inasmuch as each succeeding *mahant* does not get a fresh start of limitation on the ground of his not deriving title from any previous *mahant*. [p. 294, col. 1.]

Appeal from the decree of the Subordinate Judge, Gonda, dated the 8th December 1915.

Mr. *St. George Jackson*, Babus *Ram Chandra* and *Sarju Prasad Bhatnagar*, for the Appellant.

Babu *Bisheshwar Nath Srivastava*, for the Respondents.

JUDGMENT.—The dispute in this case relates to the village Beniban, otherwise known as Benipur, which was founded by an ascetic named Beni Ban sometime in 1670 A. D. The village was granted to Beni Ban by the Emperor Aurangzeb. Beni Ban cleared the jungle and populated a hamlet there, to which he gave his name. Beni Ban died apparently without leaving any disciple and the village come into the possession of the holder for the time being of the parent *asthan* at Srinagar, district

Gonda, which was founded by Sahaj Ban, the preceptor of Beni Ban. Upon the restoration of British rule after the Mutiny Drigraj Ban, a successor of Sahaj Ban, was found in possession of the property appertaining to the Srinagar *asthan*, including the village Beniban.

On the 27th July 1862 a *sanad* was granted to him in regard to the village Beniban, maintaining the *muafi* tenure for his life (Exhibit A-1). In 1864 owing to the death of Drigraj Ban the *muafi* was resumed, and the village was settled with Narindra Ban, his disciple and successor. Narindra Ban appears to have died soon after and was succeeded by his disciple Nageshwar Ban. On the 27th January 1873 the Settlement Court decreed the village in favour of the heirs of Narindra Ban (Exhibit A-2). In pursuance of that decree, Nageshwar Ban was in possession of the village and mortgaged it with possession for Rs. 1,000 in favour of Ghirrau Misra, the predecessor-in-title of the defendants-respondents, on the 30th June 1883 (Exhibit A-4). On the 23rd May 1892 his disciple and successor Narbadeshwar Ban mortgaged the same with possession in favour of Ghirrau Misra in lieu of Rs. 2,000, half of which went to pay the prior mortgage effected by Nageshwar Ban (Exhibit A-3).

On the 29th May 1898 he took a fresh loan of Rs. 1,000 from Ghirrau Misra and executed a mortgage in his favour for Rs. 3,000, out of which Rs. 2 000 went to satisfy his previous mortgage (Exhibit A-5). He gave possession of the village in lieu of Rs. 2,000 and agreed to pay the balance with interest at 12-annas per cent. per mensem. The mortgage was effected for a period of 51 years and one of the conditions in the mortgage-deed was that if the mortgagor failed to pay interest on Rs. 1,000 every three years, he shall be liable to pay compound interest thereon at the same rate and the mortgagee shall be entitled to recover the said money with compound interest due to him from the property mortgaged at any time he liked.

The plaintiff is the disciple and successor of Narbadeshwar Ban. His allegation is that the property mortgaged appertained to the *asthan* at Srinagar and was endowed for the expense of the *asthan* and other charitable purposes, that the *mahant* had no right to mortgage the same, and that on his death in 1904 the plaintiff became entitled to the possession of the said property.

The defendants denied that the property in suit appertained to the *asthan* at Srinagar or was endowed for its use. They pleaded that they and their predecessor-in-interest, Ghirrau Misra, had been in possession of the said property since 1883 and that the debts in question were contracted for legal necessity and were in any event binding on the plaintiff. The learned Subordinate Judge dismissed the claim, holding that it was barred by Article 134 of the Indian Limitation Act.

It is not clear from the *wajib-ul-arz* of the village Beniban (Exhibit 1) whether the said village was granted to Beni Ban for religious or charitable purposes. In the *wajib-ul arz* of the village Srinagar (Exhibit 4) there is similarly no mention that the village was given to Sahaj Ban for religious or charitable purposes; but from the statements made at the time of the summary settlement by Drigraj Ban (Exhibit 6) and the report and the statement of the Qanungo then made (Exhibits 5 and A-21) there can be no doubt that the property appertained to the *asthan* at Srinagar and was intended for the feeding of *fuqirs* and the distribution of charity (*waste khairat sadabart faqiran*). There is no clear proof of a dedication in regard to the village Beniban, but from the fact that from more than 200 years the village has been incorporated with the *asthan* at Srinagar and held by its *mahant* from time to time and treated as a part of the *asthan* property, a dedication either by Beni Ban or by one of the persons who succeeded him may be presumed. The *sanad* granted to Drigraj Ban merely maintained the *muafi* tenure for his life. It did not give him greater rights than the nature of the tenure held by him permitted. In other words, the *sanad* left the tenure intact, and if the tenure was in the nature of a trust for a charitable purpose, *Mahant* Narbadeshwar Ban, who succeeded to the tenure, had, as pointed out in *Dhar* v. *Dharam Das* (1) and *Murugesam Pillai* v. *Gnana Sambanda*

(1) 3 Ind. Cas. 549; 12 O. C. 236.

Pandara Sannadhi (2), no right to mortgage the same except for legal necessity.

The plaintiff ought, however, to have sued to contest the mortgage within the period allowed by Article 134 of the Indian Limitation Act. It is true, said their Lordships of the Judicial Committee in *Prosunno Kumari Debya* v. *Golab Chand Baboo* (3), that the idol can hold property only in an ideal sense and that its acts relating to any property must be done by or through a manager or *sebait*. But it does not follow that each succeeding manager gets a fresh start as far as the question of limitation is concerned, upon the ground of his not deriving a title from any previous manager. The succeeding *sebaits*, as pointed out in *Nilmony Singh* v. *Jagabandhu Roy* (4), form "a continuing representation of the idol's property". The same may be said in regard to the property held by a trustee, and a suit brought beyond 12 years from the date of the alienation for valuable consideration by a trustee may be barred by time to the extent of the interest which the alienation purports to convey.

No question of fraud arises in this case, for the mortgagee has been in possession since 1883. In *Dattagiri* v. *Dattatraya* (5) and *Behari Lal* v. *Muhammad Muttaki* (6) it was held in somewhat similar circumstances that the claim to set aside a sale or mortgage effected by a trustee and to recover possession of the property sold or mortgaged was barred, if not brought within 12 years from the date of the alienation.

The mortgagor had under the *sanad* either an absolute interest or the interest of a trustee under the tenure, which the *sanad* confirmed. He did not, in any case, hold an estate for life. The subsistence of the mortgage cannot, therefore, be impeached on that ground. In *Muthusamier* v. *Sree Sree Methanithi Swamiyar Avergal* (7) a lease effected by the head of a *math* was held to subsist only for the lifetime of the lessor, but as pointed out in *Abhiram Goswami* v. *Shyama Charan Nandi* (8) and *Ishwar Shyam Chand Jiu* v. *Ram Kanai Ghose* (9) a lease may not amount to an alienation of the corpus of the estate and the position of a mortgagee in possession is not quite analogous.

The learned Counsel for the plaintiff suggests that his client might be allowed to redeem the mortgage in derogation of the term of 51 years fixed for redemption. No claim for redemption was, however, laid in the plaint and it is not consequently necessary to determine whether the term of 51 years operated as a clog on the equity of redemption or not.

The appeal is, therefore, dismissed with costs.

Appeal dismissed.

(2) 39 Ind. Cas. 659; 44 I. A. 98; 32 M. L. J. 369; 15 A. L. J. 281; 21 M. L. T. 288; 1 P. L. W. 457; 5 L. W. 759; 21 C. W. N. 761; 40 M. 402; 19 Bom. L. R. 456; 25 C. L. J. 589; (1917) M. W. N. 487 (P. C.).

(3) 2 I. A. 145; 14 B. L. R. 450; 3 Sar. P. C. J. 449; 23 W. R. 253; 3 Suth. P. C. J. 10[illegible] C.).

(4) 23 C. 536; 12 Ind. Dec. (N[illegible]357.

(5) 27 B. 36[illegible]; 4 Bom L. R. 743.

(6) 20 A. 482; A. W. N. (1898) 123; 9 Ind. Dec. (N. S.) 669.

(7) 19 Ind. Cas. 694; 38 M. 356; 13 M. L. T. 498; (1913) M. W. N. 581; 25 M. L. J. 393.

(8) 4 Ind. Cas 449; 36 C. 1002; 14 C. W. N. 1; 11 Bom. L. R. 1234; 6 A. L. J. 857; 19 M. L. J. 830; 0 C. L. J. 284; 36 I. A. 148 (P. C.).

(9) 10 Ind. Cas. 783; 38 C. 526; 15 C. W. N. 417; 9 M. L. T. 448; 8 A. L. J. 528; 13 Bom. L. R. 421; 14 C. L. J. 238; (1911) 2 M. W. N. 281 (P. C.); 21 M. L. J. 1145; 38 I. A. 76.

PATNA HIGH COURT.

LETTERS PATENT APPEAL No. 113 OF 1917.

March 20, 1918.

Present:—Sir Dawson Miller, Kt., Chief Justice, and Mr. Justice Mullick.

SRIKISHUN PRASAD PANJIAR—

APPELLANT

versus

Musammat JEOHASI KUER—

RESPONDENT.

Bengal Tenancy Act (VIII B. C. *of* 1885), *ss* 88, 188 — *Division of holding—Recognition of division by landlord—Rent receipt given by gumashta, whether binding on landlord—Burden of proof—'Express consent in writing', meaning of—Contract of division between co-sharer and tenant, whether binding on entire body of landlords—Distribution of rent, recognition of—Estoppel.*

The mere acknowledgment of receipt of rent less than the total *jama*, without any indication that it is in respect of a portion only of the holding, cannot constitute a consent to a division of the holding within the meaning of section 88 of the Bengal Tenancy Act even when continued over a number of years; but if it should clearly appear on the face

of the receipt itself that the rent is paid in respect of a particular portion only of the holding this may be sufficient acknowledgment to bind the landlord. [p. 297, col. 1.]

Where a landlord repudiates the authority of a *gomashta* to give a receipt which recognises the sub-division of a tenure or holding, the onus of proof is ordinarily upon the landlord inasmuch as the relations between himself and his servant are a matter peculiarly within his knowledge under section 106 of the Evidence Act. [p. 298, col. 1.]

The "express consent in writing" required by section 88 of the Bengal Tenancy Act may be given by means of a rent receipt, and in each case the adequacy of the consent must be gathered from all the circumstances. A reciept showing the area of the transferred portion and the rent paid therefor should be sufficient to constitute express consent within the meaning of the section. [p. 298, col. 2; p. 299, col. 1.]

Section 88 of the Bengal Tenancy Act refers to a sole landlord or the entire body of joint landlords where there are more landlords than one. A division which does not bind the whole body of landlords does not come within the scope of the section. [p. 299, col. 1.]

There is no provision in the Bengal Tenancy Act which requires a landlord to recognize a distribution of rent. The landlord is authorised to do so, but the authority is derived not from the Act but under the general law as an incident to the ownership of property. [p. 299, col. 2.]

Letters Patent Appeal from a decision of Mr. Justice Chapman upholding the decree of the Sub-ordinate Judge, Chapra, dated the 21st December 1915, upholding that of the Munsif, 3rd Court, Chapra, dated the 26th May 1915.

Mr. *Nirsu Narain Singh*, for the Appellant.

JUDGMENT.

MILLER, C. J.—The plaintiff, who is a co-sharer *malik* of Mauza Chak Sobhi *alias* Babhanjawan, instituted a rent suit against the defendant as tenant in respect of a holding said to comprise 5 *bighas* 1 *cottah* 13 *dhurs* for the years 1318 to 1321 F. S. The plaintiff's collection was separate from the other co-sharers and he claimed as his share the annual sum of Rs. 13 3 3 out of a total *jama* of Rs 20-5 0. In addition to the 4 years' rent amounting to Rs. 52-13-0 he also claimed Rs. 13-3-3 on account of damages and interest until realisation.

The defendant, who is the widow of Deo Narain Singh, contended that the total rental according to the survey *khatian* was not Rs. 20-5 0 but Rs. 19 1-3 and further that her late husband Deo Narain, who was the original holder, sold a part of the holding to Uma Singh whose proportion of the total rent amounted to Rs. 10-4-0, leaving a balance of Rs. 8-13-3 payable for the part retained by Deo Narain. At the trial before the Munsif the survey *khatian* was accepted as showing the total rental and it was proved by a co-sharer *malik* with the plaintiff and by Sheonandan Raut, who acquired Oma Singh's interest, that the holding had been split up and that Uma Singh or his successors had in fact been paying Rs. 10-4-0 annually in respect of their portion of the holding, and the only question was whether this distribution of the rent was binding on the landlord. The Munsif found that it was and ordered that the plaintiff should recover his proportion of the Rs. 8-13-3 payable in respect of that part of the holding which had not been transferred together with proportionate costs and damages. The Subordinate Judge in a somewhat perfunctory judgment upheld this decision and on appeal to a single Judge of this Court the case was remanded for the Subordinate Judge to determine the question whether the division of the holding had been made with "the express consent in writing" of the landlords or their authorised agent within section 88 of the Bengal Tenancy Act. The learned Subordinate Judge on remand dealt with the evidence and came to the conclusion that the section had been complied with. The learned Judge of this Court who remanded the case upheld that view, holding that there was sufficient evidence to support the finding. The plaintiff being dissatisfied with that decision now brings this Letters Patent Appeal and contends that the evidence was not sufficient to warrant the finding that "the express consent in writing" of the landlord had been obtained. Before 1907 the section in question did not contain the word "express" before the words "consent in writing", nor did it contain the words which follow after the words "consent in writing", and the question we have to determine is whether the evidence is sufficient to prove that the division of the holding or the distribution of the rent payable in respect thereof was made with "the express consent in writing" of the landlord or his duly authorised agent in that behalf. It was conclusively proved that the holding had been split up, as contended for by the defendant, and that for several years the landlords had been in the habit of collecting the rent payable for the transferred portion from Uma

Singh and subsequently from his successors-in-title, and further the survey *khatian* shewed two *khatas* one in the name of Deo Narain and the other in the name of Uma Singh but the *jama* of Rs. 19-1-3 was not apportioned in the survey records. Rent receipts in respect to the portion of the rent then payable by Uma Singh were produced for the years 1309, 1313, 1314, 1315 and 1319 F. S. They shew an annual rent of Rs. 10-4-0 payable by Uma Singh and subsequently by his successors and Uma Singh is described in the first one as vendee. The first one is signed by Hardeo Panjiar, the plaintiff's father, as well as by Ramasis Pandey his agent. The others are signed by Ramasis only. They further shew that the holding of Uma Singh was 3 *bighas* 1 *cottah* 12 *dhurs*, which is a portion only of the total holding of 5 *bighas* 1 *cottah* 13 *dhurs*. They also shew that the plaintiff's share of the Rs. 10-4-0 rent was Rs. 6-10-4, the balance Rs. 3-9-8 being that of his co-sharers. The receipt for the year 1319 is for one of the years in respect to which the rent in this suit is claimed. Moreover, this receipt acknowledges payment of a further sum of Rs. 6-10-4 as arrears presumably for the year 1318. It would appear, therefore, that in regard to the first two years for which rent is claimed in this suit the plaintiff has already received payment for Uma Singh's portion and on this ground alone he ought not to be allowed to recover it a second time from the present defendant. No evidence was called by the plaintiff to rebut the presumption that arises from the rent receipts and I think it may legitimately be inferred from the receipt of 1319 that the arrears therein acknowledged were for the previous years. This, in my opinion, disposes of the plaintiff's claim for the first two years so far as Uma Singh's portion of the rent is concerned. As to the rest of the claim it remains to consider whether compliance with the section has been sufficiently proved.

A controversy leading to some difference of opinion as to whether rent receipts could in any case constitute "the consent in writing" prescribed by the section was finally set at rest by the decision of the Calcutta High Court in *Pyari Mohun Mukhopadhya* v. *Gopal Paik* (1). The rent receipts in that case were granted by the landlord's *gomashta* and contained a recital that the defendant's name was registered in the landlord's *sherista* as tenant of a portion only of the original holding at a rent less than the original rent. It was held that this fulfilled the requirements of the section as then existing. In 1904 the case of *Jnaendra Mohan Chowdhry* v. *Gopal Das Chowdhry* (2) came before the Calcutta High Court. In that case the rent receipts contained nothing beyond an acknowledgment of the receipt of a certain sum from the defendant as rent of a certain *taluq*. There was nothing to show that the rent was paid in respect of a portion only of the holding or that the defendant's name had been registered in the landlord's *sherista* as tenant of a divided portion. In fact the receipt showed nothing from which any inference could be drawn as to the division of the original holding or the landlord's consent. The Court held that such a receipt could not be taken as a fulfilment of the conditions of the section. It was laid down that payment by the tenant and receipt by the landlord of a portion of the original rent even extending over a number of years could not in itself afford evidence of the written consent of the landlord to a division of the holding, so as to substitute a new contract in place of the old. The facts of those two cases are separated by a wide gulf. In the first case the facts were clearly sufficient to show a written consent by or on behalf of the landlord; in the second they were just as clearly insufficient for that purpose. The case now under consideration comes midway between the two, and bears more resemblance to the later case of *Abinash Chandra Chowdhury* v. *Purnananda Khan* (3) decided by the High Court at Calcutta in 1913. In that case several tenants were sued jointly for the rent of a *putni* tenure. They objected that the suit was not maintainable against them jointly on the ground that the original rent had been apportioned to each of them in separate shares. They produced rent receipts granted to the tenants separately, which shewed the total rent and the portion allotted to each for their respective shares. The Court found on this evidence that there

(1) 25 C. 531; 2 C. W. N. 375; 13 Ind. Dec. (N. s.) [illegible]

(2) 31 C. 1026; 8 C. W. N. 923.

(3) 21 Ind. Cas. 420; 18 C. L. J. 174.

had been a sub-division of the tenure and a distribution of the rent consented to by the landlord. That case was decided after the amendment of the Bengal Tenancy Act in 1907 and once it is conceded that the granting of a rent receipt by the landlord or his agent may amount to "express consent" within the meaning of the section, it is only a question of determining what are the elements necessary to constitute such consent. It seems to me that the principle underlying these cases is that the mere acknowledgment of receipt of rent less than the total *jama*, without any indication that it is in respect of a portion only of the holding, cannot constitute a consent to a division of the holding even when continued over a number of years; but if it should clearly appear on the face of the receipt itself that the rent is paid in respect of a particular portion only of the holding, this may be a sufficient acknowledgment to bind the landlord. The present case is very near the line and although the conclusion to which I have come has been arrived at with some hesitation, I think on the whole the finding of the learned Subordinate Judge was justified by the proved facts of the case. The present receipts clearly show that Uma Singh's proportion of rent was paid in respect of a named area which was less than the total area of the holding, and the first in point of date which was signed by the landlord as well as by the agent described Uma Singh as vendee. This seems to me to amount to an acknowledgment in writing that the holding had been divided and a proportionate rent allotted to Uma Singh. The plaintiff's co-sharer Dhurendhar also supported the defendant's case and the fact that the plaintiff was endeavouring to recover from the defendant rent clearly proved to have been already collected from Uma Singh's successors, although perhaps not a material factor in determining the question under consideration, is one which leads me to believe that the present decision will not work an injustice on the landlord. In arriving at this decision I would point out that there is no intention of disagreeing in any way with the judgment of this Court in the recent case of *Wyatt* v. *Sheo Gobind Sahu* (4). The facts of that case bear no resemblance to the facts of the present case. It was there admitted that the transfer was a *benami* transaction and that all along the transferor was treated as the tenant of the land. The remarks as to the authority of the landlord's *patwari* in that case could have no application to the present where the landlord himself was a signatory to one at least of the rent receipts. It was contended that section 188 of the Bengal Tenancy Act rendered the consent of one co-sharer landlord nugatory, unless it were proved that he was authorised by the remaining landlords to act on their behalf. It is difficult to see how section 188 can have any application to a case like the present where the landlords have separate collection of their share of rent; but however that may be, the evidence of Dhurendhar was enough to show that the act of the plaintiff or his predecessor was authorised by the other co-sharer. In my opinion, this appeal should be dismissed. It has been brought to our notice that the decree of the first Court does not carry out the directions contained in the Munsif's judgment. If that is so, we have power under Order XLI, rule 33, to set it right. The decree will, therefore, be modified and in lieu thereof it will be decreed that the plaintiff do recover from the defendant a sum equal to the plaintiff's share, *viz.*, thirteen-twentieths of Rs. 8-13-3 for the four years in question together with $12\frac{1}{2}$ per cent. per annum interest to date of suit and 6 per cent. thereafter until realisation. There will be no modification of the orders for costs in the lower Courts and save as above mentioned this appeal will be dismissed without costs, the respondent not having appeared.

MULLICK, J.—I agree with the judgment which has just been delivered. I desire only to add a few observations on the matter urged before us.

The learned Vakil who appears on behalf of the plaintiff-appellant before us contends in the first place that the rent receipts upon which the learned Munsif and the Subordinate Judge and the learned Judge of this Court found that a division of the holding had taken place were not binding upon him.

Now it is found as a fact that one of these receipts Exhibit A-1, dated the 7th

(4) 36 Ind Cas. 777; 1 P. L. J. 414; 3 P. L. W. 88.

SRIKISHUN PRASAD v. JEOHASI KUER.

Sraban 1309 F. S., was signed by the plaintiff's father and by his *gomashta* Ram Asis and was given to Uma Singh's brother while four other receipts for the years 1313, 1314, 1315 and 1319 F. S. were signed by the *gomashta* only and were given to Uma Singh or his co sharers. All these receipts, if believed, would tend to show that the plaintiff agreed to recognise the transfer of an area of 3 *bighas* 1 *cottah* 12 *dhurs* at a rental of Rs. 10-4-0 inclusive of cesses. The finding of fact as to the signatures is conclusive, but the plaintiff contends in regard to the receipts given by the *gomashta* that the servant in question had no authority to recognise any sub-division of the tenancy and that the defendant has not discharged the burden which rests on him to prove such authority.

Now the case of *Sudaman* v. *Bebari Mahton* (5) is clear authority for the proposition that where a landlord repudiates the authority of a *gomashta* to give a receipt which recognises the sub-division of a tenure or holding, the onus of proof is ordinarily upon the landlord inasmuch as the relations between himself and his servant are a matter peculiarly within his knowledge under section 106 of the Indian Evidence Act.

The learned Vakil for the appellant, however, relies upon the case of *Wyatt* v. *Sheo Gobind Sahu* (4), in which there are observations to the effect that if a *patwari* gives a receipt recognizing a division of a tenancy, the onus of proof is upon the tenant and not upon the landlord. That case, however, was decided in reference to its own facts, which showed that the *patwari* concerned was not a person ordinarily entrusted with the duty of recognizing divisions of holdings. In my opinion, this case does not conflict with the long line of decisions which have held that in regard to receipts given by *gomashtas* the onus of showing that the *gomashta* had no authority to recognize a distribution of rent or division of tenancies lies upon the landlord. In the case now before us this point as to the want of authority in the *gomashta* Ram Asis was never raised and as neither party has given evidence, the Courts below have rightly assumed that the *gomashta* had authority to bind his principal.

With regard to the receipt Exhibit A-1, which has been found to have been signed by the father of the plaintiff and by the *gomashta*, it only states that a sum of Rs 5-2-0 has been paid by Uma Kuer, the vendee, and as it omits to mention the area for which this rent is paid it is inconclusive if taken alone; but taken with the other receipts it tends to corroborate the case of the defendant. It is true the Record of Rights does not show two separate holdings. It merely shows that Deo Narain and Uma Singh were joint tenants though occupying separate parcels of land. There was, however, evidence in the shape of the rent receipts upon which it was competent for the learned Munsif and the Subordinate Judge to come to the conclusion that the plaintiff had recognized a division. In my opinion these receipts have been correctly construed and are binding upon the plaintiff.

The learned Vakil for the plaintiff next urges that even if the rent receipts are otherwise binding, they do not operate to have that effect as they do not conform to the conditions of section 88 of the Bengal Tenancy Act.

Now the law previous to 1907 was that a division of a tenure or holding or the distribution of rent payable in respect thereof shall not be binding on the landlord unless made with his consent in writing. In 1907 the word "express" was added and it is, therefore, now necessary to decide what is meant by "express consent."

The learned Vakil has not been able to show any authority for his contention that the law has been substantially changed and that the current of decisions of which the case of *Pyari Mohun Mukhopadhya* v. *Gopal Paik* (1) is a type has been in any way overruled. In my opinion "consent in writing" may be given by means of a rent receipt, and in each case the adequacy of the consent must be gathered from all the circumstances. It has been held that if a receipt shows the total area of the holding and the area of the share transferred and the rent distributed thereon, then that is sufficient consent in writing; *Jnaendra Mohan*

(5) 10 Ind. Cas. 456; 15 C. W. N. 953.

v. *Gopal Das* (2). If this is so, I see no reason why a receipt showing the area of the transferred portion and the rent paid therefor should not also be sufficient to constitute express consent within the meaning of section 88.

If, therefore, section 88 had been applicable to the present case, I think that the rent receipts filed by the defendant would have been sufficient to show that the plaintiff had given his express consent in writing to a division of the tenancy.

But, in my opinion, section 88 has no application to a co-sharer landlord who is still joint with his co-owners.

That section enacts under what conditions a division of a tenure or holding is binding upon the landlord. It obviously refers to a sole landlord or the entire body of joint landlords where there are more landlords than one; for as was held by Rampini, J., in *Kunja Behari Singh* v. *Mussammat Roshan Koer* (see unreported decision in Second Appeal No. 28 of 1897) one co-sharer cannot bind his other co-sharers by any act of his own without authority to do so. It would seem that the earliest enactment bearing upon this point was section 27, Act X of 1859, which required landlords to give effect to all divisions of transferable tenures but at the same time provided that no division was to be binding upon a landlord without his written consent. Section 88 of the present Act reproduced and amplified the proviso by including within its scope the division of holdings. The object of the Legislature in both enactments was to protect the landlord's security against unauthorised divisions by the tenant. Therefore, it seems reasonable to suppose that divisions which would not bind the whole body of landlords do not come within the scope of the enactments.

In this view section 88 could only apply when the contract between a co-sharer and the tenant has the effect of creating a separate tenure or holding.

Now it is, in my opinion, settled that even when a tenant executes a *kabuliyat* agreeing to pay a co-sharer landlord his share of the rent separately and also agreeing that this co-sharer shall be competent to deal with him as if he were his sole landlord, the contract though it may create a separate tenancy cannot create a separate holding; for a holding being defined in the present Bengal Tenancy Act as a parcel or parcels of land held by a *raiyat* and forming the subject of a separate tenancy, the undivided share of one co-sharer landlord in the holding cannot be a parcel within the meaning of the definition, *Hari Charan Bose* v. *Ranjit Singh* (6), *Parbutty Debya* v. *Mathura Nath* (7). As has been pointed out by Banerji, J., in the former of these two cases, the position is otherwise in respect of an undivided share in a tenure which is not required by definition to consist of a separate parcel or parcels.

Therefore in the case now before us Deo Narain's tenancy under the plaintiff was not a holding and it follows that section 88 which deals with the division of holdings cannot apply. Even if Deo Narain had contracted to treat the plaintiff in all respects as his sole landlord, section 88 would not be a bar to the operation of that contract.

The learned Vakil for the appellant next contends that section 188 of the Bengal Tenancy Act prohibits the plaintiff from recognizing without the consent of the other co-sharers the transfer to Uma Singh and the consequent distribution of the rent. In my opinion this section has no application whatsoever. There is no provision in the Tenancy Act which requires a landlord to recognize a distribution of rent. He is certainly authorised to do so, but that authority is derived not from the Act but under the general law as an incident to the ownership of property.

Therefore, if neither section 88 nor section 188 applies, the question arises what is the effect of the plaintiff's recognition of Uma Singh as Deo Narain's transferee. Section 178, which is the only section which restricts a tenant's power of contract with his landlord, does not in any way operate as a bar here, and, therefore, it was perfectly competent to the plaintiff to recognize the transfer and the distribution of rent so far as his share was con-

(6) 25 C. 977; 1 C. W. N. 521; 13 Ind. Dec. (N. S.) 595.

(7) 15 Ind Cas. 453; 40 C. 29; 16 C. L. J. 9; 16 C W. N. 877.

cerned. Again as section 88 does not apply, his consent in writing, whether express or implied, was unnecessary. The defendant is entitled to prove the contract by any legal evidence she pleases and to enforce it. Here she has proved express consent in writing.

The defendant, therefore, is only liable for the balance of the rent after deduction of the sum due from Uma Singh.

But there is another ground which, in my opinion, is fatal to the plaintiff's claim. Having recognized the transfer to Uma Singh the plaintiff cannot, even if section 88 had been applicable, be permitted to say that the distribution is not binding upon him merely because the formalities of the section were not complied with. The principle of *Maddison* v. *Alderson* (8) have been applied to this country by their Lordships of the Privy Council in *Mahomed Musa* v. *Aghore Kumar Ganguli* (9), where their Lordships cite with approval the following observations of the Chancellor: "The matter has advanced beyond the stage of contract and the equities which arise under the stage which it has reached cannot be administered unless the contract is regarded."

The underlying principle is one of universal application, namely, that equity will not fail to support a transaction clothed imperfectly in those legal forms to which finality attaches after the bargain has been acted upon. Therefore, having acted upon the contract with Deo Narain as disclosed by the rent receipts, the plaintiff cannot take advantage of the defects, if any, in the form in which his consent was signified to Uma Singh so as to bar the enforcement of the contract. In my opinion to support him in such a plea would be to support that which amounts to a fraud.

Appeal dismissed.

(8) (1883) 8 A. C. 467; 52 L. J. Q. B. 737; 49 L. T. 303; 31 W. R. 820; 47 J. P. 821.

(9) 28 Ind. Cas. 930; 17 Bom. L. R. 420; 21 C. L. J. 231; 28 M. L. J. 548; 13 A. L. J. 229; 17 M. L. T. 143; 2 L. W. 256; 42 I. A. 1; 19 C. W. N. 250; 42 C. 801; (1915) M. W. N. 621.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 131 OF 1917.

November 8, 1917.

Present:—Mr. Lindsay, J. C.

BHAIRON BAKHSH SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

Musammat RAGHUBANSA KUNWAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—Mortgage—Redemption suit by one co-mortgagor—Subsequent suit by another co-mortgagor—Co-mortgagor suing to redeem share of mortgaged property—Court-fee payable.

A decree was passed in a suit for redemption by one of several co-mortgagors, in which the other co-mortgagors were impleaded as defendants. The decree directed that if the plaintiff failed to pay the money within a period of six months the decree would become a nullity. It did not provide for redemption by the defendants-co-mortgagors in case the plaintiff made default. The plaintiff failed to comply with the order of the Court, and subsequently some of the other co-mortgagors brought a suit for redemption:

Held, that the suit was not barred by the rule of *res judicata* inasmuch as the plaintiffs in the subsequent suit were not claiming under the plaintiff in the previous suit. [p. 302, col 1.]

Where a co-mortgagor who is entitled to redeem a share of the mortgaged property sues for redemption, the Court-fee payable is to be calculated on the amount of the mortgage debt which is chargeable on the share which the plaintiff is entitled to redeem. [p. 303, col. 1.]

Appeal from the decree of the District Judge, Rae Bareli, dated the 12th January 1917, upholding the order of the Officiating Subordinate Judge, Rae Bareli, dated the 23rd June 1916.

Babu *Bisheshwar Nath Srivastava* and *Rajeshwari Prasad*, for the Appellants.

The Hon'ble Pandit *Gokaran Nath Misra* and Mr. *Shahabuddin Ahmad*, for Respondent No. 7.

JUDGMENT.—The principal question for decision in this second appeal is whether the suit for redemption brought by the plaintiffs-appellants was barred by the rule of *res judicata*. A minor question relates to the Court-fee which was payable on the plaint.

As regards the first point both the Courts below have held that the suit was barred. After hearing the arguments in the case I have come to the conclusion that this decision is erroneous and that the suit is maintainable. In order to

understand the matter in dispute it is necessary to set out the following facts.

In the village of Pindaria there are three Pattis, called respectively Patti Sheo Ghulam Singh, Patti Gur Bakhsh Singh and Patti Kali Din. Each of these Pattis represents a 5-annas 4-pies share in the whole Mauza. In the year 1866 two of these Pattis, namely, Sheo Ghulam Singh and Gur Bakhsh Singh, were mortgaged with possession to one Kali Din Shukal to secure a debt of Rs. 2,066. Later on, that is to say, in the year 1868, a deed of further charge was executed by the owners of a one-half share in Patti Gur Bakhsh. On the 7th of December 1896, a suit for redemption was filed by one Sitla Bakhsh, the son of Sheo Din Singh, who was one of the owners of Patti Sheo Ghulam Singh. In this suit the representatives of the co-mortgagors who had executed the deed of 1866 were impleaded as defendants. The case was tried out and a decree was given declaring that Sitla Bakhsh the plaintiff could have redemption of the entire property mortgaged under the deed of 1866 on payment of a certain sum. The Court gave a direction that if the money were not paid within a period of six months the decree was to become a nullity. It appears that Sitla Bakhsh never complied with the order of the Court. He made several applications for extension of time and eventually the last application for this purpose was refused. It is an admitted fact that at some time subsequent to this last order of the Subordinate Judge the mortgagee allowed redemption of a 2-annas 8-pies share out of the 5-annas 4-pies share in Patti Gur Bakhsh. This redemption was allowed on payment of a proportionate amount of the mortgage debt. The consequence is that at the time the present suit was brought a 2-annas 8-pies share of Patti Gur Bakhsh and the whole 5-annas 4-pies share of Patti Sheo Ghulam were still unredeemed. In this suit the plaintiffs together with defendants Nos. 8—17 represent this 2-annas, 8-pies share of Patti Gur Bakhsh. The defendants Nos. 18 and 19 are the proprietors of the 5-annas 4-pies share of Patti Sheo Ghulam. Defendants Nos. 1—7 represent the original mortgagee. The suit as brought was for redemption of the whole 8-annas share, that is to say, 2 annas 8-pies of Patti Gur Bakhsh and 5-annas 4-pies share of Patti Sheo Ghulam. The mortgagees resisted the claim on various grounds, the most important plea taken being that the suit was barred by the rule of *res judicata*. This plea was founded upon the facts which I have stated already in connection with the suit brought by Sitla Bakhsh Singh in the year 1896.

The case for the mortgagee defendants was that as Sitla Bakhsh had been given a decree for redemption and that as he had failed to avail himself of it, no second suit for redemption could be maintained. Another plea taken was that even if the plaintiffs were entitled to sue, they could only ask for redemption of a 2-annas 8-pies share in Patti Gur Bakhsh Singh. As I have mentioned, both the Courts below held that as the result of the suit which was brought in the year 1896 the present suit for redemption was barred. In coming to this decision both the Courts relied upon a decision of a single Judge of the Allahabad High Court reported as *Nathe* v. *Khachera* (1). It seems to me that notwithstanding this ruling upon which the Courts below have relied, the plaintiffs were entitled to maintain the suit. The rule of *res judicata* can only be applied as between the parties to the previous suit or their representatives-in-interest; and from what is disclosed in the present case it appears to me to be impossible to hold that the present plaintiffs (together with the defendants Nos. 8—17), who are the owners of a 2-annas 8 pies share in Patti Gur Bakhsh Singh are the representatives of Sitla Bakhsh Singh who brought the previous suit for redemption in the year 1896. To begin with, Sitla Bakhsh Singh in that suit was the representative of only one of the co-mortgagors. The present plaintiffs with the defendants Nos. 8—17 are the representatives of other co-mortgagors of the Patti of Gur Bakhsh Singh; and it cannot, therefore, be said that these plaintiffs and defendants are in any way claiming title under Sitla Bakhsh Singh or his predecessor-in-interest. On

(1) 20 Ind. Cas. 372; 11 A. L. J. 844.

the other hand, it is quite clear to me that they are claiming under an independent title. It has been argued that there is certain evidence on the record to indicate that in this earlier suit Sitla Bakhsh was really representing the other co-mortgagors as well; but I do not think this point has been established. There are no doubt statements of certain witnesses who say that the mortgagor defendants in the suit which was brought by Sitla Bakhsh were helping Sitla Bakhsh with funds in the prosecution of the suit This is possibly true, but I should not be able to infer therefrom that Sitla Bakhsh was the representative of the other co-mortgagors in the sense in which the expression is used in connection with the rule of *res judicata*. It is further to be observed that in this suit of 1896 the co-mortgagors put forward in their written statement of defence certain objections to the right of Sitla Bakhsh to bring this suit for redemption. It was only by way of alternative that they pleaded that if their objections were overruled, then they would not oppose a decree for redemption being given in favour of Sitla Bakhsh in respect of the entire 10 annas 8 pies. I may further observe in this connection that these co-mortgagors who were impleaded as defendants in the suit in 1896 applied to the Court to be made plaintiffs. The Subordinate Judge who was dealing with the case refused this application, stating in his order that there was no need to make these persons plaintiffs, for if a decree were passed in favour of that plaintiff, Sitla Bakhsh, then the defendants co-mortgagors would be in a position to obtain redemption from him. I may also mention in connection with this earlier litigation that there was no decision of the Court regarding the right of the co-mortgagors to redeem. In the decree which was passed upon the judgment no provision was made for allowing the co-mortgagors to redeem in case the plaintiff Sitla Bakhsh should make default. The judgment and decree are altogether silent regarding any right of redemption on the part of the co-mortgagors who were joined as defendants; and this being so, it is impossible to hold that there was any decision by the Subordinate Judge regarding the rights of these co-mortgagors to redeem. If no decision on this question was given in the earlier suit and if no opportunity was afforded to the co mortgagors to the decree to redeem in case of Sitla Bakhsh's failure to deposit the mortgage money, then it seems to me that the principle of *res judicata* cannot in any way operate in order to bar the present suit. Of course it is well-settled law in this Court that no second suit for redemption will lie, that is to say, where a plaintiff has obtained a decree for redemption and has failed to take advantage of it he will not be allowed to bring a fresh suit. But that decision cannot be applied to the facts of the present case where the plaintiffs are not claiming in any way under the person who was the plaintiff in the earlier suit and who were not represented by him in that suit. I have omitted to state that in the record of the earlier suit of 1895 there is nothing to show that Sitla Bakhsh was allowed in any way to maintain the suit on behalf of the other co mortgagors. With regard to the decision in *Nathe* v. *Khachera* (1) upon which the defendants relied, that was a case in which the equity of redemption had been bought jointly by three purchasers. A suit had been brought by one purchaser and a decree obtained, and it was held that this decree was a bar to another suit by the other joint purchasers for the purpose of obtaining redemption. It may be that on the facts of that case it was possible to hold that the plaintiff in the first suit was acting as the representative of all the joint purchasers; but as I have said, there is no evidence upon which in this case it could be held that Sitla Bakhsh, when bringing his suit in 1896, was acting as the representative of the present plaintiffs and the defendants Nos. 8—17. According to the view taken by the Courts below the final refusal of the Subordinate Judge in the earlier suit to extend the period fixed for payment of the mortgage debt shows that it was his intention to debar the plaintiff from all right to redeem. That remark is quite correct, but it is not to be inferred that because it was the intention of the Court to debar Sitla Bakhsh from exercising his right of redemption it was meant that the co-mortgagors, each of whom had a separate right to redeem, were also to be

debarred. If any such intention was in the mind of the Court, it ought to have been expressed in the judgment and decree. I am satisfied, therefore, that the principle of *res judicata* does not apply so as to bar the present suit.

It is to be noted here that the first Court took the view that if the suit for redemption were maintainable then the plaintiffs together with the defendants Nos. 8—17 would be entitled only to ask for redemption of a 2-annas 8-pies share in Patti Gar Bakhsh. That position has been accepted by the learned Counsel for the plaintiffs-appellants. He states that his clients are not eager to redeem anything more than this share.

As regards the question of Court-fee I may say that in my opinion the Court-fee paid is sufficient. If the right of the plaintiffs is to redeem only a share of the mortgaged property, then the Court-fee payable is to be calculated on the amount of the mortgage-debt which is chargeable on the share of which the plaintiffs are entitled to ask for redemption. This view of the law has been accepted in the following cases, namely, *Vasudeva* v. *Madhava* (2), *Amanat Begam* v. *Bhajan Lal* (3) and *Balkrishna Dhondo* v. *Nagrekar* (4). As the appeal has been disposed of on a preliminary point it is necessary now to send the case back to the District Judge for disposal on the merits.

I allow the appeal accordingly and direct the learned District Judge to dispose of the case in accordance with the above observations. Costs here and hitherto will abide the result.

Case remanded.

(2) 16 M. 326; 5 Ind. Dec. (N. S.) 934.
(3) 8 A. 438; A. W. N. (1886) 145; 5 Ind. Dec. (N. S.) 2 7.
(4) 6 B. 324; 3 Ind. Dec. (N. S.) 673.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 959 OF 1917.

March 21, 1918.

Present:—Mr. Justice Roe and Justice Sir Ali Imam, Kt.

RAGHUBIR PRASAD AND OTHERS—APPELLANTS

versus

MISRI KAHAR AND OTHERS—RESPONDENTS.

Intention, whether mixed question of law and fact—Specific Relief Act (I of 1877), s. 42—Trespasser, whether can sue for declaration that he is trespasser.

The question with what intention a person did a certain act can hardly be said to be anything but a question of fact. [p. 304, col. 2.]

This question must be examined with reference to the subsequent acts of the person alleged to have a certain intention. [p. 304, col. 2.]

Section 42 of the Specific Relief Act does not contemplate an action by a person having no title. [p. 305, col. 1.]

A trespasser cannot, therefore, sue for a declaration that he is a trespasser. [p. 305, col. 1.]

Appeal from a decision of the District Judge, Patna.

Messrs. *Pugh*, *Abani Bhushan Mukerji* and *Saroshi Charan Mitter*, for the Appellants.

Messrs. *P. K. Sen*, *Bankim Chandra Mitter* and *Sona Lal Bose*, for the Respondents.

JUDGMENT.—The appellants in this case are the heirs of one Kali Prasad. The defendants-respondents are the sons of one *Musammat* Jitni who, as has been found concurrently by the Courts below, was Kali Prasad's mistress. In 1884, Kali Prasad bought a house in Patna. It is found as a fact that he paid the purchase-money out of his own pocket. It is admitted by both sides that the title deeds were made out in the name of Jitni and it is found as a fact that the title deeds remained in the possession of Jitni and her heirs up to the time of the institution of the present suit. On the death of Jitni in 1898, Kali Prasad appears to have continued to use this house as a resting place whenever he visited Patna. On his death in 1905 his heirs took possession. In 1915 the defendants instituted a suit in the Small Cause Court claiming three years' rent from the plaintiffs at Rs. 10 a month. The learned Small Cause Court Judge decided the issue of the relationship of landlord and tenant in favour of the defendants and gave them a decree. The plaintiffs, therefore, instituted the pre-

sent suit for a declaration, *firstly*, that the house in dispute was not the house of the defendants; *secondly*, for a declaration that the decree passed in the Small Cause Court suit is ineffective and inoperative; *thirdly*, that it be declared that defendants have no right to execute this decree and in the alternative that if it be held that the rent-decree resulted in a legal dispossession of the plaintiffs, the plaintiffs should be restored to possession. The suit was dismissed by the learned Subordinate Judge and on appeal to the District Court the learned Judge stated that the only issue involved was that of the intention of Kali Prasad in making out the title-deeds in the name of Jitni. He accepted it as good law that the consideration money having come from Kali Prasad's pocket, the presumption was that Kali Prasad made the purchase himself. But in view of the fact, firstly, that the house was one such as a man of Kali Prasad's position would not buy for himself, and in view of the fact that the title-deeds remained in the possession of Jitni, and in view of the fact that when Jitni died, Kali Prasad entered not his own name in the Municipal Register but those of Jitni's sons, he held that the presumption arising from the payment of the purchase money by Kali Prasad had been rebutted, and that it must be decided that the intention when making the purchase was that the purchase should be for the benefit of Jitni.

In appeal to this Court the first proposition advanced by Mr. Pugh is that he is not limited by the finding of fact, for the reason that all questions of intention must be regarded as mixed questions of fact and law. In support of this contention reliance is placed on a series of decisions which deal mainly with the existence of a custom. He might perhaps have also relied upon Criminal Bench rulings of the Calcutta Court, in which it has been decided that where the question of intention is in issue, a Court in revision is entitled to scrutinize the evidence and to decide for itself whether the facts proved establish the intention. The existence of a custom is undoubtedly to some extent a question of law for custom is in many instances itself law; where the existence of a law is in issue the question upon that issue must be to that extent a question of law, but the question with what intention a person did a certain act can hardly be said to be anything but a question of fact. Inasmuch as the question has been argued fully before us we propose to deal briefly with it, and say that in the circumstances of the case there was ample reason for holding that the purchase was in the first instance made for Jitni's benefit. If Kali Prasad had wished to buy a house for himself, it is tolerably certain that he would have bought a house more suitable to his position than the house in question. If he intended it to be his own property he would, as the learned Judge suggests, have kept the title deed in his own possession and not made it over to Jitni, and in all probability would not have allowed the title deed and the receipts for Municipal taxes which he had himself paid to pass into the possession of Jitni's sons on her death. The question of intention must be examined with reference to subsequent acts of the person alleged to have that intention. Kali Prasad's acts during his life were all consistent with a desire that the house should be considered to be the property of Jitni, and inconsistent with a desire that it should be considered his own property. What happened subsequent to Kali Prasad's death cannot affect the question of Kali Prasad's intention. It may be that his heirs were able to oust the heirs of Jitni from this property, but that would merely give rise to a period of limitation. It cannot affect the main issue before us.

As further points of law Mr. Pugh suggests, firstly, that from the moment Kali Prasad paid the purchase-money himself the house was his, and that he could not transfer it to the lady merely by making out the title-deed in her name, it would require a registered document to complete any such transfer. With this contention we are not in agreement. It would be immaterial whether Kali Prasad went through the form of handing the money to Jitni. So that Jitni's hands might be used for the payment of the money. If he intended to buy the house for the lady and throughout his negotiations represented that he was buying the house for the lady, the

house as soon as the contract with the vendor was completed became the property of the lady As a last resort Mr. Pugh suggests that the alternative prayers asked for in the plaint should be granted. There is no suggestion whatever that the rent decree was obtained by fraud. We have, therefore, no jurisdiction to say that the rent decree was inoperative or void or incapable of execution. And if indeed we are asked to make a declaration that the plaintiffs are in possession not as tenants of the defendants but by virtue of some right not specified, it is sufficient to say that the Specific Relief Act does not contemplate an action by a person not having a title. A trespasser cannot sue for a declaration that he is a trespasser.

The appeal is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

ORDINARY ORIGINAL CIVIL SUIT No. 547 OF 1917.

June 1, 1917.

Present:—Mr. Justice Greaves.

THE METROPOLITAN ENGINEERING WORKS—PLAINTIFFS

versus

WALTER EUGENE DEBRUNNER—DEFENDANT.

Evidence Act (I of 1872), s. 91—Oral evidence to explain document, admissibility of—Construction of document—"Up to" or "until" a certain day, meaning of.

The words "up to" or "until" a certain day in a contract may be construed as exclusive or inclusive of the day to which they are applied according to the context and subject-matter of the contract. [p. 305, col. 2.]

No extrinsic evidence as to the sense in which the words were used by the promisor or understood by the promisee is admissible under section 91 of the Indian Evidence Act. [p. 305, col. 2.]

Where in making an offer for the sale of a motor car the vendor said in a letter "please understand that my offer only holds good up to Wednesday next as the time I have is limited:"

Held, that having regard to the ordinary bearing of the words "up to" and to the well-known principle applicable to deeds and other documents that a document should in case of doubt and where all other rules of constructions fail be construed most strongly against the grantor, the offer remained open during the whole of Wednesday and did not expire at midnight of Tuesday. [p. 306, col. 2.]

Mr. *Langford James* (with him Mr. *B. K. Ghose*), for the Plaintiffs.

Mr. *R. C. Bonnerjee*, for the Defendant.

JUDGMENT.—The short point which arises for decision in this suit is the meaning of the words "up to Wednesday" contained in a letter, dated the 12th May 1917, and addressed by the defendant to the plaintiff Company and whereby the defendant offered to sell to the plaintiff Company his Motor Car in these words:—"Nevertheless I am quite willing to hand over the Motor Car to you against a cheque of Rs. 3,120,—Rs. 3,000 being the costs of the Car and Rs. 120 interest. As I intend advertising the Car unless you wish to have it, please understand that my offer only holds good up to Wednesday next, as the time I have is limited." It is not disputed that the plaintiff Company some time on Wednesday the 16th May tendered Rs. 3,120 in Government Currency Notes to the defendant and asked for delivery of the Car in accordance with the offer contained in the letter of the 12th May. The defendant, however, refused the tender contending that his offer expired at midnight on Tuesday, May 15th, and that the phrase "up to Wednesday" was exclusive and not inclusive of Wednesday. The defendant claimed to give evidence of his meaning and intention when he wrote the letter and of the sense in which the plaintiff Company understood the offer, but I refused to admit this evidence having regard to section 91 of the Evidence Act. I have not been able to find, nor have Counsel who appeared before me, any authority in which the meaning and effect of the word "up to" has been judicially considered; but Counsel have referred me to various authorities in which the meaning of the word "until", which seems to me to be synonymous with "up to", has been considered and discussed. These authorities are collected in the late Mr. Stroud's Judicial Dictionary, 2nd Edition, Volume III, 2142, under the heading "until", and it appears from *Rex* v. *Stevens* (1) that the word "until" may be construed either as exclusive or inclusive of the day to which it is applied, according to the context and subject-matter.

It appears from the cases cited in Mr.

(1) (1804) 5 East 244; 102 E. R. 1063.

Stroud's book that in a memorandum enlarging the time within which an award may be made "until" will generally include the whole of the day named, that where a defendant is given "till" a certain day to plead, judgment signed for want of a plea on that day was bad as the defendant might have delivered a plea during such day.

In *Bellhouse* v. *Mellor* (2) a bankrupt was granted protection until the 29th July from all process, and it was held that the protection extended to the whole of the 29th July. In *Isaacs* v. *Royal Insurance Co.* (3) goods were insured from the 14th February 1868 until the 14 August 1868, and it was held that under the terms of the policy the whole of the 14th August was protected.

In The Annual Practice for 1917 at page 1202 in the notes to rule 1 of Rules of the Supreme Court, Order 54, which deals with time under the heading "General Rule of Computation" these words occur :—"all periods of time under Rules of Court in the Supreme Court (including Bankruptcy)" and in the County Court are so computed that the day "from" or "after" which the time is fixed is excluded from such computation; and the day on which the act is to be done or "until" which some act is prohibited or protection afforded, is included therein (Encyclopædia of the Laws of England, 2nd Edition, tit. "Time") and see page 1203 of the Annual Practice under the heading "until". There is an Irish decision to the contrary effect in *Rogers* v. *Davis* (4), in which a plea of confession had been given with stay of execution until the first of May next, and on that day execution was issued. The three Judges who formed the Court held that the writ was properly issued, Burton, J., stating that the word until did not mean after. Now these authorities do not appear to me to be conclusive of the case, but I think they show a general tendency of inclusion rather than exclusion of the day up to or until which something is to be done; but of course the context and subject-matter have to be taken into account in determining whether the word "up to" is to be taken as exclusive or inclusive of the day to which it is applied. I cannot find anything in the context here which really assists in construing the words. It is true that the defendant states that his time is limited, but his anxiety on this score is not so much to limit the period during which the offer is to remain open, as to give him time to advertise the Car in the event of his offer not being accepted, that is to say, his dominating motive is, I should say, not so much to limit the duration of the offer as to have time to dispose of the Car elsewhere if his offer is not accepted. The result is that I have to fall back on the words themselves, and I think that the ordinary meaning which the ordinary person would attach to them is that the offer is to be open during the whole of Wednesday and does not expire at midnight on Tuesday. Having regard then, 1*st*, to what, I think, is the ordinary meaning of the words, 2*nd*, to the manner in which similar expressions have ordinarily and generally been construed, and 3*rdly* to the fact that I think the well-known principle applicable to deeds and I think to other documents that the document should in case of doubt, and where all other rules of construction fail, be construed most strongly against the grantor, Co. Litt. 183*a*, is applicable here, I am of opinion that upon the true construction of the letter and the words "up to Wednesday" the offer remained open until midnight on Wednesday. The Car has, I understand, been sold, and, accordingly the defendant, after deducting the sum of Rs. 3,120 from the sale-proceeds (less the sum of Rs. 583-7-0 due from him to the plaintiff Company for repairs to the Car) and the commission on sale of the Car, will pay over the balance to the plaintiff Company. And the defendant must pay the plaintiff Company's costs, to be taxed on scale No. 2.

Order accordingly.

(2) (1859) 4 H. & N. 116; 28 L. J. Ex. 141; 5 Jur. (N. s.) 175; 118 R. R. 343; 157 E. R. 780.
(3) (1870) 5 Ex. 296; 39 L. J. Ex. 189; 22 L. T. 681; 18 W. R. 982.
(4) (1845) 8 Ir. L. R. 399.

FAKHR JAHAN BEGAM *v.* MUHAMMAD ABDUL GHANI KHAN.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 85 OF 1915.

December 19, 1917.

Present:—Mr. Stuart, A. J. C., and Pandit Kanhaiya Lal, A. J. C.

Musammat FAKHR JAHAN BEGAM—DEFENDANT No. 2—APPELLANT

versus

MUHAMMAD ABDUL GHANI KHAN AND ANOTHER—PLAINTIFFS,

MUHAMMAD HAMID ULLAH KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Gift—Possession, delivery of—Gift of corpus, with reservation of usufruct, validity of—Will—Bequest of more than one-third, validity of—Consent of heirs, validity of—Transfer of Property Act (IV of 1882), s. 41—Disclaimer by real owner—Transfer by ostensible owner—Taluka—*Succession—Primogeniture* sanad, *effect of.*

Where in a deed of gift executed by a Muhammadan lady subject to the Hanafi law the donor excepted some of the property, retaining possession over it free of rent and revenue, and stated that after her death the donee would be its proprietor and that the donor would have no power to transfer it by mortgage, sale, or gift:

Held, that even in respect of the excepted property the deed operated as one of gift, inasmuch as the donor transferred the corpus of the property to the donee, reserving for herself the usufruct for life, which was not prohibited under the Hanafi law. [p. 310, col. 1; p. 314, col. 1.]

Held, further, that under the circumstances the stipulation not to transfer her interests in the property during her lifetime satisfied the conditions of the Hanafi law with regard to the delivery of possession. [p. 310, col. 1.]

A person who has disclaimed a title cannot be allowed to set it up afterwards to the prejudice of third parties, who have purchased the disclaimed property from the ostensible owner in good faith and for value. [p. 315, col. 2.]

Per *Stuart, A. J. C.*—There are three essentials of a gift under the Hanafi law—declaration, acceptance, and seizin. With regard to seizin, however, the rule is that where everything reasonable has been done to perfect a contemplated gift, nothing more is required. There is nothing in Hanafi law to prohibit a gift of the corpus combined with the retention of the usufruct inasmuch as such a transfer does not create a limited estate. [p. 309, col. 2; p. 310, col. 1.]

Where a primogeniture *sanad* had been issued to a *talukdar* who died before the Oudh Estates Act came into force, succession to the estate would be governed by the terms of the *sanad* in the case of succession under a testamentary disposition. [p. 309, col. 1.]

Per *Kanhaiya Lal, A. J. C.*—Where the intention to make an absolute transfer *in praesenti* of all proprietary right is clear, any condition which derogates from the immediate completeness of the gift is regarded as void. Where the condition, however, may be given effect to without in any way interfering with or detracting from the immediate completeness of the gift, or rather the immediate transfer of the right in the substance of the gift, the condition as well as the gift are valid. [p. 314, col. 1.]

Any reservation of proprietary rights in the corpus would be inconsistent with an intention to make a gift, but the reservation of a right to the usufruct of a portion of the property given would not be inconsistent, if the intention to give the corpus be otherwise manifest. [p. 314, col. 1.]

The consent or acquiescence, express or implied, of the heirs of a Muhammadan to a Will by him in excess of two-thirds of his property is treated as a ratification by them of his conduct. Such consent may be express or may be implied from unequivocal conduct. [p. 315, col. 1.]

Appeal from the decree of the Officiating Subordinate Judge, Kheri, dated 13th July 1915.

Mr. *Muhammad Nasim*, the Hon'ble Syed *Wazir Hasan*, Syed *Shahenshah Husain Rizvi* and Mr. *Muhammad Wasim*, for the Appellant.

Mr. *John Jackson*, the Hon'ble Mirza *Sami Ullah Beg* and Babu *Chhotey Lal*, for Respondents Nos. 1 and 2.

JUDGMENT.

STUART, A. J. C.—Niamat Ullah Khan, Lutf Ullah Khan and Ibrahim Khan were the sons of Ibad Ullah Khan. They were the members of a family who had originally been Thakurs of the Ahban Clan. Several centuries ago the members of that family were converted to the Muhammadan religion. Their personal law of succession is now admitted to be that of the Hanafi school. They were residents of the village Jalalpur in the Kheri district. After the re-conquest of Oudh, Niamat Ullah Khan received from the British Government the *Taluka* of Agar Buzurg. He died on the 29th August 1857. His name was nevertheless entered in the lists prepared under Act I of 1869 and is found at No. 116 on List No. I and at No. 47 on List No. II. Instances of the name of a deceased person being entered in the lists are not uncommon. His *taluka* is described in these lists as the *taluka* of Agar Buzurg. He received a primogeniture *sanad* which is filed in this case as Exhibit A1. The estate is there described as the estate of Jalalpur. The amount of land revenue is given as Rs. 5,752.

Niamat Ullah Khan executed a Will on the 20th May 1865, by which he devised the whole of his *talukdari* property to his wife *Musammat* Munni Bibi. This lady succeeded on his death to the *talukdari* property. On the 15th November 1876, Government granted

share of a village called Gundia to *Musammat* Munni Bibi in her own right. The grant was contained in a deed Exhibit 6. On the 7th March 1884, *Musammat* Munni Bibi executed a deed in favour of Lutf Ullah Khan, her husband's elder surviving brother. Under the terms of this deed she transferred absolutely to Lutf Ullah Khan the whole of her *talukdari* estate with the exception of two villages in the estate, Mundia Misr and Gungepur. She retained possession of the two latter villages and of the share of Gundia which had been granted to her by Government. Under the terms of this deed she undertook not to transfer the property which remained in her possession. This deed is Exhibit A4. All the property except Mundia Misr, Gungepur, and the share in Gundia was at once transferred to the possession of Lutf Ullan Khan. *Musammat* Munni Bibi died on the 16th June 1906. Lutf Ullah Khan then obtained possession of Mundia Misr, Gungepur and the share in Gundia. He died and was succeeded by his son Hamid Ullah Khan.

In 1910, the four sons of Ibrahim Khan, the younger brother of Niamat Ullah Khan, instituted a suit against Hamid Ullah Khan who had succeeded Lutf Ullah Khan, his two wives, and Muhammad Abdul Ghani Khan and Muhammad Abdur Rahman Khan, the persons who would have been the heirs under the Hanafi law of *Musammat* Munni Bibi had she died intestate, for possession of the property transferred to Lutf Ullah Khan by *Musammat* Munni Bibi. They asserted title on the basis of an alleged Will, dated the 10th June 1906. Their suit was finally dismissed by the Court of the Judicial Commissioner under a decree, dated the 13th March 1912, ExhibitB 9.

The suit out of which these appeals arise was filed on the 20th February 1914 by Muhammad Abdul Ghani Khan and Muhammad Abdur Rahman Khan (the same persons who were defendants in the previous suit) against Hamid Ullah Khan, his wives, the widow of Lutf Ullah Khan and a certain Pandit Sheo Dayal. This suit was for the possession of the property over which *Musammat* Munni Bibi had reserved possession during her lifetime and which had not passed at once to Lutf Ullah Khan under the provisions of the deed of the 7th March 1884. The case for the plaintiffs was that the succession to the estate of *Musammat* Munni Bibi was governed by the rules of Hanafi law, that they were her heirs under Hanafi law, that the property in question had not been validly transferred during the lifetime of *Musammat* Munni Bibi and that they were entitled to it. The defendants set up a variety of pleas, to the effect that the law of succession of the parties, although they were converted to Muhammadanism, was the Hindu Law, and that thus the property would revert in any circumstances to the family of Niamat Ullah Khan and not to the family of *Musammat* Munni Bibi, that *Musammat* Munni Bibi was a *talukdar*, that the property had passed by valid gift and that the plaintiffs were estopped. There were also other pleas. The learned Subordinate Judge decided all these pleas against them. He held, however, that the disposition by the deed of the 7th March 1884 had the effect of a Will with respect to the property in suit, and that, such being the case, the plaintiffs could only challenge its disposition with regard to two-thirds of the property. He decreed their claim with respect to two-thirds. Against this decision Fakhr Jahan Begam, defendant No. 2, has filed Appeal No. 85 of 1915 and Pandit Sheo Dayal has filed Appeal No. 89 of 1915. The plaintiffs-respondents have filed cross-objections.

The first point to be decided is whether the property (other than the share in Gundia) is covered by the terms of the primogeniture *sanad* Exhibit A1. This point was barely considered in the Court below, as nothing particular depended upon its decision at the time that the case was tried. As the law was understood at the time of the decision of the learned Subordinate Judge, the provisions of section 15 Act I of 1869, applied to that property, and the terms of the primogeniture *sanad* would not have affected the rule of succession. Subsequently on the 5th July 1915 a Bench of this Court of which I was a member delivered judgment in *Ghulam Abbas Khan* v. *Bibi Ummatul Fatima* (1). The existence of the judgment was not likely to have been brought to the notice of the learned Subordinate Judge, when he decided the present suit on the 13th

(1) 31 Ind. Cas 748; 18 O. C. 188; 2 O. L. J. 636.

July 1915. In that decision I took the view that where a primogeniture *sanad* had been issued to a *talukdar* who died before Act I of 1869 came into force, succession to the estate would be governed by the terms of the *sanad* in the case of succession under a testamentary disposition. If this view were adopted the successor would have an unrestricted power of alienation. My reasons are stated at length in that decision and need not be repeated. If my interpretation of the law be correct, *Musammat* Munni Bibi had a power of devise unrestricted by the provisions of the Hanafi law with regard to all the property in suit with the exception of the share in Gundia, should that property be included in the property covered by the primogeniture *sanad*. It is thus of importance to ascertain whether this property was or was not included under the primogeniture *sanad*, and we have accordingly permitted a certified copy of the Kabuliyat to be produced in evidence during the hearing of the appeal. Its production corrects the omission to produce it in the Court below. The respondents admit that they are unable to produce anything to controvert it. They contest, however, the allegation that the property in question is *talukdari* property, basing their objection on the circumstance that in Exhibit A1, the estate is called Jalalpur whereas the Kabuliyat is the Kabuliyat of Agar Buzurg. The property in question is included in the Kabuliyat. There can be no doubt to my mind as to the fact that the *sanad* and the Kabuliyat refer to the same property. There is no *taluka* of Jalalpur. There seems to have been a Jalalpur estate because in Exhibit 27 we find that there was a suit between Imdad Ullah Khan, the son of Rahmat Ullah Khan, and Habib Ullah Khan and Kudrat Ullah Khan with regard to shares in the Jalalpur property. Habib Ullah Khan, Rahmat Ullah Khan, and Kudrat Ullah Khan were brothers of Ibad Ullah Khan. To that suit Ibad Ullah Khan was no party. The circumstances of that case show clearly that there was no *taluka* of Jalalpur. The settlement decree of Jalalpur was passed in favour of *Musammat* Munni Bibi on the 17th April 1869, Exhibit 4. But the circumstance that such a settlement decree was passed in her favour does not indicate that there was any *taluka* of Jalalpur. What confirms my decision that the primogeniture *sanad* refers to Agar Buzurg and that the description of the estate as Jalalpur is merely a clerical error is the circumstance that both in the *sanad* and in the Kabuliyat which refers to Jalalpur the revenue is given at the same figure, *i. e.*, Rs. 5,752. What apparently happened was that the clerk who prepared the *sanad* inadvertently wrote the name of the estate as Jalalpur because Niamat Ullah Khan lived in Jalalpur. I find, therefore, that the property with the exception of the share in Gundia is covered by the primogeniture *sanad*, and, as *Musammat* Munni Bibi was according to my view s successor of her husband within the meaning of the words of the *sanad* she had full power to alienate under its terms. If the matter rested there, there would be some difficulty in decision for my learned colleague does not share my view of the law upon this point. We are, however, in accord as to the decision of these appeals upon another point.

The learned Counsel for the appellants have completely abandoned the position that the personal law of this family is the Hindu Law. The only alternative is that it is the Hanafi law. On the assumption that the personal law is the Hanafi law the terms of the deed of the 7th March 1824 must be construed. The learned Subordinate Judge regarded this deed as a Will with respect to the property in suit. After considering its terms we have come to a contrary opinion: we consider this deed a deed of gift with respect to the property in suit. It is true that the lady in one place excepts the property in suit and goes on to state that after her death the donee will be the proprietor. But at the same time she states that she will have no power to transfer the property left in her possession by mortgage, sale or gift, and I read the deed as meaning that she tranferred the corpus of the property in suit to Lutf Ullah Khan, reserving for herself the usufruct for life. The learned Subordinate Judge takes the point that, even if such were the case, the gift would be invaild under the Hanafi law owing to failure to deliver possession. I proceed to consider this point, which has been argued with skill on both sides.

There are three essentials of a gift under the Hanafi law—declaration, acceptance, and seizin

It is clear that here we have both declaration and acceptance. The remaining point is, was there seizin within the sense contemplated by law? This subject has been treated in detail in Ameer Ali's well-known work on Muhammadan Law, Chapter 2, page 62 *et seq.*, 3rd edition. According to the view taken therein the delivery of possession required under the Hanafi law varies according to the nature of the property transferred, and, where the donor is only in symbolical possession, the transfer can also be symbolical and may be effected under the terms of the deed of transfer itself. Where a donor transfers the corpus of the property retaining a usufruct for life, physical possession must necessarily remain with the donor. There is nothing in the Hanafi law to prohibit a gift of the corpus combined with the retention of the usufruct. Under the Hanafi law a limited estate cannot be created but such a transfer does not create a limited estate. The old view which finds place in some of the illustrations of Macnaghten must be considerably modified in the light of the more recent authoritative pronouncements on the subject. I refer in particular to the decision of their Lordships of the Privy Council in *Mahomed Buksh Khan* v. *Hosseini Bibi* (2), where at pages 701 and 702 their Lordships lay down that, where everything reasonable has been done to perfect a contemplated gift, nothing more is required. In the circumstances of the case physical possession could not be given. Possession by the enjoyment of rents could not be given. It would have been difficult even to effect mutation of names for the lady would have been prejudiced in making collections from tenants if the name of Lutf Ullah Khan had been entered in the revenue papers. What then could she do? The transfer of title-deeds (if any) already in her possession would have been purely formal, for the title was contained in the deed of transfer itself. She did this much that she covenanted in the deed not to transfer her interests in the property in question during her lifetime, and this stipulation satisfies the conditions of the law with regard to the delivery of possession. Some stress has been laid by the learned Counsel for the plaintiffs-respondents upon a deposition made by the lady, Exhibits A7 and B5, as showing that she was under the impression that she had only a life-estate in the property. I agree with the learned Subordinate Judge that this deposition is of no value. There the lady in one place described herself as the holder of a life-estate, and in another place described herself as absolute owner. She was apparently confused as to what her real position was at the time she made the deposition. Nothing of value can be derived from the statements therein made. It was urged by the learned Counsel for the appellants that, even if the transfer of the property in suit was taken to be by a devise, the devise would be good as the present plaintiffs had consented thereto. As I regard the transfer to have been by a valid gift this point is unimportant. But I should refer to the facts, on which this argument is based. When a suit was brought by the sons of Ibrahim Khan, they wrote to the present plaintiffs-respondents asking what position they intended to take in the case. One of them Muhammad Abdul Ghani Khan replied on the 14th November 1910 (Exhibit A 6) that he had no objection whatever to the provisions of the Will, and that the then plaintiffs were at liberty to take the said property by virtue of the Will. Here he was, however, clearly referring to the alleged Will of 1908, the execution of which was found not to have been established. But in his deposition in the same case (Exhibit A 5) we find him making the following statement. "I never thought of the matter whether I am entitled to the assets of *Musammat* Munni Bibi or not. I disclaim a share in the property if I am entitled to it. I do not know about others." Whether this can or cannot be held to be a valid relinquishment under Muhammadan Law is not of much importance in view of our decision as to gift, especially as it could only affect the man who made it. But in the case of the appellant Sheo Dayal who is a transferee for value, reliance could be placed in any circumstances on the provisions of section 41, Act IV of 1882, for both the plaintiffs permitted Lutf Ullah Khan to enter into possession of the village transferred to

(2) 15 C. 684; 15 I. A. 81; 12 Ind. Jur. 291; 5 Sar. P. C. J. 175; 7 Ind. Dec. (N S.) 1040.

him. It is to be noted that my view with regard to the effect of the *sanad* has no bearing on the position of Sheo Dayal because the property transferred to him was a share in Gundia which was granted by Government to *Musammat* Munni Bibi herself. Had she died intestate succession to that property must certainly have been governed by the Hanafi law. I have already found that she executed a valid transfer by gift of this property during her lifetime. But even, had she not done so, I consider that the plaintiffs-respondents would be out of Court with respect to this property. The deed which purported to transfer it was executed in 1884. That deed was of the nature of a deed of gift, was considered by the transferee as a deed of gift, and was utilized by him as a deed of gift. When the lady died in 1906, both the plaintiffs took no steps to oppose Lutf Ullah Khan succeeding to possession. They made no attempt whatever to assert title to the property. In subsequent proceedings, when they had an opportunity to assert title they did not do so. They permitted transfers of the property to take place, and did not assert a claim until two-thirds of the period of limitation had expired. Such being the case, I consider that the provisions of section 41 have certainly application to protect the transferee. He appears to me to have acted with due care and caution, and I fail to see what more could have been expected from him as a reasonable man.

On the above findings I decree both appeals and dismiss the cross-objections. The contesting respondents will pay their own costs and those of the appellants both with regard to the appeals and the cross-objections in all Courts.

KANHAIYA LAL, A. J. C.—The dispute in this case relates to the village Mundia Misr, a 4-annas 5-pies share in the village Gundia and some land and groves in the village Jalalpur.

The village Mundia Misr and the land in Jalalpur belonged to Niamat Ullah Khan, who was the *talukdar* of Agar Buzurg. His name was entered at No. 116 in List No. I and No. 47 in List No. II appended to Act I of 1859. The *sanad* granted to Niamat Ullah Khan was a primogeniture *sanad* and purported to convey to him the Jalalpur estate in the district Mohamdi, which, as the Kabuliyat executed by his father at the time of the summary settlement shows, was identical with the Agar Buzurg estate. The revenue of the Agar Buzurg estate, as entered in the list attached to the Kabuliyat, was Rs. 5,752; and that was the revenue which is described in the *sanad* as having been then payable by Niamat Ullah Khan. Niamat Ullah Khan lived in Jalalpur, by reason probably of which his estate was described in the *sanad* as the Jalalpur estate; but in the lists appended to Act I of 1859 it was rightly described as "Agar Buzurg." He had some share in Jalalpur too, in regard to which his widow, *Musammat* Munni Bibi, obtained a decree from the Settlement Court on the 17th April 1869, Exhibit 4. The share in the village Gundia was granted to *Musammat* Munni Bibi by a *sanad*, dated the 15th November 1876. She was the absolute owner of that share under the *sanad* and had a right to dispose of it in any manner she liked.

On the 20th May 1865 Niamat Ullah Khan bequeathed his entire estate to his wife, *Musammat* Munni Bibi. He died on the 29th August 1867, leaving *Musammat* Munni Bibi surviving him. On the 7th March 1884, *Musammat* Munni Bibi made a gift in favour of Lutf Ullah Khan, the eldest surviving brother of her deceased husband, giving him the entire estate belonging to her, with the exception of the property now in dispute, which she retained for herself for her life without any power of alienation, coupled with a direction that it should revert after her death to the donee. The construction and validity of that deed of gift is one of the main points at issue in this case.

Musammat Munni Bibi died on the 16th June 1906. On her death possession of the disputed property was obtained by the donee, who was subsequently succeeded by his son Hamid Ullah Khan. In 1910 a suit was broght by the sons of Ibrahim Khan, another brother of Niamat Ullah Khan, claiming the estate on the strength of another Will, alleged to have been executed by *Musammat* Munni Bibi on the 10th June 1906. This suit was dismissed by this Court on the 13th March 1912. After

its dismissal Abdul Ghani Khan and his brother Abdur Rahman Khan filed the present suit for possession of that portion of the property, which *Musammat* Munni Bibi had retained for herself without any power of alienation for her life and which was to go to the donee after her death. They alleged that they were the heirs of the said lady and that Hamid Ullah Khan and the other persons who had obtained transfers from him and his father were in possession of the same without any right. They also claimed mesne profits.

The learned Subordinate Judge found that the deed of gift executed by *Musammat* Munni Bibi in favour of Lutf Ullah Khan operated, so far as the disputed property was concerned as a bequest and was invalid except as to a one-third share. He decreed the claim accordingly for possession of a two-thirds share in the said property with the mesne profits appertaining to that share.

It has been argued on behalf of the contesting defendants that by virtue of the bequest made by her husband, *Musammat* Munni Bibi had obtained only a life-interest in the property bequeathed; but the terms of the bequest clearly conveyed to *Musammat* Munni Bibi full proprietary rights in the manor possessed by the testator (*malik wa mukhtar misl zat khas mere ke hogi*). On behalf of the plaintiffs it is contended that the village Mundia Misr did not form part of the Agar Buzurg estate and was not affected by the primogeniture *sanad* granted to Niamat Ullah Khan. But the Kabuliyat of the Agar Buzurg estate, which was inadvertently described as the estate of Jalalpur in the *sanad*, includes and refutes that contention. In the list appended to Act I of 1869, no estate, known as the estate of Jalalpur, is entered as having been held by Niamat Ullah Khan, and the identity of the property comprised in the *sanad* with that entered in the Kabuliyat cannot, therefore, be disputed.

The main point for consideration is whether *Musammat* Munni Bibi made a gift or a bequest of the disputed property in favour of Lutf Ullah Khan and whether that gift or bequest was valid or not. The family to which Niamat Ullah Khan belonged was a family of Ahban Thakurs, converted to Muhammadanism. It was at one time asserted that the family was governed by the Mitakshara school of the Hindu Law, but the finding of the learned Subordinate Judge is against it and that contention is no longer pressed in appeal. It is conceded that the succession to the estate of *Musammat* Munni Bibi is not governed by Act I of 1869, inasmuch as the estate had vested in her before that Act came into force. Her name was entered in the lists, and it is unquestionable that if there was no valid gift or bequest in favour of Lutf Ullah Khan, the plaintiffs would be her heirs under the Muhammadan law, because as held by me in *Ghulam Abbas Khan* v. *Bibi Ummat'ul Fatima* (1) and by this Court in *Thakur Sital Singh* v. *Thakur Sitla Bakhsh Singh* (3) and *Musammat Balraj Kuar* v. *Mahadeo Pal Singh* (4) the rule of succession laid down in the *sanad* would not apply to her, as she was not a successor, that is, a person deriving title by inheritance within the meaning of that *sanad*. The reasons in favour of that view, based largely on the context and contemporaneous exposition, have been discussed at length in those cases and need not be recapitulated here.

The validity of the deed of gift or bequest, so far as it relates to the disputed property, depends entirely on how far it complies with the provisions of the Muhammadan Law bearing on the point. After referring to the Will executed by Niamat Ullah Khan her husband the testator goes on to say:—"Now in sound health and full possession of my senses without any persuation or compulsion and of my own accord I have gifted my moveable property, all my Zamindari and Lambardari estate, etc., to Muhammad Lutf Ullah Khan, son of Muhammad Ibad Ullah Khan, the brother of my husband, according to the details given below with the exception of the villages and *sir* land, etc., set out below, name by name, which will remain in my possession for the duration of my life and my dependent relatives (*sic*) free of rent and Governmsnt revenue, out of the aforesaid estate. At this time having exempted them I have made a gift, and

(3) 40 Ind Cas. 469; 4 O L. J. 193 at p 218.
(4) 44 Ind. Cas. 59; 20 O. C. 360; 4 O. L. J. 589.

by virtue of this deed have authorized the donee to get mutation of names in his favour, and now I have nothing to do with the estate and property gifted, and such villages and *sir* land aforesaid, as have been at this time for the duration of my life excepted (left out), will be kept by me without transfer by mortgage or sale or gift for my lifetime, and after my death the donee will be the proprietor (*malik*) of the aforesaid excepted property; and of the excepted property the donee will pay the revenue from the Ilaqa except of the Patti Mauza Gundia. Of the Patti Gundia, I will pay the revenue from my own pocket and the donee will pay all the debts outstanding against the estate. I have nothing to do with them. Therefore, these few words have been written by way of a deed of gift of inheritance and proprietorship on a stamp of Rs. 600-8-0 on a stated value of Rs. 7,000 as a title-deed which will be useful at the time of need" Then follows a detail of the immoveable property gifted in Parganas Bhur and Paila and another detail of "the property excepted", which is described as the village Mundia Misr, standing in the name of the donor for her life without any liability for the payment of the revenue, and the other property now in dispute.

The language of the deed is very inartistic. At one place it seems to suggest that the property described in the second list was excluded from the gift, while at another place it suggests that it was only excepted from the possession of the donee for the lifetime of the donor and that all that the donor retained was dominion over the usufruct or possession for life without any power of transfer by sale, mortgage or gift, with an ultimate reversion after her death, if reversion it can be called, in favour of the donee. Read as a whole, the document leaves little room for doubt that though the disputed property was described as "excepted," it was only excepted from the *possession* of the donee for the lifetime of the donor and that the donee was to be owner thereof subject to the right of the donor to enjoy the usufruct for her life. The restriction placed by the donor on her power of transfer by mortgage, sale or gift can have otherwise no significance. The reference in two different places to the property having been excepted "*at this time*" (*is waqt*) also indicates that the exception was intended to be temporary or for a definite terminable period, and it is significant that the revenue on the "excepted property" other than the share in the village Gundia was made payable by the donee from the date of the gift. An intention to convey the corpus of the estate to the donee from the date of the gift, subject to the right of the donor to remain in possession for her life without any power of transfer by mortgage, sale or gift, is thus manifest.

Under the Hanafi law such conditions are invalid as render the gift nugatory or defeat its very purpose. But as pointed out by Syed Ameer Ali, "an analytical examination of the principles with due regard to the main purpose of the Mussalman Law shows that where the intention is clear to transfer the entire right of property in the corpus of the gift, a mere reservation of interest in its rents and issues, or any profit accruing therefrom or a subordinate share in its enjoyment, does not affect the validity." (Ameer Ali's Muhammadan Law, Volume I, 4th Edition, page 136). It was accordingly held by their Lordships of the Privy Council in *Nawab Umiad Ally Khan* v. *Musammat Mohumdee Begum* (5) that a gift *inter vivos* of Government promissory notes by a father to his only son, accompanied by a delivery of possession and a transfer into the son's name, without any reservation of the dominion over the corpus by the donor, except a stipulation for the right to the accruing interest on the notes during the donor's life, to be applied by him to certain religious and charitable purposes, was a valid gift according to the Muhammadan Law. Their Lordships were dealing there with a case governed by the Shia law, but the authority on which they relied was the Hedaya, in which an objection that a participation of property in the thing given invalidates the gift was answered as follows:—"The donor is subjected to a participation in a thing which is not the subject of his grant, namely, the use (of the whole indivisible article), for his gift

(5) 11 M. I. A. 517; 10 W. R. P. C. 25; 2 Suth. P. C. J. 98; 2 Sar. P. C. J. 315; 20 E. R. 195.

related to the substance of the article, not to the use of it" (Hamilton's Hedaya by Grady, page 483). Discussing this decision, Syed Ameer Ali observes:—"This decision may, at first sight, seem to be in conflict with the doctrine of the Hanafi lawyer, Abul Kasim-as-Saffar, but it must be borne in mind that, in the Hanafi law, much of the voidableness of conditions arises from the character of the Arabic expressions. As a general rule, it may be stated that, where the intention to make an absolute transfer *in præsenti* of all proprietary right is clear, any condition which derogates from the immediate completeness of the gift is regarded as void. Where the condition, however, may be given effect to without in any way interfering with or detracting from the immediate completeness of the gift, or rather the immediate transfer of the right in the substance of the gift, *the condition as well as the gift are valid.* If a man were to give absolutely his property to another and place the donee in possession thereof, so far as *its* nature admits, to use the language of the *Majm'aa-ul-Anhar* with the condition that the whole or a portion of the income should be given to him, the donor, or to anybody else *during his lifetime*, such a reservation or condition would not prevent the property vesting immediately in the donee. The condition, therefore, would be valid. So also, if a person were to make a gift subject to the donee paying the donor's debts, and place the donee in possession of the subject-matter of the gift, the condition would be valid. Or, if a donor were to make a condition that the donee should give a *part* of the income or pay an annuity to his heirs in perpetuity, and give effect to the donation by transferring the subject thereof to the dominion of the donee, as the condition in no wise interferes with the completeness of the gift, both the gift and the condition would become operative in law" (Ameer Ali's Muhammadan Law, 4th Edition, Volume I, pages 138 and 139). Any reservation of proprietary rights in the corpus would be inconsistent with an intention to make a gift, but the reservation of a right to the usufruct of a portion of the property given would not be inconsistent, if the intention to give the corpus be otherwise manifest. And would it make any difference if the usufruct was received directly by the donor and not through the donee, for as pointed out by their Lordships of the Privy Council in *Bagar Ali Khan* v. *Anjuman Ara Begam* (6) the substance and not the form should be looked to. The decisions in *Mahomed Buksh Khan* v. *Hosseini Bibi* (2) and *Chaudhri Mehdi Hasan* v. *Muhammad Hasan* (7) establish that a donor should give such possession as the nature of the property or interest given admits of. If the property given includes a portion over which the donor wants to retain his or her possession for a definite time, it would be unreasonable to hold that he or she should deprive herself of the possession of that portion before the gift can be validated. To require her to withdraw her connection forthwith is to compel her to give more than what she intended to give, or in other words, to disqualify her from reserving anything for herself though it may fall short of proprietary rights. Her possession, so long as the rights so reserved are exercised, is virtually possession on behalf of the owner, for a donor would refuse to accept a gift burdened with such a condition, if he did not assent to it.

Assuming, however, that the gift so far as it related to the disputed property is inoperative, the dispossession can in any event be upheld as bequest, if the intention of the testator be deemed to have been that the property should go to Lutf Ullah Khan in the event of his surviving her. The consent of heirs validates a bequest in excess of a one-third share. Lutf Ullah Khan survived *Musammat* Munni Bibi and got possession of the disputed property on her death without any question having been raised as to his title by the present plaintiffs. When the sons of Ibrahim Khan determined to file a suit for the estate of *Musammat* Munni Bibi on the strength of a Will alleged to have been executed by her, they consulted the present plaintiffs, one of whom, Abdul Ghani Khan, wrote in reply : "after prayers for your long life

(6) 25 A. 236 at p. 252; 30 I. A. 94; 7 C. W. N. 465; 5 Bom. L. R. 410; 8 Sar. P. C. J. 397 (P. C.).

(7) 9 O. C. 196; 10 C. W. N. 706; 3 A. L. J. 405; 8 Bom. L. R. 387; 28 A. 439; 4 C. L. J. 295; 1 M. L. T. 163; 33 I. A. 68 (P. C.).

I have to tell you that with regard to the property left and possessed by sister Munni Bibi deceased, wife of Niamat Ullah Khan, *Talukdar* and Rais of Jalalpur, about which you have made enquiries, I have no objection whatsoever to the provisions of her Will. You are at liberty to take the said property by virtue of the Will, either by means of a suit or in any other way possible. I have no objection at all. You can take steps with pleasure. Dear Muhammad Abdur Rahman Khan, may God protect him, also holds the same opinion. I have enquired from him." (Exhibit A6). This letter was sent on the 14th November 1910. In the course of the suit which was subsequently filed, this letter was produced and Abdul Ghani Khan was examined as a witness on behalf of the sons of Ibrahim Khan. He then admitted having sent the above letter with the permission of Abdur Rahman Khan, who, he said, was joint with him, and further stated on being cross examined "I never thought of the matter whether I am entitled to the estate of *Musammat* Munni Bibi or not. I disclaim a share in the property, if I am entitled to it" (Exhibit B8). The heirs of Lutf Ullah Khan were parties to that suit, and it is significant that no claim was then set up by either of the present plaintiffs in that suit or any written statement filed in assertion of the title which they now seek to enforce. The express disclaimer of Abdul Ghani Khan and the conduct of Abdur Rahman Khan in allowing the donee and his heirs to obtain and retain possession and in not asserting any title in himself when a claim was made by others to the estate, show that they felt no concern and have acquiesced in the property going either to the sons of Ibrahim Khan under the Will set up by them or to the heirs of Lutf Ullah Khan under the gift or bequest, whatever it may be called, which *Musammat* Munni Bibi had made in favour of Lutf Ullah Khan. The consent or acquiescence of heirs is treated as a ratification by the heirs of the conduct of the testator and as pointed out in *Daulatram Khushalchand* v. *Abdul Kayum Nurudin* (8), it may be express or be implied from unequivocal conduct such as has been proved in this case (Ameer Ali's Muhammadan Law, 4th Edition, Volume I, page 590).

It is contended on behalf of the plaintiffs that the statement in the deed of gift by the donor that after her death "the donee will be the proprietor of the aforesaid exempted property" does not amount to a testamentary disposition. But it is difficult to say what other meaning can be assigned to it, if the words preceding be treated as excluding the disputed property from the gift altogether.

Lutf Ullah Khan and his heirs have, moreover, been holding the property in dispute as ostensible owners since at least 1906 and if the circumstances set forth be accepted as sufficient evidence of the disclaimer, consent or acquiescence of the present plaintiffs, their claim as against the transferees of Lutf Ullah Khan and his son Hamid Ullah Khan would be barred by section 41 of the Tansfer of Property Act. The earliest transaction was one of a mortgage made in 1907, and another transaction took place thereafter by which the transferees were placed in possession of the property transferred. A person who has disclaimed a title cannot be allowed to set it up afterwards to the prejudice of third parties, who have purchased the property from the ostensible owner in good faith and for value. The letter and the deposition of Abdul Ghani Khan above referred to show that the attitude taken up by both the plaintiffs was identical.

The defendants-appellants ought, therefore, to succeed. Their appeals are accordingly allowed with costs here and below and the suit of the plaintiffs dismissed with costs throughout. The cross-objections filed by the plaintiffs will be dismissed with costs.

Appeal allowed.

(8 26 B. 497; 4 Bom. L. R. 132.

KISHUN DEYAL RAI v. KULPATI KUER.

PATNA HIGH COURT.
CIVIL REVISION No. 339 OF 1917.
March 23, 1918.
Present:—Mr. Justice Mullick and Mr. Justice Atkinson.

KISHUN DEYAL RAI AND OTHERS—PETITIONERS
versus
Musammat KULPATI KUER AND ANOTHER—OPPOSITE PARTY.

Res judicata—*Rent suit—Decision as to rate of rent in particular year, whether* res judicata.

A decree in a rent suit does not operate as *res judicata* as to the rate of rent payable for years other than the years covered by the decree. [p. 317, col 1.]

Per *Mullick, J.*—The question whether a decision as to the rate of rent operates as *res judicata* depends on the frame of the issue. [p. 317, col. 2.]

Civil revision from an order of the Munsif, Arrah, dated the 3rd November 1917.

Mr. *Fakhruddin*, for the Petitioners.

Mr. *Lakshmi Narain Singh*, for the Opposite Party.

JUDGMENT.

ATKINSON, J.—This application comes before us in revision under section 115 of the Civil Procedure Code against an order of the learned Munsif, dated the 3rd of November 1917, refusing an application for review of a judgment passed by the learned Munsif on the 29th of May 1917. The action was one for rent, and the rent sought to be recovered was in respect of the years 1320 to 1323. The plaintiffs claimed that the rate of rent was Rs. 124 odd per annum; the defendants on the other hand contended that the rate of rent payable was only Rs. 63 odd. The plaintiffs' case was based upon an entry in the Record of Rights, which disclosed that the rent as recorded was Rs. 124 odd. On the other hand there was a proceeding under section 106 of the Bengal Tenancy Act in which the Settlement Officer found that the rate of rent actually payable was Rs. 63. No appeal appears to have been taken from the order of the Settlement Officer in the section 106 proceeding by either party, and, therefore, the order of the Settlement Officer would appear to be final and conclusive as between the parties to that proceeding. There have been previous rent suits between the same parties. A suit for rent was decreed by the Subordinate Judge in the year 1912 upon the basis of the order of the Settlement Officer. That decree was subsequently set aside by an order of the Calcutta High Court; and their Lordships in that case suggested to the parties that the proper course to adopt would be to have the Settlement Officer's order reviewed; but notwithstanding the intimation that was given by their Lordships neither party did anything to impeach or challenge the order of the Settlement Officer; hence the difficulty that has arisen. With the above suggestion the learned Judges of the Calcutta High Court remanded the case to the Subordinate Judge who on the 12th of February 1916 affirmed the decision of the Munsif awarding a decree to the plaintiffs at the rate of Rs. 124 odd per annum. That decision came before us in second appeal; and while that second appeal was pending, the judgment now complained against was passed on the 29th of May 1917. Our judgment was pronounced on the 11th of July 1917 and by that judgment was confirmed the order of the lower Appellate Court on the ground that it was only a judgment for rent for the years in suit and no more; and that a judgment in a rent suit did not in point of law amount to an estoppel and did not accord with the principles of *res judicata* unless the rent was payable at a rate stipulated by contract. We also intimated in our judgment that we thought that great weight should be attached to the order made by the Settlement Officer in the section 106 proceeding. After our judgment was pronounced the defendants in the rent suit, who are the present petitioners before us, applied to the learned Munsif to review his order, dated the 29th of May 1917. At the time that the application for review was filed, the learned Munsif who had tried the case had left Arrah and was succeeded by the present Munsif Mr. Syed Hasan. Mr. Syed Hasan considered that in pursuance of the provisions of Order XLVII, rule 2, he, not having been the Judge who tried the suit, had no jurisdiction to entertain the present application for review, as the application presented to him did not come within the four corners of the rule. He held that no new or important matter had been discovered, and that there was no clerical or arithmetical error such as to justify him in interfering with the order of his predecessor. The ground upon which the petitioners based their application for review was that new and important matter had come into existence in the shape of our judgment and that that judgment was material in considering what

were the relative rights of the parties. The learned Munsif, however, appears to have failed to appreciate the nature of the new and important matter indicated by Order XLVII, rule 2. Clearly our judgment was a new and important matter which he should have properly considered with a view to ascertaining whether or not it afforded sufficient ground for re-considering the order which had been previously passed on the 29th of May 1917. The learned Munsif has also clearly fallen into an error in two other respects He has held that the judgment of the Subordinate Judge of the 12th of February 1916 amounts to *res judicata* so far as that judgment establishes that the rate of rent payable by the defendants is Rs. 124 odd per annum. Clearly in holding that that judgment amounted to *res judicata* between the landlord on the one hand and the tenants on the other the learned Munsif fell into an error. A decree in a rent suit is not *res judicata* as to the rate of rent payable for years other than the years covered by the decree. Another error which the learned Munsif has made is as regards the weight to be attached to the order of the Settlement Officer. He considers that it has very little weight because it is founded on a judgment of the Subordinate Judge which was subsequently set aside by the Calcutta High Court. That is obviously an error, because though the Settlement Officer's order may have been based upon an order of the Subordinate Judge which was set aside, yet it has, by lapse of time, crystallised into a binding decree between the parties and, therefore, is entitled to great weight. We think, therefore, that the view which the learned Munsif took of Order XLVII, rule 2, is erroneous and that there was new and important matter in the shape of our judgment which he should have considered having regard to the legal directions contained therein. We feel, therefore, that we must set aside the order of the learned Munsif dated the 3rd of November 1917 and direct him to re-try the whole case. The original decree of the 29th of May 1917 is also set aside and the learned Munsif is directed to re-hear the whole case, having due regard to the order of the Settlement Officer which has crystallised into a binding decree between the parties; and also bearing in mind that a rent-decree is not *res judicata* upon the question of the rate of rent payable in respect of years other than those covered by the decree. This application is accordingly allowed with costs, hearing fee one gold *mohur*.

MULLICK, J.—I agree. The question whether a decision as to the rate of rent operates as *res judicata* depends on the frame of the issue. Here the order of the High Court did not permit the Subordinate Judge to determine anything more than the rent of the years in suit.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 310 OF 1916.

March 7, 1918.

Present:—Mr. Justice Richardson and Mr. Justice Walmsley.

GABINDA CHANDRA GHOSE BISWAS AND OTHERS—PLAINTIFFS—APPELLANTS

versus

NANDADULAL SUT—DEFENDANT—RESPONDENT.

Licensee—Ejectment, suit for—Notice to quit, whether necessary.

In order to maintain a suit for the ejectment of a licensee, a notice to quit is not necessary even where the licensee has erected huts upon the land. [p. 318, col. 1.]

Appeal against the decree of the Subordinate Judge, 2nd Court, Tipperah, dated the 23rd September 1915, reversing that of the Munsif, 2nd Court at Kasba, dated the 23rd July 1914.

FACTS appear from the judgment.

Babu *Upendra Kumar Roy*, for the Appellants, argued that a mere licensee was not entitled to any notice. *Doe d. Knight Quigley* (1).

Babu *Nitish Chandra Lahiry*, for Babu *Arun Kumar Ghose*, for the Respondent, contended that there were two distinct class as of

(1) (1810) 2 Camp. 505; 11 R. R. 780.

SUGRIVE MISSER v. JOGI MISSIR.

cases, the first one being of ordinary licensees who had erected no structures on the land and the other that of licensees who had, in acting upon the license, erected structures of a permanent nature on the land. The present case fell under the second head, inasmuch as the respondent, who had been found to be a licensee, was brought upon the land and led to erect *katcha* huts thereon; and as such the licensee was entitled to notice. *Vide Aldin* v. *Latimer Clark, Muirhead and Co.* (2), *Winter* v. *Brockwell* (3).

Thus *Doe d. Knight* v. *Quigley* (1) cannot apply to the present circumstances.

It was not disputed that the licensee had actually been led to erect *katcha* huts. It has been held that *katcha* huts may be permanent structures. *Nasir-ul-Zaman Khan* v. *Azim-ullah* (4).

JUDGMENT.

RICHARDSON, J.—This appeal arises out of a suit brought by the plaintiffs for the purpose of ejecting the defendant from certain homestead land in his possession. The case for the plaintiffs was that the defendant was a licensee and was not entitled to any notice to quit. The plaintiffs nevertheless alleged that they had served a notice to quit. The defence raised by the defendant was that he was in possession of the land as the plaintiffs' tenant. Both the Courts below have concurred in finding that there is no relationship of landlord and tenant between the parties. Apparently when the defendant obtained possession, there was some talk of a lease being granted to him but the negotiations come to nothing. The first Court further found that the notice to quit had been served and decreed the suit allowing the defendants two months' time to remove the huts which he had erected. There is nothing to show that these huts were in any sense of the term permanent structures. In the lower Appellate Court the learned Subordinate Judge, though, as I have said, he concurred with the Munsif that the defendant was not a tenant, nevertheless held that he was entitled to a notice to quit and that no notice had been served. In my opinion on the facts found the defendant is a mere licensee and in the words of Lord Ellenborough in *Doe d. Knight* v. *Quigley* (1), "If this was a tenure of any sort it was a tenancy at sufferance and a notice to quit was unnecessary." Whether, therefore, any notice to quit was served or not, I agree with the learned Munsif that the plaintiffs are entitled to possession of the land. In the circumstances I am of opinion that the judgment and decree of the Subordinate Judge should be discharged and the decree of the Munsif restored, with this modification that the time allowed for removing the huts should be extended for a period of two months from the date of the arrival of the record in the Trial Court. We make no order as to costs. Let the record be sent down as soon as possible.

WALMSLEY, J.—I agree.

Record sent down.

(2) (1894) 2 Ch. 437; 63 L. J. Ch. 601; 8 R. 352; 71 L. T. 119; 42 W. R. 453.
(3) (1807) 8 East 308; 103 E. R. 359; 9 R. R. 454.
(4) 28 A. 741 at p. 742; 3 A. L. J. 765; A. W. N. (1906) 216.

PATNA HIGH COURT
SECOND CIVIL APPEAL No. 737 OF 1917.
March 23, 1918.
Present:—Mr. Justice Mullick.
SUGRIVE MISSER—DEFENDANT—APPELLANT
versus
JOGI MISSIR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—Pro forma *defendant against whom no relief is claimed, position of.*

The decision in a case does not operate as *res judicata* against a *pro forma* defendant who was not a necessary party to the suit and who was impleaded not because any relief was claimed against him, but because he might assist the Court in the adjudication of the claim against the real defendant. [p. 320, col. 1.]

Appeal from a decision of the Subordinate Judge, Shahabad, dated the 28th April 1917.

Mr. *Nirsu Narain Singh*, for the Appellant.

Mr. *G. C. Pal*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for redemption in respect of 4·76 acres of land alleged to constitute a *raiyati* holding, which was mortgaged by Ramgolam Misser and Ramdeni Misser, the predecessors of the plaintiffs, to one Rameshwar who is alleged to be the predecessor of the defendants. The suit was contested by defendant No. 1, who denied that Rameshwar was joint with him and asserted that the holding had always belonged to him and that Rameshwar never had any interest therein.

The Munsif found that the defendants had entered into possession through Rameshwar on the strength of the *zurpeshgi* mortgage and that the allegation that the defendant had title to the holding was false. At the same time the learned Munsif found that in or about 1901 the Maharani of Dumraon, the admitted landlord, attempted to attach and sell certain lands, which included a part of the present holding, in execution of a decree for arrears of rent obtained by her against the present plaintiffs. The defendant No. 1 thereupon brought a title suit against the Maharani joining the present plaintiffs as *pro forma* defendants and obtained a declaration in 1902 that a part of the land, which was about to be attached and which corresponds to plots Nos. 74, 76, 77, 148, 154, 162, 164, 168, 149 and 175 in the present suit, was not liable to be attached on the ground that he had *raiyati* interest therein. The learned Munsif was of opinion that this decree was *res judicata* between the defendant No. 1 and the plaintiffs, and, therefore, the plaintiffs were not entitled to recover these plots in the present suit. The learned Munsif also found that since 1901 the defendant No. 1 had been asserting a right as occupancy *raiyat* in respect of these plots adversely to the plaintiffs' title as mortgagors and that, therefore, the suit in respect of these plots was also barred by limitation.

The learned Subordinate Judge in appeal agreed with the Munsif that the defendants got possession as mortgagees and that they had failed to prove that any part of the lands in suit was the first defendant's ancient occupancy holding. He also held that the Munsif's decisions with regard to *res judicata* and limitation was incorrect and he gave the plaintiffs a decree entitling them to redeem the whole of the lands in suit on payment of a sum of Rs. 160.

The first point urged by the learned Vakil for the defendant-appellant before me is that the learned Subordinate Judge was wrong on the point of *res judicata*.

Now I have to observe at the outset that the learned Vakil has not supplied me, as required by the rules of this Court, with any copies of the translations of the plaint, written statement, decree and judgment upon which he relies for this part of his argument. It is almost impossible to decide whether a former judgment is *res judicata* unless we have all the pleadings before us. I have, however, with the learned Vakil's assistance examined the vernacular plaint and the judgment in the suit of 1901, upon which the learned Vakil relies and which are on the record of the case before me. It appears from these documents that the defendant No. 1 claimed no relief against the present plaintiffs, who were impleaded as *pro forma* defendants. It was not alleged in the plaint that he had any cause of action against them. His suit was directed against the Maharani of Dumraon who was defendant No. 1, and he desired to establish that he and not the plaintiffs was the tenant under the Maharani. He had a cause of action against the Maharani, namely, that the Maharani had obtained a decree for arrears of certain lands alleging them to be the holding of the present plaintiffs. There is a faint allegation in the plaint that that decree was collusive, but there is no allegation that there was any collusion between the Maharani and the present plaintiffs. The suit was aimed at the Maharani for the purpose of setting aside the decree on the ground of fraud, but in the absence of any specific allegation against the *pro forma* defendants in that suit that they were parties to the fraud and in the absence of any claim for relief as against them, it cannot be said that there was any question directly and substantially in issue between them and the plaintiff in that suit. The present

plaintiffs were really not necessary parties at all and were impleaded, not because any relief was claimed against them, but because they might assist the Court in the adjudication of the claim against the real defendant, the Maharani of Dumraon. It would seem that the position was so regarded by the present plaintiffs, for they took no trouble to appear in the suit. The Maharani of Dumraon did appear, but finally allowed the suit to be decreed without any substantial contest.

In my opinion the case of *Malki Kunwar* v. *Imam-ud-Din* (1) is somewhat similar to the case now before me. In that case the plaintiff in the first instance brought a suit for redemption of a mortgage against two sets of defendants, alleging that he had paid half the mortgage money to the second set and the remaining half only was due to the first set. The Court held that the second set of defendants had no concern with the land and that the whole amount of the mortgage-money was due to the first set and he ordered redemption on that footing. The plaintiff thereupon brought a second suit to recover from the second set of defendants what he had paid to them on account of the mortgage, but it was held that the decision in the first suit did not operate as *res judicata* upon the point whether or not the second set of defendants were interested in the mortgaged property, and that it was open to these defendants to re-agitate this matter as between themselves and the plaintiff in the second suit. I think therefore the decision of the learned Subordinate Judge on the point of *res judicata* is correct and that it is not necessary for the present plaintiffs to set aside the decree of 1902 before proceeding to redeem.

The second point urged by the learned Vakil is that there is no clear finding by the learned Subordinate Judge that the lands in suit were not the ancestral occupancy holding of the defendant No. 1. It appears that the case made by the defendant No. 1 before us is that he has succeeded to Rameshwar's property as a distant agnate upon the death of Rameshwar's son and that Rameshwar took a mortgage of the lands now in suit from persons who had no title to the same. The learned Munsif, however, clearly found that Rameshwar got into possession upon the strength of the *zurpeshgi* mortgage which was executed so far back as 1883. He also found that the defendants got into possession through Rameshwar and that they were not in possession before the mortgage upon the strength of a title independent of that of Rameshwar. The learned Subordinate Judge, although he has not examined the evidence upon the point in any details, has come to the same conclusion.

I am asked by the learned Vakil to remand the case for a fuller consideration of the evidence, but I think it is unnecessary to do so, having regard to the form that the litigation took in the Courts below. It would seem from the judgment of the learned Subordinate Judge that the defendants' main attack was directed to the points of limitation and *res judicata*. The finding of fact, therefore, being conclusive in second appeal, what is the position as regards limitation? The defendant No. 1 is found to have no independent title and to have been always in occupation as a mortgagee. He was, therefore, in the position of a trustee in regard to the mortgagors and it was not open to him to set up any claim of title adverse to their title. He could not, therefore, by adverse possession have acquired a prescriptive title to plots Nos. 74, 76, 77, 148, 154, 162, 164, 168, 149 and 175. The point of limitation, therefore, must fail. This disposes of all the points argued before me and the appeal is dismissed with costs.

Appeal dismissed.

(1) 27 A. 59; 1 A. L. J. 363.

JAIPAL TEWARY *v.* TAPESWARI TEWARY.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 331 OF 1917.

December 3, 1917.

Present:—Mr. Justice Jwala Prasad.

JAIPAL TEWARY—PLAINTIFF—APPELLANT

versus

TAPESWARI TEWARY AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 2 (15), Sch. II, paras. 1, 3—Arbitration—Reference by Pleader, validity of—Pleader, authority of

The position of a Pleader is that of an agent in relation to his client and his power is, therefore, created entirely by the *vakalatnamah* given to him by his client. [p. 322, col. 2.]

A Pleader has no right to compromise on behalf of his client unless expressly authorised to do so; nor is he empowered to refer a matter to arbitration except by an express authority in that behalf. A *vakalatnamah* in general terms is wholly insufficient. [p. 324, cols. 1 & 2.]

The words "all the parties interested" in paragraph 1 of Schedule II of the Civil Procedure Code mean that all the parties interested in the litigation only need be parties to the application for reference to arbitration. [p. 322, col. 2.]

It is a question of fact in each case as to who are the parties interested in the litigation. [p. 322, col. 2.]

Appeal from a decision of the Subordinate Judge, Shahabad.

Mr. *Parmeshwar Dayal*, for the Appellant.

Mr. *Sivanandan Rai*, for the Respondents.

JUDGMENT.—The suit brought by the plaintiff who is the appellant here was dismissed by both the Courts below. During the pendency of the appeal before the Subordinate Judge an application was filed before the District Judge, on the 9th December 1916, for a reference of the case to the arbitration of the persons named therein. This application has been signed by one Narain Lal who was the Pleader engaged on behalf of the defendants and by Babu Balbir Prasad Pleader on behalf of the plaintiff. The defendants Nos. 6 to 9 are described in the plaint as *pro forma* defendants. In the body of the plaint it is said that they were made defendants to avoid any objection and that they need not appear. They did not contest the claim of the plaintiffs. As a matter of fact it appears that they did not appear at any stage of the case. The contest, therefore, was between the plaintiff and the other defendants who appeared in the case.

The petition referred to above was rejected by the District Judge on the ground that all the parties did not join in the application for referring the matter to arbitration. The appeal was dismissed by the lower Court on the merits after hearing the parties on the 8th January 1917.

This is an appeal against the judgment and decree of the lower Court, dated the 8th January 1917. No appeal was preferred against the order, dated 9th December 1916, rejecting the application for referring the dispute to arbitration. The present appeal was filed on the 17th April 1917. It is doubtful whether there is any express provision in the Code of Civil Procedure for an appeal against an order refusing to refer to arbitration on the application of the parties under rule 3 of the Second Schedule. If an order under rule 3 was appealable, then the appeal of the plaintiff against that order was barred by time. Section 104 of the Code of Civil Procedure makes certain orders passed by a Court regarding arbitration matters appealable, but it appears that an order under rule 3 does not come under any of the clauses mentioned in section 104.

It was contended by the learned Vakil on behalf of the respondent that it comes under clause (*e*) of section 104, but that clause apparently refers to an order passed under rule 18 of the Schedule, for it relates to a stay of suit when there is an agreement outside the Court to refer matters to arbitration, whereas rule 3 relates to the reference by the Court of the matter in difference in a suit pending in Court for final adjudication by the arbitrators appointed by the parties. If section 104 did not apply, there was no appeal from the order rejecting the application and hence there was no bar to the objection being taken in the present appeal. If on the other hand section 104 did apply, the objection could be taken under section 105 in an appeal against the final decree as has been done in this case, for the result of the granting of the petition for reference to arbitration would affect the decision of the case and the decision of the arbitrators would have taken the

place of the decision of the lower Appellate Court. Similar was the view taken in the case of *Ramautar Tewari* v. *Deoki Tewari* (1) and also in *Datta* v. *Khedu* (2). However be that as it may, it appears to me that the second appeal on behalf of the plaintiff should be dismissed upon another ground.

The application filed before the District Judge referred to above praying for the reference of the case to the arbitrators for arbitration has not been signed by the parties themselves. The Pleaders of the parties who have signed the application do not appear to have had any express authority given to them by the powers-of-attorney or Vakalatnamahs filed in this case. They had, therefore, no power to make this application on behalf of their clients.

The power of a Pleader is defined in the Vakalatnamah or power-of-attorney given to him. A Pleader has no right to compromise on behalf of his client unless expressly authorised to do so; nor is he empowered to refer a matter to arbitration except by an express authority in that behalf.

The principle appears to have been recognised in the case of *Jagapati Mudaliar* v. *Ekambara Mudaliar* (3) and in *Thakoor Pershad* v. *Kalka Pershad* (4). In the case of *Ramjiwan Ram* v. *Kali Charan Singh* (5) it was held that a Pleader should not apply for an order for referring a case to arbitration unless he has been expressly authorised to do so. A Vakalatnamah in general terms is wholly insufficient. This ruling added further that where, however, a party on whose behalf an application is signed knows about it and acquiesces in it, he cannot raise an objection for want of authority to the Pleader afterwards. Well the first portion of the ruling supports the view that I have taken whereas there is nothing on the record to show that the parties in this case acquiesced in the filing of the application. There are so many defendants in the case and so it is impossible to say whether all the defendants were present or they acquiesced in that application. As a matter of fact the parties had the appeal heard and decided by the Judge and in this Court the defendants contest the application for reference filed before the Judge.

The definition of Pleader given in clause 5 of section 2 of the Code of Civil Procedure makes it clear that the position of a Pleader is that of an agent in relation to his client and his power is, therefore, created entirely by the Vakalatnamah given to him by his client.

In this case there is no express authority in either of the Vakalatnamahs filed on behalf of the plaintiff or the defendants to refer the matter to arbitration. I, therefore, hold that the application has been filed without any authority at all. Under rule 1 of the Second Schedule an application for an order for reference to arbitration must be made by all the parties interested and that application must be in writing. In this case there was no application in writing made by the parties themselves nor by their authorised agents. The application was, therefore, rightly rejected by the lower Court.

On behalf of the respondents it was also contended that all the parties to the suit were not made parties to the application for reference to arbitration. This was the view taken by the learned Subordinate Judge. The point is a controversial one. Rule 1, as it now stands, is different from the corresponding section 506 of the old Code of Civil Procedure. In the place of all the parties to the suit in the old Code we have in the present Code "all the parties interested." This obviously means that all the parties interested in the litigation only need be parties to the application. It is a question of fact in each case as to who are the parties interested in the litigation. In the present case upon the pleading the defendants Nos. 6 to 9 do not appear to have been interested in the litigation; they were expressly named as *pro forma* defendants and were made defendants with the express words that they need not

(1) 29 Ind. Cas. 41; 37 A. 456; 13 A. L. J. 653.
(2) 11 Ind. Cas. 935; 33 A. 645; 8 A. L. J. 678.
(3) 21 M. 274; 8 M. L. J. 40; 7 Ind. Dec. (N. S.) 550.
(4) 6 N. W. P. H. C. R. 210.
(5) 4 A. L. J. 342; A. W. N. (1907) 139; 29 A. 429.

enter appearance in case they had no objection to the claim of the plaintiff. As a matter of fact they did not appear at any stage of the litigation. It is needless to say more upon the point, for, as already observed, there was no proper application before the lower Court as required by the Second Schedule. It was argued, however, on behalf of the appellant that clause 2 of rule 1 of the Schedule requiring that the application shall be in writing is only directory and not mandatory, and that the application may be made orally by the parties.

Reliance has been placed upon the ruling in *Abdul Hamid* v. *Riaz-ud-din* (6) for the above contention. In that case the application was made orally by the parties who were identified by their respective Pleaders before the Court and their application was reduced in writing by the Court itself, and the matter was thereupon referred under the orders of the Court to arbitration. The facts in that case are quite dissimilar to the facts in the present case and in the particular circumstances of that case the requirements of the rule might be taken to have been complied with. I, therefore, hold that there is no substance in the contention of the learned Vakil for the appellant. This is the only ground upon which the appeal has been pressed before me.

The learned Vakil made a passing reference in the course of his argument that he was entitled to a modification of the decree of the Court below in that he should have been allowed a right of easement to go over the land of the defendants in order to repair his wall. This point does not appear to have been pressed in the Courts below and there is no reference to it at all in the judgment of either Court. It has not been seriously pressed before me as well, and I do not think that there is any force at all in the contention. Apart from its having been raised at a late stage, it should not be permitted in second appeal unless there is a substantial ground for the new point to be raised. I, therefore, dismiss this appeal with costs.

Appeal dismissed.

(6) 30 A. 32; 4 A. L. J. 691; A. W. N. (1907) 273.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 46 OF 1917.

July, 2 1917.

Present:—Mr. Justice Piggott.

RAM NATH—PLAINTIFF—APPLICANT

versus

SEKHDAR SINGH—DEFENDANT—OPPOSITE PARTY.

Provincial Small Causes Courts Act (IX of 1887), Sch. II, Art. 8—Suit against partner for share of rent, whether suit for rent—Jurisdiction of Small Cause Court.

Defendant, in consideration of being admitted as a partner in the plaintiff's tenancy, agreed to pay to the latter a certain sum as his estimated share of the rent of the holding:

Held, that the payment was not rent within the meaning of Article 8, Schedule II, of the Provincial Small Causes Courts Act, so that a suit for its recovery was cognizable by a Court of Small Causes. [p. 324, col. 1.]

Civil revision from an order of the Judge of the Court of Small Causes, Fatehpur.

FACTS.—Plaintiff was the tenant of certain land. He took the defendant in as a partner in the tenancy and they agreed to cultivate the holding jointly and to divide the crops equally. The rent of the holding was estimated at Rs. 60 and defendant agreed to pay to the plaintiff Rs. 30 annually as his share of the rent. Defendant failed to make the payment and plaintiff thereupon instituted a suit for the recovery of the sum in the Revenue Court. That Court held that the relationship between the parties was not that of tenant and sub-tenant and that, therefore, it had no jurisdiction to entertain the suit. The plaintiff then brought a suit to recover the sum in a Court of Small Causes. That Court, however, also declined to entertain the suit on the ground that it was a suit for rent and was, therefore, excluded from the cognisance of a Court of Small Causes by Article 8 of Schedule II of the Provincial Small Causes Courts Act. Plaintiff applied to the High Court in revision.

Mr. *J. N. Mukerji*, for the Applicant.

Mr. *Bhagwati Shankar*, for the Opposite Party.

JUDGMENT.—This was a suit for money in a Court of Small Causes. That Court has refused to entertain it on the ground that it is not cognizable by that Court, being a suit for rent. It presumably

refers to paragraph (8) of the Second Schedule to the Provincial Small Causes Courts Act, IX of 1887. If it were a suit for rent at all it, would be cognizable by a Revenue Court under the provisions of the Tenancy Act, and the Revenue Court has already refused to entertain a claim for this money, though the defendant is not to blame for this. On the plaint as drafted the claim is for damages for breach of a contract. I set aside the order of the Court below and direct the Court to re-admit the suit on to its file of pending cases and to dispose of it according to law. Costs here and hitherto will abide the event.

Application allowed; Cause remanded.

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 29 of 1915.
September 14, 1917.
Present:—Mr. Pratt, J. C., and Mr. Hayward, A. J. C.

THE FIRM OF BHAWANDAS FEROOMAL —APPELLANTS
versus
MENGHRAJ AND OTHERS—RESPONDENTS.

Execution—Instalment decree—Default—Acceptance of overdue instalments, whether evidence of waiver—Limitation.

Where a decree provides for payment by instalments subject to the condition of the entire decretal amount becoming payable at once on failure to pay any fixed number of instalments regularly, the mere acceptance of overdue instalments by the decree-holder is not of itself sufficient proof of waiver on his part to execute the decree for the entire amount. [p. 324, col. 2.]

Whether the payment and acceptance of an overdue instalment is to be treated as a payment regularly made in satisfaction of the instalments due, so as to extend the period of limitation for execution of the decree, is a question of fact. [p. 324, col. 2.]

Appeal against the decision of the Joint Judge, Hyderabad.

Mr. *Fatehchand Asudomal*, for the Appellants.

Mr. *Tejumal Hassomal*, for the Respondents.

JUDGMENT.

PRATT, J. C.—This is a second appeal from an order made in appeal by the Joint Judge of Hyderabad, dismissing the appellants' application for execution of an instalment decree made on the 5th November 1909. The decree provided for payment of a decretal sum of Rs. 1,800 by instalments of Rs. 35 per mensem, the first instalment being payable on 13th November 1909. The appellant alleged that he had received the sum of Rs. 300 by 9 different payments of Rs. 30, Rs 40, and Rs. 50 between the 2nd January 1911 and 24th December 1912. The *darkhast* was dismissed as time-barred because the decree provided that when 3 consecutive instalments fell due the defendant should pay the decretal money at once. This default had, on the appellants' own showing, occurred in January 1910. The point raised in appeal is that the appellants had waived their right to enforce the default provision in the decree. It has been held that the mere acceptance of overdue instalments is not of itself sufficient proof of waiver, see the case of *Kashiram* v. *Pandu* (1) and *Kimatrai* v. *Wadero Sher Mahomed Khan* (2). There is no other evidence of waiver in this case beyond the acceptance of overdue instalments and the fact that the appellants are now seeking to enforce the same provision in the decree is not consistent with the plea that they had waived it. The question whether the acceptance of overdue intstalments has the effect of extending the priod of limitation is one which was decided here as in the High Court of Bombay on the doctrine of mutual estoppel and the question here is, whether by paying and accepting these instalments, parties understood that they were to proceed on the footing that these Rs. 300 were to be treated as having been paid regularly in satisfaction of the first 8 or 9 instalments. This is really a question of fact. The lower Courts have come to the conclusion that no such estoppel was worked because the first payment was made 14 months after the first instalment was due and the payments were not made regularly or in

(1) 27 B. 1; 4 Bom. L. R. 688.
(2) 25 Ind. Cas. 938; 8 S. L. R. 63.

sums which were equivalent of any one instalment or a multiple of any one instalment. This is a finding of fact with which we cannot interfere in second appeal.

We accordingly confirm the decree of the lower Court and dismiss this appeal with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2883 OF 1915.

February 2, 1918.

Present:—Mr. Justice Leslie Jones.

Musammat SEOTI AN ANOTHER—PLAINTIFFS—APPELLANTS

versus

BHAGIRATH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), s. 10—Trust—Assignment of land—Suit for possession—Limitation.

Where as the result of a mutual arrangement plaintiff assigned some land to the defendant who was to remain in possession of it taking profits and bearing loss until the termination of the assignment:

Held, that a suit to recover possession of the land by the plaintiff was governed by section 10 of the Limitation Act. [p. 326, col. 1.]

Second appeal from the decree of the Additional Judge, Kangra, dated the 14th July 1915, reversing that of the Munsif, 3rd Class, Kangra, dated the 17th of May 1915, decreeing the claim.

Mr. *Mukand Lal Puri*, for the Appellants.

Bakshi *Tek Chand*, for Bhagirath Respondent.

JUDGMENT.—This suit relates to a small property in Tika Kachher, Dhakhli Ghorkari, a village in the Kangra District.

According to a statement in the Record of Rights of 1865 the then owners had assigned it three years previously to the predecessors-in-interest of the present defendants, who were in possession as assignees according to mutual arrangement and would so continue taking profit and bearing loss until the assignment terminated. The assignors were shown in the proprietary column of the records as *tafwiz kunindgan* and the assignees were shown in the same column as *mufawwaz alaihim*. The same entries reappeared in the Settlement of 1891 and again in that of 1910.

In 1914 the plaintiffs as representatives of the original assignors applied for mutation in their own favour and on their application being refused by the Revenue Officer instituted the present suit for possession.

In the Court of the Munsif they obtained a decree but on appeal their suit was dismissed by the Additional Judge. They have now preferred a second appeal to this Court.

The question is whether the suit is one governed by section 10 of the Limitation Act. Counsel for the appellants relies on *Mitra Lal Sahi* v. *Rajib Lochan Joshi* (1). That was a case in which certain land had been left by the owners in the custody of another person, on the condition that it should be restored to them or their representatives whenever either should demand it and it was held that the trust originally granted was not a constructive but an express trust, to which section 10 of the Limitation Act applied.

Counsel for the respondents has cited *Roshan ud-Din* v. *Fatta* (2), *Shera* v. *Qutba* (3), *Fazl Din* v. *Shah Muhammad* (4), *Dhan Singh* v. *Har Narain* (5) and *Barkat* v. *Daulat* (6). All of these were cases in which it was urged that the persons in possession were holding as trustees, because it had been laid down in the Records of Rights that when the absentees returned and wanted the land it would be restored to them. It was consistently held that entries of this kind did not constitute a trust and it was held that the defendants had acquired adverse possession after abandonment of the original owners.

In none of the cases, however, was there any indication that the persons in possession had obtained the land as the result of an arrangement with the original owners. Rather they had taken possession as the result of an abandonment which had already occurred. Under such circumstances obviously no trust is created, but in the

(1) A. W. N. (1905) 89; 2 A. L. J. 247.
(2) 78 P. R. 1875.
(3) 38 P. R. 1878.
(4) 141 P. R. 1883.
(5) 3 Ind. Cas. 599; 85 P. R. 1909; 135 P. W. R. 1909.
(6) 4 A. 187; A. W. N. (1882) 3; 2 Ind. Dec. (N. S.) 799.

present case it is clear that the possession of the defendants was the result not of abandonment but of what is expressly described as a mutual agreement and one which dated from the time when the defendants first obtained possession. For these reasons the present case is distinguishable from those on which Counsel for the respondents has relied.

Here there is an express trust, the land having been made over to the assignees to hold for the assignors.

I hold, therefore, that the suit is within time, and accepting the appeal, set aside the decree of the lower Appellate Court and restore that of the Munsif. The plaintiffs will get costs throughout.

Appeal accepted.

PATNA HIGH COURT.
APPEALS FROM APPELLATE DECREES
NOS. 1465 TO 1471 OF 1916.
February 12, 1918.
Present:—Mr. Justice Roe and Mr. Justice Jwala Prasad.
Raja DHAKESWAR PRASAD NARAIN SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
POOKHAR PANDAY AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—*Refusal of Court to decide issue.*

There can be no *res judicata* under section 11 of the Civil Procedure Code unless the issue was heard and finally decided by the Court. [p. 327, cols. 1 & 2.]

The refusal of the Court to determine an issue raised in a case does not operate as *res judicata* in a subsequent suit. [p. 328, col. 2.]

Appeals from a decision of the District Judge, Gaya.

Messrs. *Gangadhar Das* and *G. D. Singh*, for the Appellants.

Mr. *Kailash Pati*, for the Respondents.

JUDGMENT.

JWALA PRASAD, J.—These appeals arise out of suits for rent brought by the appellants against the respondents for the years 1317 to 1320 *Fasli*. The claim for 1317 and 1318 was *bhaoli* and *naqdi*. The Subordinate Judge decreed the claims in all the suits in part. The learned District Judge in appeal further reduced the claim for the years 1319 and 1320 to the amount admitted by the defendants-respondents.

As regards the claim for *bhaoli* rent for 1317 and 1318, the learned District Judge set aside the decree of the Subordinate Judge and dismissed the suit on the ground that the claim was barred by the principle of *res judicata*. The plaintiffs have, therefore, come to this Court in second appeal. The following contentions have been raised on their behalf:—

(1) That the learned District Judge wrongly applied the principle of *res judicata* to the claim for 1317 and 1318.

(2) That the learned District Judge should not have allowed *bhaoli* rent for 1319 and 1320 according to the admission of the defendants, but should have allowed the amount determined by the Subordinate Judge.

The amount of *naqdi* rent allowed by the District Judge in respect of the years 1319 and 1320 has not been disputed in this appeal.

As to the second contention, the District Judge has recorded a clear finding of fact that the plaintiffs had given no definite idea of the amount of outturn. This finding has been arrived at upon the consideration of the plaint and the evidence given in the case, notably of the Patwari who admitted in his evidence that no appraisement or even detailed estimate of the crop was made in respect of the lands of the tenants sued. There is absolutely no reason why this finding should be disturbed in second appeal. This disposes of the contention of the appellants so far as the claim for the years 1319 and 1320 is concerned.

The first contention of the appellants deserves a more careful consideration. The principle of *res judicata* has been applied upon an earlier decision in Title Suit No. 87 of 1912 by the then Subordinate Judge of Gaya, Babu Prayag Nath, of the claim of the plaintiff in respect of the years 1317 and 1318. In that suit the finding of the Subordinate Judge was as follows:—

"It is, therefore, impossible to ascertain in these suits the quantity and kind of crops in defendant's *bhaoli* lands. The determination of the question involved in this issue No. 4 must be left for separate rent suits to be hereafter brought by the plaintiff".

The judgment was concluded in the following words: —

"That the plaintiffs' claim for rent of *bhaoli* land be dismissed leaving the plaintiffs at liberty to sue for the rent of such land." The decree prepared in the suit also contains the same words.

The defendants in that case went in appeal to the High Court and objected to the aforesaid order of the Subordinate Judge giving liberty to the plaintiffs to bring another suit for the rent for the years in claim. The ground taken in the memorandum of appeal is as follows: —

"That the plaintiffs not being able to prove their claim the lower Court should have dismissed it and was not justified in ordering that the plaintiffs were at liberty to bring another suit for its recovery, specially when no such prayer was made by the plaintiffs".

Upon the above point taken in appeal, his Lordship of the Calcutta High Court (Fletcher, J.) observed as follows: —

"The lower Court has left the question as to the amount of rent open to be settled in any future suit that may be brought by the parties. We do not express any opinion as to whether the Judge had or had not the power of giving the plaintiffs the liberty to withdraw from the suit so far as that claim is concerned. That must be decided in proper proceedings that the plaintiffs may choose to institute".

The result was that the order of the Subordinate Judge leaving the question to be decided in another suit by the plaintiffs remained undisturbed by the High Court. I do not think the plaintiffs are precluded from laying their present claim for the *bhaoli* rent for the years 1317 and 1318 by reason of the above order of the Subordinate Judge in their former suit. Although an issue was raised in that suit, yet the Subordinate Judge rightly or wrongly did not decide the issue and there can be no *res judicata* under section 11 unless the issue was "heard and finally decided" by the Court. This is an essential condition for the application of the principle of *res judicata*.

The learned District Judge has relied on *Sukh Lal* v. *Bhikhi* (1). But in that case it was held upon evidence that the plaintiff was entitled to one-third share of the land in suit. The issue about the title of the plaintiff was decided and determined; yet the Munsif wrongly dismissed the suit, adding that his order will not prevent the plaintiff from instituting another suit for the one-third share decided in his favour. The second suit by the plaintiff brought for possession of the one-third share was held barred by *res judicata* on the ground that his title was declared and decided in the first suit and that the Munsif wrongly dismissed the whole claim instead of granting him relief in respect of one-third interest to which he was entitled and the plaintiff could rectify the decree by a review or an appeal. It was pointed out by Mahmud, J., that "where an issue has been raised and evidence received and adjudication arrived at, the suit does become *res judicata*". This ruling, therefore, does not apply to the present case, inasmuch as although an issue was raised there was no adjudication arrived at by the Subordinate Judge in the first suit.

The present case is rather similar to the case of *Ram Charan Buhardar* v. *Reaz-ul-din* (2), where the Courts declined to decide the issue and dismissed the plaintiff's suit without prejudice to his right to bring a fresh suit for possession of the same lands. It was held that what "was left undecided in the former suit cannot be said to have been heard and finally decided within the meaning of section 13 of the Code". The following observation in that case applies to this case as well: —

"It may be that in the former suit both Courts ought, properly speaking, to have insisted on proper issues being raised, and to have tried those issues upon the best evidence that the parties could adduce. But we are not prepared to say that the course taken by those Courts was *ultra*

(1) 11 A. 187; A. W. N. (1889) 13 6 Ind. Dec. (N. S.) 548.

(2) 10 C. 956; 5 Ind. Dec. (N. S.) 572.

rires. They considered, rightly or wrongly, that they were not in a position to try the main question in the cause."

In *Longmead* v. *Maple* (3) the plaintiff's suit was dismissed without prejudice to his right to bring another suit. It was held that the subsequent action by the plaintiff was not barred by the principle of *res judicata*. Willes, J., laid down that "the conditions for the exclusion of jurisdiction on the ground of *res judicata* are that the same identical matters shall have come in question already in a Court of competent jurisdiction, that the matter shall have been controverted and that it shall have been finally decided."

The above principle is affirmed by Lord Macnaghten in *Sheosagar Singh* v. *Sitaram Singh* (4), where his Lordship says as follows:—"To support a plea of *res judicata* it is not enough that the parties are the same and that the same matter is in issue. The matter must have been 'heard and finally decided'."

That case is much stronger than the present one, as in that case the plaintiff's suit was dismissed on merits by the Subordinate Judge and in appeal the High Court, while dismissing the case, withheld any decision on the issue concerning the merits of the case. There can be no *res judicata* when the question is left open: *vide Gungabishen Bhugut* v. *Raghoonath Ojha* (5), *Chunder Coomar Mitter* v. *Sib Sundari Dassee* (6) and *Ghurpheksni* v. *Purmeshar Dayal Dubey* (7).

In the Privy Council case of *Parsotam Gir* v. *Narbada Gir* (8), where the plaintiff's suit was dismissed by the High Court of Allahabad leaving it open to the plaintiffs to institute a fresh suit, it was held by their Lordships of the Privy Council that the former judgment did not operate as *res judicata*, on the ground that the Judges in the former suit did not intend to decide anything as between the parties and left it open to the plaintiffs to institute a suit against the defendant.

As to the contention about the order of the Court giving the plaintiff liberty to bring another suit it was answered by their Lordships of the Privy Council in the following words:—

"The question is not whether the judgment of the High Court in 1886 was right, but whether it did or did not finally decide the ...question as between Nepal Gir and Narbada Gir. It would be a contradiction in terms to say that the Court had finally decided the matters which it expressly left 'untouched and undecided.'"

The learned District Judge has tried to distinguish the aforesaid Privy Council ruling on the ground that "The Privy Council had before it two unintelligible judgments and, therefore, it was not possible to say with certainty that the question at issue in the second suit had been at issue in the first suit." This is not the ground upon which their Lordships of the Privy Council held that the principle of *res judicata* did not apply.

The ground was that the question was left undecided as is clear from the following words:—

"One thing, however, is plain; the learned Judges in 1886 did not intend to decide anything as between Nepal Gir and Narbada Gir."

Their Lordships of the Privy Council in a recent case, *Abdullah Ashgar Ali Khan* v. *Ganesh Das* (9), have held that the principle of *res judicata* did not apply where the Court of Appeal refused to determine the issue.

It is thus clear from the summary of the decisions referred to above that the refusal of the Court to determine an issue does not operate as *res judicata*. It does not matter whether the Court was right or wrong in refusing to try the issue, or in giving liberty to bring another suit. The Code of Civil Procedure in section 11 has clearly laid down that the matter must have been "heard and finally decided" in order to apply the bar of *res judicata* to a subsequent suit.

(3) (1865) 18 C. B. (N. S.) 256; 144 E. R. 441; 11 Jur. (N. S.) 177; 12 L. T. (N. S.) 143; 13 W. R. 469; 144 R. R. 482.

(4) 24 I. A. 52 at p. 58; 24 C. 616; 1 C. W. N. 297; 7 Sar P. C. J. 124; 12 Ind. Dec. N. S.) 1079.

(5) 7 C. 381; 9 C. L. R. 34; 3 Ind. Dec. (N. S.) 794.

(6) 8 C. 631, at p. 632; 11 C. L. R. 22; 4 Ind Dec. (N. S.) 406.

(7) 5 C. L. J 653.

(8) 21 A. 505; 1 Bom. L. R. 700; 3 C. W. N 517; 26 I. A. 175; 7 Sar. P. C. J 538; 9 Ind. Dec. (N. S.) 1028.

(9) 42 Ind. Cas. 959; 34 M. L. J. 12; 128 P. W. R. 19 7; 22 M L. T. 451; 23 C. W N 121; 3 P. L. W. 381; 26 C. L. J. 568; 15 A. L. J. 889; 18 Bom. L. R. 974; 7 L. W. 62; 132 P. L. R. 1917; (1918) M. W. N. 7 (P. C.).

I, therefore, hold that the claim of the plaintiffs for the *bhaoli* rent of 1317 and 1318 was not barred by reason of the decision in the former Suit No. 87 of 1912 and that the plaintiffs are entitled to a decree for the amount of rent proved by them for the years 1317 and 1318. The case must, therefore, be remanded to the lower Appellate Court to determine the amount of rent that the plaintiffs are entitled to for the years 1317 and 1318 and to return its finding to this Court by the 1st April.

ROE, J.—I agree that it is not *res judicata* that the appellants are not entitled to any rent at all for the years 1317 and 1318, and, therefore, concur in the proposed order remanding the case for a trial of the issue: what amount is due for the years 1317 and 1318. I do not consider it necessary to decide at present whether anything at all was decided by the previous litigation.

Case remanded.

ALLAHABAD HIGH COURT.

FULL BENCH.

SECOND CIVIL APPEAL NO. 357 OF 1916.

July 17, 1917.

Present:—Sir George Knox, KT., Ag. Chief Justice, Mr. Justice Tudball and Mr. Justice Rafique.

MUHAMMAD FAIYAZ ALI KHAN—PLAINTIFF—APPELLANT

versus

BEHARI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Wajib-ul-arz, *entry in, value of*—Parjote, *payment of*—*Suit to recover* parjote, *maintainability of.*

The *wajib-ul-arz* of a village recorded that every shopkeeper in the village was liable to pay *parjote* at a certain rate:

Held, that the entry pointed to the fact that the payment was based on agreement and not on custom and that being rent payable in kind under the terms of the *wajib-ul-arz* it could be recovered by suit. [p. 330, col. 1.]

Second appeal from a decree of the First Additional Judge, Aligarh, dated the 1st of December 1915, confirming a decree of the Munsif, Bulandshahr, dated the 25th of August 1915.

Maulvi *Iqbal Ahmad*, for the Appellant.

Munshi *Panna Lal*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by Nawab Mumtaz-ud-daula Faiyaz Ali Khan, who in his plaint sets himself out as, and who is further admitted to be, the sole Zemindar of the village to which this appeal relates. The respondents are in the plaint described as the village Banias and as being shopkeepers in the said village. The plaintiff is claiming 12 maunds of cotton seeds or the value thereof. It is true that in the plaint the plaintiff set out that there was a custom of such payment in the village. This amount of the seeds is payable for each shop occupied by the Banias in the Bazar. But in the written statement, which was filed, we note that the respondents themselves alleged that at the most the entry in the *wajib ul-arz* amounts to an agreement between themselves and the plaintiff, the terms of which expired at the end of the former Settlement of 1866. As the case went on, it is evident that the Courts below tried the question between the plaintiff and the defendants as a question of *parjote*. The Court of first instance held that the payment of this *parjote* was a custom proved. He says that it is *parjote* or ground-rent and not a cess and cannot be called illegal and the *wajib-ul-arz* of 1866 is a good evidence of the custom set up by the plaintiff but the Court went on to hold that the custom had fallen into desuetude and dismissed the claim of the plaintiff. The plaintiff went in appeal to the District Judge of Aligarh. That Court took a different view from the Court of the first instance and held that the custom to take ground-rent had not been proved. It, therefore, dismissed the appeal.

The plaintiff comes here in second appeal and the first plea taken by him is that the entry in the *wajib-ul arz* is a record of custom and proves the custom set up by the plaintiff-appellant, and a further plea is taken that in any case the plaintiff-appellant is entitled to get a reasonable rent of the land in the possession of the defendants-respondents. We are of opinion that the word custom throughout has been wrongly used. In case of an agreement between the plaintiff and the defendants it can never be said for a moment that the rent they paid was rent payable by force of custom. The word used in the *wajib-ul arz* is Parjote and points to the fact that if the payment of anything from the respondents to the

appellant was due, it was a matter based upon some agreement in the first instance. At first sight the way in which this payment was to be made may strike one as somewhat strange, but it is not so strange as to be impossible. The definition of rent sanctions the view that rent may be something paid in cash and also something paid in kind. When this is borne in mind, we are of opinion that the lower Appellate Court has approached the evidence it had to consider from a wrong point of view. There is on the record the *wajib-ul-arz* of 1870. We had that *wajib-ul-arz* read to us and we see nothing in the language which will justify the inference that the matters recorded in paragraph two * were unlikely or improbable. We look upon that paper as a statement made fifty years ago, more or less, by a person who was qualified and had the knowledge necessary to make it. It is not a statement narrating a tradition, but it is a statement by a person possessing an interest and an existing right in the village. It is extremely improbable that the person was making a statement to perpetrate a fraud or was making a statement which was false to be used fifty years afterwards. There was nothing to rebut that statement and we hold that the payment of *parjote* by the respondents to the appellant is proved thereby.

We accordingly set aside the decrees of both the Courts below and decree the plaintiff's claim with costs in all Courts and future interest at the usual rate.

Appeal decreed.

* *Reyaya bashinda deh se kiraya nahin liya jata hai.....Aur babat parjote.....bashindgan deh se bataſsil zael liya jata hai: Babat parjote sal tamam; bapqalan bazar ſi dukan binaula ek man;.....*

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 3460 OF 1913.

August 3, 1917.

Present:—Mr. Justice Mullick and Mr. Justice Atkinson.

CHULHAI—APPELLANT

versus

BALA BUKSH SETH AND OTHERS—RESPONDENTS.

Construction of document—Sale-deed, whether can be treated as deed of gift on failure of consideration.

Where a deed purporting to be a deed of sale fails for want of consideration, it is not open to the Court, in the absence of any indication in the deed itself, to treat it as a deed of gift. [p. 331, col. 1.]

A deed must be construed by what appears within the four corners of the document itself and the Court cannot go outside the deed for the purpose of showing the intention of the maker. [p. 331, col. 2.]

Ismail Mussajee Mookerdum v. *Hafiz Boo*, 10 C. W. N. 570; 3 A. L. J. 353; 3 C. L. J. 484; 8 Bom. L. R. 379; 16 M. L. J. 166; 1 M. L. T. 137; 33 C. 773; 33 I. A. 86 (P. C.), distinguished.

Appeal against the decision of the Judicial Commissioner, Chota Nagpur, dated the 12th June 1913, reversing a decision of the Munsif, Hazaribagh, dated the 31st May 1912.

Mr. *Atul Krishna Rai*, for the Appellant.

Mr. *Jamini Mohan Mukerji*, for the Respondents.

JUDGMENT.—The plaintiffs in this action seek a declaration that the defendants Nos. 1 to 4 have no right to share in the house forming the subject-matter of this suit. The facts shortly stated are that one Gopal, who was the common ancestor of the defendants, lived with his two grandsons, Hatim and Seru. The other members of the family had separated from him, to this extent, that they did not live with him and the daughters who were married resided in their own houses with their husbands. Gopal, who was a man of advanced age, resided with his two grandsons, Hatim and Seru, and it is alleged that on the 22nd April 1895, Gopal disposed of his interest in the two houses which he had by transferring them to Hatim and Seru. The *kebala* which was executed by Gopal appears on its face to be a deed of absolute sale and the consideration money specified therein to support the transaction is the sum of Rs. 100. At the time that the deed was executed Hatim and Seru were quite young, and although they are described in the deed of sale as shopkeepers, the learned Judge on appeal seems to think that it was quite impossible for Hatim and Seru to have had the means of paying the money specified in the sale-deed. Hatim got into difficulties and his creditors proceeded against him and obtained a decree and on foot of that decree proceeded against these two houses to realise the amount of their debt. In that execution proceeding Seru objected that the houses were partly his and that Hatim was only entitled to a half share in each house. Accordingly in that matter the Court was pleased to exclude

the share of Seru from the execution proceedings and the sale proceeded, and the plaintiffs became decree-holder purchasers of Hatim's interest in the houses alleged to have been conveyed by the deed of the 22nd of April 1895.

Then the members of Gopal's family other than Hatim and Seru appeared on the scene and contended that Hatim and Seru never got possession of the houses, that they did not form part of the property of Hatim and Seru and that, therefore, the plaintiffs got nothing by their purchase.

Accordingly the contest lies between the plaintiff on the one hand and the members of Gopal's family other than Hatim and Seru on the other. The members of Gopal's family claimed that the houses in suit formed their property and that the plaintiffs acquired no title at all by virtue of their purchase in the execution proceeding.

Everything turns in this case upon the true construction of the deed of sale, dated the 22nd of April 1895.

The learned Judge has come to the conclusion that no consideration money passed at all, that Hatim and Seru had no means with which to pay Rs. 100 as consideration money; and that, therefore, the document of the 22nd April 1895 was inoperative as a deed of sale. The learned Judge, however, seems to think that although the deed is inoperative as a deed of sale, nevertheless it was open to him in point of law to hold that the deed was a gift having regard to the intention of the party making it. Having considered the matter carefully in view of the authorities cited, we think that the learned Judge was wrong in coming to the conclusion that the deed of the 22nd of April 1895 was a gift. The case of *Ismail Mussajee Mookerdum* v. *Hafiz Boo* (1) has been relied on before us, but we are of opinion that the facts of that case are distinctly distinguishable from the facts of this case. In that case their Lordships were pleased to hold that although the deed in question was not on the face of it operative as a deed of sale, yet from its frame and from surrounding circumstances it was clear that the intention of the donor in that case was to make a gift and not a transaction by way of sale and purchase. But in the present case we do not find one single word or one single fact which would lead us to hold that the intention of the maker of the deed was to grant a gift. No such express or implied intention can be gathered from the deed itself. We are bound by the well-established principle of law that the deed must be construed by what appears within the four corners of the document itself and that we cannot go outside the deed for the purpose of showing the intention of the maker. Acting upon that general principle, we can find nothing in the deed which would justify the conclusion that the deed was a deed of gift. Accordingly we hold that the learned Judge was wrong in coming to the conclusion he did; and that as no consideration passed to support the deed of sale dated the 22nd of April 1895, no title was acquired by Hatim and Seru in respect of the houses in suit and consequently the plaintiffs acquired nothing by their purchase.

We would accordingly set aside the order of the learned Judge and allow this appeal with costs.

Appeal allowed.

(1) 10 C. W. N. 576; 3 A. L. J. 353; 3 C. L. J. 484; 8 Bom. L. R. 379; 16 M. L. J. 166; 1 M. L. T. 137; 33 C. 773; 33 I. A. 86 (P. C.).

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2646 OF 1914.

March 14, 1918.

Present :—Mr. Justice LeRossignol and Mr. Justice Wilberforce.

GULAB—DEFENDANT—APPELLANT

versus

BADHAWA—PLAINTIFF—RESPONDENT.

Registration Act (XVI of 1908), s. 17 (2) (vi)—Compromise embodied in proceedings of Court, whether compulsorily registrable—Party to compromise, whether can bring fresh suit—Estoppel.

Where a compromise entered into by parties to a suit is embodied in the proceedings of the Court, it does not require registration. [p. 332, col. 1.]

In a suit to recover possession of certain land the defendant pleaded that the plaintiff had served him with a notice of ejectment and he had brought a suit to contest the notice, whereupon the parties reached a compromise whereby the plaintiff ceded the land in dispute to the defendant and the defendant withdrew his suit in the Revenue Court:

Held, (1) that the compromise did not require registration and secondary evidence of its contents was admissible: [p 332, col. 1.]

(2) that by his admission of compromise before the Revenue Court the plaintiff having induced the

defendant to withdraw his suit in that Court, he was now estopped from bringing the present suit. [p. 332, col. 1.]

Second appeal from the decree of the District Judge, Lyallpur, dated the 10th October 1914, reversing that of the Subordinate Judge, 2nd Class, Lyallpur, dated the 31st of March 1914, dismissing the claim with costs.

Bakhshi *Tek Chand*, for the Appellant.

Mr. *Gobind Ram*, for the Respondent.

JUDGMENT.—In this case the plaintiff and the respondent are brothers and the plaintiff sues to recover one-third of a square from the defendant. The defendant's plea was that when the plaintiff had served him with a notice of ejectment, he had brought a suit in the Revenue Court to contest that notice, whereupon the parties reached a compromise whereby the plaintiff ceded the land in dispute to the defendant and defendant withdrew his suit in the Revenue Court. The first Court found that such a compromise had been effected and that the land in suit had been given by the plaintiff to the defendant, and dismissed the suit. On appeal the learned District Judge has decreed for the plaintiff, on the ground that before the parties recorded a compromise in the Revenue Court an agreement to get mutation of the land effected had been executed, that the agreement had not been registered and consequently had not been produced by the defendant and, therefore, no secondary evidence of the contents of the document could be received. This reasoning, in our opinion, is unsound. The compromise was recited to the Revenue Court and that Court embodied in its proceedings the essential portions of the compromise and taking cognizance of them dismissed the present defendant's suit at his request. The compromise being embodied in the proceedings of the Court required no registration. Further the case is a clear one of estoppel. By his admission of the compromise before the Revenue Court the plaintiff induced his brother to withdraw his suit, a course which otherwise he would not have adopted.

For these reasons we accept the appeal and restore the decree of the first Court with costs throughout.

Appeal accepted.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 1339 OF 1916.

June 11, 1917.

Present:—Mr. Justice Atkinson and Mr. Justice Jwala Prasad.

MAHADEO RAI—APPELLANT

versus

SHEOGULAM MAHTO—RESPONDENT.

Bengal Tenancy Act (VIII B. C. of 1885), ss. 76, 155—Landlord and tenant—Improvement, what is—Dwelling house, erection of, by tenant.

The clauses which specify what constitutes improvements within the meaning of section 76 of the Bengal Tenancy Act are not exhaustive. [p. 333, col. 1.]

A tenant is entitled to effect on his holding any improvement which would add to the value of the holding. [p. 333, col. 1.]

The fact that a tenant has a house in an adjacent *mouza* does not deprive him of his right to erect upon his occupancy holding another house for the purpose of making a residence for himself and his family. [p. 333, col. 1.]

Second appeal from a decision of the District Judge, Saran, dated the 10th July 1916, affirming a decision of the Subordinate Judge, Saran, dated the 5th June 1915.

Messrs. *Saroshi Charan Mitter* and *Ram Prasad*, for the Appellant.

Mr. *Naresh Chandra Sinha*, for the Respondents.

JUDGMENT.—The claim in this suit, in the form in which it was originally presented, was one for ejectment coupled with a claim for compensation for user by the defendants of their holding, as tenants of the plaintiffs, in a manner which was unfit for the purposes of the tenancy. The defendants are the tenants of the plaintiff in respect of 14 Bighas 7 Kattas 19 Dhurs of land. The lands of which the defendants are tenants are claimed by them as their *kashtkari* lands situated in Mauza Bangra; and in a *basti* adjacent to the lands in dispute the defendants have what is termed a residence. In or about the year 1912 the defendants erected, upon $7\frac{1}{2}$ Dhurs of the 14 Bighas 7 Kattas 19 Dhurs of land in their possession as tenants, a *katcha-pucca* house which may have been intended either for purposes of a dwelling house or as a shed for their cattle. The plaintiff brings this suit basing his claim on section 155 of the Bengal Tenancy Act. The plaintiff alleges that the defendants in erecting the house in question have used the holding

for purposes inconsistent with the nature of the tenancy. Both the lower Courts have held that the erection of the house was an improvement, and we gather from the observations of the lower Appellate Court that the improvement was of a suitable character having regard to the nature of the tenancy. This finding of fact arrived at by the lower Courts practically disposes of this appeal. The plaintiff entirely abandoned his claim for ejectment, certainly in the lower Appellate Court, and he merely claimed compensation for the alleged damage sustained by him. A tenant is entitled to effect on his holding any improvement which would add to the value of the holding. The clauses which specify what constitutes improvements within the meaning of section 76 of the Bengal Tenancy Act are not exhaustive. However, clause (*j*) of sub-section (2) of section 76 of the Act provides that a Raiyat may erect a suitable dwelling house for himself and his family together with all necessary outhouses. Both the lower Courts have, however, come to a definite finding of fact that the erection put up by the defendant is an improvement, and the lower Appellate Court holds that the improvement is consistent with the purposes of the tenancy. This is a finding of fact by which we are bound in second appeal. The fact that the defendants have a house in an adjacent Mauza would not, in our opinion, deprive them of their right to erect upon their occupancy holding another house for the purpose of making a residence for themselves and their family.

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

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 2053 OF 1915.

August 24, 1917.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Oldfield.

RAJAGOPALACHAR—PLAINTIFF—APPELLANT

versus

SUNDARAM CHETTY AND OTHERS—DEFENDANTS NOS. 1 TO 3 AND 8—RESPONDENTS.

Benami *transaction—Mortgage—Tainted origin of money lent, effect of—Fraud, intended but not effected—Suit, maintainability of, by real beneficiary.*

Where a mortgage was taken *benami* with money having a tainted origin in the name of *N* for a fraudulent purpose for plaintiff's benefit, but the fraud was not effected:

Held, per *Wallis, C. J.*—That the plaintiff could sue to enforce the mortgage as the fraud contemplated was not, in fact, effected. [p. 334, col. 1.]

Feret v. *Hill*, (1845) 15 C. B. 207; 2 C. L. R. 186; 23 L. J. C. P. 185; 18 Jur. 1014; 2 W. R. 493; 139 E. R. 400; 23 L. T. (o. s.) 158; 100 R. R. 318, distinguished.

Per *Oldfield, J.*—That the suit was maintainable, however tainted was the origin of the money lent, and that no further proof was necessary for the claim than that the ostensible mortgagee had the funds, whatever their origin, and invested them for plaintiff's benefit in a manner which was innocent in itself. [p. 334, col. 2.]

Second appeal against the decree of the District Court, Trichinopoly, in Appeal Suit No. 124 of 1915, preferred against the decree of the Court of the District Munsif, Namakkal, in Original Suit No. 592 of 1910.

Messrs. *L. A. Govinda Raghava Ayyar* and *L. S. Veeraraghava Ayyar*, for the Appellant.

The Hon'ble Mr. *T. Rangachariar* and Mr. *T. M. Krishnasami Ayyar*, for the Respondents.

JUDGMENT.

WALLIS, C. J.—The plaintiff first sued as heir of his natural mother Namammal, the nominal mortgagee under Exhibit A, the document sued on. The Subordinate Judge, in appeal, found that he was not entitled to sue as her heir and gave leave to amend the plaint. The plaintiff in his amended plaint alleged that the document was taken in the name of his mother for his benefit by one Srirangammal, widow of Appanna Ayyangar, as there were then disputes going on as to whether the plaintiff had been lawfully adopted by Appanna Ayyangar and it was desired to benefit him in any event. Both the District Munsif and the District Judge have found that the mortgage money was advanced by Srirangammal, Appanna Ayyangar's widow, out of the sale proceeds of properties which had formed part of his estate and had been sold by her under Exhibit C as guardian of the plaintiff and on the footing that he was the adopted son of Appanna Ayyangar. They have also found that this was done to defraud Rangasami Ayyangar, who was also claiming to have been adopted, in the

event of the disputes ending in his favour and the District Judge, applying apparently the maxim *allegans suam turpitudinem non est audiendus*, has dismissed the suit. The plaintiff's cause of action in the amended claim is that the mortgage was taken *benami* in his name for this fraudulent purpose and it appears to be well settled, as laid down by A. G. Smith, L. J., in *Scott* v. *Brown* (1), that, if a plaintiff cannot maintain his cause of action without showing that as part of such cause of action he has been guilty of illegality, the Courts will not assist him in his illegality. See also *Taylor* v. *Chester* (2), *Gordon* v. *Metropolitan Police Commissioner* (3). In *Feret* v. *Hill* (4) a plaintiff who had taken premises for the purposes of using them for prostitution and had been ejected by the landlord for so using them was allowed to recover possession from the landlord, but this has been explained in *Gordon* v. *Metropolitan Police Commissioner* (3), on the ground that the plaintiff was entitled to possession under his lease and that the purpose for which he acquired the premises was not a matter which he had to prove to establish his cause of action.

In the present case the plaintiff as part of his cause of action has to prove that the mortgage taken in the name of Namammal was *benami* for him, and the finding is that it was so taken with a fraudulent intention. It is, however, well settled that this is not a bar to a suit unless a fraud has been in fact effected. *Petherpermal Chetty* v. *Muniandi Servai* (5). The mortgage money, in the present case, was the proceeds of certain properties sold by the widow of Appanna Ayyangar under Exhibit C and Rangasami Ayyangar having by Exhibit D renounced his claim to be the adopted son and to the properties comprised in Exhibit C, it follows, in my opinion, that no fraud has been effected in this case and the plaintiff is entitled to succeed. I would reverse the decision of the lower Appellate Court and restore that of the District Munsif with costs throughout.

OLDFIELD, J.—With all respect I am not at present clear that the present case is one of those, in which the plaintiff cannot maintain his cause of action without showing as part of it that he or a person, under whom he claims, has been guilty of illegality. No doubt in the plaint, as amended, he said that "the amount of the suit land was given from the estate of his adoptive father by his adoptive mother for his benefit and the document was obtained in the name of his natural mother *benami*, having in view the litigation that was going on then regarding his adoption; and this was an admission of a wrongful conversion which no attempt has been made to defend. But it has not so far been shown that this averment or proof of it was necessary for the establishment of plaintiff's case; or that more was required than proof that his natural mother, the ostensible mortgagee, had the funds and invested them, whatever their origin, for plaintiff's benefit, in a manner which was innocent in itself, in the suit mortgage. If such proof could be given without reference to that origin, it and plaintiff's admission regarding it would be immaterial. The distinction involved is justified by reference to *Tassell* v. *Cooper* (6), *Farmer* v. *Russell* (7) and *Gordon* v. *Metropolitan Police Commissioner* (3), the plaintiff in the two last mentioned cases having actually alleged and given evidence of a tainted origin for the money claimed. This aspect of the case was not present to the minds of the lower Courts, and, if these were the only facts, I should think that a remand, in order to its consideration, would be necessary.

There is, however, Exhibit B which, I agree with my Lord, covers the land from the sale of which the money lent under the suit mortgage was derived, and the money itself, and whether the result of that document is to negative the carrying out

(1) (1892) 2 Q. B. 724; 61 L. J. Q. B. 738; 4 R. 42; 67 L. T. 782; 41 W. R. 116; 57 J. P. 213.

(2) (1869) 4 Q. B. 309 at p. 315; 10 B. & S. 237; 38 L. J. Q. B. 225; 21 L. T. 359.

(3) (1910) 2 K. B. 1080; 79 L. J. K. B. 957; 103 L. T. 338; 74 J. P. 437; 54 S. J. 719; 26 T. L. R. 645.

(4) (1845) 15 C. B. 207; 2 C. L. R. 186; 23 L. J. C. P. 185; 18 Jur. 1014; 2 W. R. 493; 139 E. R. 400; 23 L. T. (o. s.) 158; 100 R. R. 318.

(5) 35 I. A. 98; 10 Bom. L. R. 590; 12 C. W. N. 562; 5 A. L. J. 290; 7 C. L. J. 528; 14 Bur. L. R. 108; 35 C. 551; 18 M. L. J. 277; 4 M. L. T. 12; 4 L. B. R. 266 (P. C.).

(6) (1850) 9 C. B. 509; 137 E. R. 990; 82 R. R. 411.

(7) (1798) 1 Bos. & P. 296; 126 E. R. 913.

of any fraud on its executant or, as I should, with all due deference, prefer to hold, to vest in plaintiff the ownership of the land or the money which now represents it, the result is the same, that plaintiff is entitled to sue. I concur in the decision proposed.

Appeal allowed.

M. C. P.

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 5 OF 1915.

September 21, 1917.

Present:—Mr. Pratt, J. C., and Mr. Hayward, A. J. C.

MULCHAND TILOKCHAND—
APPELLANT
versus
Fakir MURADALI SHERMOHMED
AND OTHERS—RESPONDENTS.

Bombay Land Revenue Code (Bom. Act V of 1879), s. 203—Executive order of Revenue Officer—Appeal, right of, by aggrieved person not party to inquiry—Bombay Revenue Jurisdiction Act (X of 1876), s. 10.

Under section 203 of the Bombay Land Revenue Code, the right of appeal against an executive order of a Revenue Officer is vested in every person aggrieved by the order, irrespective of his being a party to the inquiry wherein the order was passed. [p. 335, col. 2.]

Appeal against the decision of the District Judge, Hyderabad.

Mr. *Kewalram Jethanand*, for the Appellant.

Mr. *E. Raymond*, for Respondent No. 2.

JUDGMENT.—The plaintiff-appellant sues the first defendant and the Secretary of State, alleging that the land to the north of his shop over which he had frontage rights and, therefore, as he says, a right of prior grant, had been wrongly sold by the Deputy Collector to the first defendant.

His prayer is that the land should be granted to him on payment of Rs. 13-14-0.

This prayer makes the Deputy Collector's order the cause of action and is equivalent to a prayer for an injunction on the Secretary of State to grant the land to himself. The District Judge held the suit barred by section 11 of the Bombay Revenue Jurisdiction Act, 1876, on the ground that there had been no appeal from the Deputy Collector to the Collector or at any rate from the Collector to the Commissioner.

The contention of the plaintiff in this Court is that he was not a party to the proceeding before the Deputy Collector and had, therefore, no right of appeal under section 203 of the Bombay Land Revenue Code.

Section 203 of the Bombay Land Revenue Code provides for an appeal from "any decision or order passed by a Revenue Officer." The words "any order" are very wide and include orders that are either executive or judicial or *quasi*-judicial. The latter class of order should be passed by the Collector after an inquiry which may be formal or summary or ordinary (sections 193, 195 and 197). In such a case there would be a judicial or *quasi*-judicial inquiry and it might be contended that the right of appeal was limited to a party to that inquiry. But if the order is, as in the present case, a mere executive order professing to dispose of Government land, there would be no inquiry or proceeding, to which the appellant could be a party. In such a case it seems to us that the right of appeal is vested in the person aggrieved by the order. This seems to be in consonance with the language and intention of section 203 and apparently it was the view taken of the section in the cases of *Natha* v. *Secretary of State* (1) and *Government of Bombay* v. *Bhimbhai Sundarji* (2).

This construction involves no hardship for if the Collector has put the first defendant into possession or done a physical act that violates plaintiff's right, that would supply a cause of action to which section 11 of the Bombay Revenue Jurisdiction Act would be no bar; *Sultan Mahamed Shah* v. *Secretary of State* (3).

There is moreover another fatal objection to plaintiff's suit, for it affects to control the disposal by Government of

(1) (1896) P. J. 341.
(2) (1879) P. J. 351.
(3) 10 Ind. Cas. 223; 5 S. L. R. 46.

waste land and is, therefore, barred by section 4 of the Act.

We, therefore, confirm the decree of the lower Court and dismiss this appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

RULES *Nisi* NOS. 708 AND 709 OF 1917.

April 3, 1918.

Present :—Mr. Justice Teunon and Mr. Justice Newbould.

PEARI LAL DAS AND OTHERS—PETITIONERS

versus

BEPIN BEHARI DAS AND OTHERS—OPPOSITE PARTIES.

Probate and Administration Act (V of 1881), ss. 8, 9, 98—Probate granted to some executors without citation upon others—Remedy of other executors—Executors not liable to render accounts under Will, whether exempt from exhibiting accounts to Court.

Where Probate has been granted to some of the executors appointed by a Will without citation upon the others calling upon them to accept or renounce their executorships, section 9 of the Probate and Administration Act becomes applicable to the case and the other executors can, on application for Probate, obtain it unless they are debarred under section 8 of the Act.

A provision in a Will that the executors shall not be liable to render accounts does not exempt them from the obligation of exhibiting to the Court of Probate the account of the estate required by section 98 of the Probate and Administration Act. But the Probate Court in such a case has no concern with the accounts of management by the executors.

Rules against the order of the District Judge, Dacca.

Babus *Mohendra Nath Roy* and *Jotindra Nath Roy*, for the Petitioners.

Babus *Bepin Chandra Mullick* and *Bhupendra Chandra Guha*, for the Opposite Party.

JUDGMENT.—In these two Rules it appears that one Kamini Sundari Dasi made a Will by which she dedicated the bulk of her property to a certain deity.

By the Will she appointed six executors, of whom three Pyari Lal, Nadiar Chand and Bepin Behari Saha proved the Will and obtained a grant of probate on the 12th of August 1912. The remaining three Koylash Chandra, Bepin Behari Das and Sarat Lal have now applied that they should be joined in the grant, but of these the first named has since formally renounced his executorship.

The applications of Bepin Behari Das and Sarat Lal are opposed by the three executors to whom probate was granted in the first instance. They alleged on the part of the applicants adverse interest, lack of business capacity and waiver and their contention before us is that issues on these questions should have been framed.

We are unable to accede to this contention. It is not suggested that either of these present applicants renounced his executorship in the manner contemplated in section 16 of the Probate and Administration Act, and in fact no citation calling upon them to accept or renounce their executorship was ever issued. This is, therefore, a case to which section 9 is strictly applicable, and the only question that can arise is whether the applicants are debarred by incapacity within the meaning of section 8.

The Rules are further directed against an order by which the District Judge has required the executors who obtained probate to furnish accounts. They take exception to this order, on the ground that the Will provides that the executors shall not be liable to render accounts. But this does not exempt them from the obligation of exhibiting to the Court of Probate the account of the estate required by section 98, though we may point out that with their management as Shebaits and with the accounts of such management that Probate Court has no concern.

With these observations, we discharge both these Rules with costs to the opposite parties. We assess the hearing fee in each Rule at two gold *mohurs*.

Rules discharged.

PAITALI SINGH *v.* GANAPATI KUER.

PATNA HIGH COURT.

CRIMINAL REVISION No. 432 OF 1917.

December 11, 1917.

Present:—Mr. Justice Jwala Prasad.

PAITALI SINGH AND OTHERS—PETITIONERS

versus

Musammat GANAPATI KUER AND OTHERS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 145—Rejection of material evidence—Jurisdiction, refusal to exercise—Revision.

Ordinarily the rejection of evidence might not be accepted as a good ground for revision of an order under section 145 of the Code of Criminal Procedure, but the rejection of material evidence offered by a party would amount to a refusal to exercise jurisdiction vested in the Court by section 145. [p. 338, col. 1.]

Criminal revision against an order of the Honorary Magistrate, Dinapore, dated the 25th September 1917.

Messrs. *S.P. Varma* and *Mohammed Mahmud*, for the Petitioners.

Mr. *Panchanan Banerjee*, for the Opposite Party.

JUDGMENT.—This is an application against an order of an Honorary Magistrate of Dinapore, dated the 25th September 1917, under section 145 of the Code of Criminal Procedure, declaring the second party to be in possession of the land in dispute.

The first party represents the landlords and the second party are the tenants. The first party obtained a rent decree against the second party on the 19th December 1912. This decree was passed in the presence of the second party and was a contested one. The sale certificate was obtained on the 19th June 1912. The contention of the first party is that on the strength of the decree and the sale certificate obtained from the Civil Court, they applied to the Court for delivery of possession and accordingly possession was delivered to them of the land in dispute with the crop standing thereon by a Civil Court peon deputed by the Court. On the 23rd September 1916, in order to prove the delivery of possession, the first party filed the writ of the Civil Court along with a report of the peon Nabi Hussain, who is said to have delivered possession on the spot. Nabi Hussain was summoned as a witness on behalf of the first party; and on an application of the first party a Rubakar or letter was addressed to the District Judge by the Magistrate calling for the records mentioned in its margin. The note in the margin giving the specification of the papers is as follows:—

"Ganga Dayal Singh and others—Appellants

versus

Musammat Ganpati Kuer—Defendants.

Case No. 2568 of 1910 disposed of on 19th December 1912.

Case No. 587 of 1914 disposed of on 23rd September 1917.

Disposed of by the Munsif, 2nd Court."

This Rubakar was returned to the Magistrate with a note of the record-keeper on the back of it saying—"that the Case Nos. 2568 of 1910 and 587 (2587) of 1914 is not found in the catalogue of Munsif, 2nd Court. It may be returned to the Court concerned for information." This was received by the Magistrate on the 12th September, and upon that date it was ordered to be shown to the Mukhtear of the first party for giving correct numbers of the cases. Neither the order-sheet nor the petition shows that this order was communicated to the Mukhtear of the first party. The date of the case was the 11th September and it was received on the 12th, and so it cannot be presumed that this order was at all known to the party concerned. On the 11th the case was adjourned to the 18th, so from the 12th to the 18th there does not appear to be any reason for presumption that the first party must have known of the order passed in the case unless it was expressly communicated to the first party. The result was that the original papers called for were not produced in Court. On the 18th September, the date fixed for the case, the first party put in another petition praying for an adjournment of the case as the original papers were not forthcoming, in order that they may be called for and proved by witness Nabi Hussain who was then present in Court. Babu Nabi Hussain peon could not possibly be examined without these original papers, and hence he was not examined. The Magistrate by his order on the top of the petition refused it, because the order of the 12th September was not complied with. As shown above no opportunity was given to the first party to comply with that order of the 12th September. On the 18th September, therefore, the case was disposed of without the evidence of the peon or the documents referred to above, whereby possession was

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said to have been delivered to the first party by the Civil Court. The Court decided, therefore, upon oral evidence of the first party, and came to the conclusion that possession, under the sale certificate, had not been given and decided this upon a contradiction in the statements of the Patwari and Chaukidar. The Magistrate disbelieved the Patwari witness for the first party for the reasons given by him in his order. But the question here is what would have been the effect of the papers which the first party wanted to prove in the case, and the evidence of the peon who is said to have given possession. Upon the evidence of the peon corroborated by the *dakhl dehani* or delivery of possession, the Court, notwithstanding the fact that it disbelieved the evidence of the Patwari and the Chaukidar, might have come to the conclusion that possession was actually delivered to the first party. If that were so, the Court necessarily would have held that the second party had no claim to possession over the property in dispute. Ordinarily the rejection of evidence in certain cases might not be accepted as a good ground for revision under section 145 of the Code of Criminal Procedure, but the rejection of material evidence offered by a party, as in this particular case, to my mind, would be a refusal to exercise jurisdiction vested in the Court by section 145. There does not appear to be any laches on the part of the first party in the case. I am also impressed in this case by the fact that the second party contested the rent suit and that the decree was obtained in his presence in 1912. The rent decree was not satisfied up till 1914 and the plea of the second party as summarised by the Magistrate that he would have paid up the decree if he had known of the execution of the decree, does not appear to me to be tenable. I am also impressed by the fact that possession is said to have been delivered only in September 1916 and the present dispute arose just after the delivery of possession by the Civil Court, which, if proved, the Criminal Court is bound to respect and give effect to. It appears to me also that the first party did all that it could in order to secure the papers. The details given in the margin of the Rubakar appear to me to agree exactly with the certified copy. The record-keeper reported that the papers of the cases mentioned in the Rubakar were not traced in the catalogue of the Second Munsif's Court but the decree was passed and the *dakhl dehani* was issued by Second Munsif. And although there appears to be no mistake in the number of the cases cited in the margin of the Rubakar, still the Magistrate by his order directed the correct numbers of the cases to be given. I, therefore, think that the Magistrate ought to have, on the 18th September when the case was first taken up, drawn the attention of the party to the report of the record keeper and tried to find out where the mistake was and why the papers asked for were not sent by the District Judge. In any case the Magistrate should have allowed an adjournment of the case, as prayed for by the first party, so that necessary steps could have been taken to get the papers. The case was taken up only six days after the first date of hearing, namely, the 11th September and so there does not appear to have been any delay of the case by the first party. I therefore, with reluctance set aside the order of the Magistrate and remand the case to him in order that the first party may be given an opportunity to get the papers properly proved, and also to examine the peon Nabi Hussain, and then to decide the question of possession.

The costs, if already paid, will be taken into account in the final order of the Magistrate.

Order set aside;
Case remanded.

CALCUTTA HIGH COURT.
SPECIAL BENCH
June 27, 1917.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, Justice Sir John Woodroffe, KT., Justice Sir Asutosh Mookerjee, KT., Justice Sir Charles Chitty, KT., and Mr. Justice Fletcher.

In the matter of TARIT KANTI BISWAS, PRINTER AND PUBLISHER OF THE "AMRITA BAZAR PATRIKA", AND OTHERS.

Contempt of Court, what constitutes—High Court, power of, to punish contempt summarily when committed out of Court—Printer and publisher of newspaper, liability of, for contempt—Directors of limited com-

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pany carrying on newspaper, liability of, for contempt —Civil and criminal contempt, distinction between— Construction of writings alleged to be contempt of Court—Evidence Act (I of 1872), ss. 65, 74—Secondary evidence of returns in custody of Registrar of Joint Stock Companies, whether admissible.

Per *Sanderson, C. J, and Mookerjee, J.*— In deciding whether an article published in a newspaper is or is not a contempt of Court, the question is not whether the article in fact obstructed or interfered with the due course of justice but whether it is "calculated" to obstruct and interfere with the due course of justice. [p. 363, col. 1; p. 386, col. 1.]

An allegation against a litigant that he is attempting to get a Bench constituted in such a way as would in his opinion give him a favourable decision, is calculated to obstruct or interfere with the course of justice and is, therefore, a contempt [p. 363, col. 1; p. 386, col. 2.]

Per *Curiam.*—The High Courts in India are superior Courts of Record. The offence of contempt of Court and the powers of the High Court to punish it are the same in India as in the superior Courts in England and the High Court has power to punish summarily a contempt of Court committed by the publication of a libel on the Court or on the Judges when the Court is not sitting. [p. 365, col. 2; p. 386, col. 2.]

The printer and publisher of a newspaper is liable for contempt even though he was not aware of the subject constituting such contempt. [p. 366, col. 1; p. 391, col. 1.]

The jurisdiction which the Court has in respect of a contempt of Court should be exercised with great care and should only be exercised when the case is beyond all reasonable doubt, and this should especially be the case when the proceedings are at the instance of the Court itself. [p. 369, col. 1.]

Per *Woodroffe, J.*—In contempt cases the Court does not seek to vindicate any personal interest of the Judges but the general administration of justice, which is a public concern. Proceedings for contempt by scandalising the Court are not obsolete. [p. 372, col. 1.]

All proceedings, whether in respect of civil or criminal contempts, are of a criminal nature when their object is to punish by fine or imprisonment. But it does not follow that the procedure in such cases is in all respects the same as in an ordinary criminal case. In fact both the offence of contempt as also the jurisdiction and procedure under which it is tried are *sui generis*. There is but one rule of evidence which in India applies both to civil and criminal trials, and that is contained in the definition of "proved" and "disproved" in section 3 of the Evidence Act. [p. 372, cols. 1 & 2.]

One cannot escape either contempt or libel merely by relying upon a rumour. [p. 374 col. 2.]

It is a contempt of Court to prejudice or attempt to prejudice a litigant before it and to interfere with the course of justice. [p. 375, col. 1.]

The question whether persons in the position of directors of a company carrying on a newspaper are responsible for contemptuous articles published in the paper must depend upon the facts of each case. [p. 377, col. 2.]

Per *Mookerjee, J.*—In ascertaining the true meaning articles published in a newspaper and alleged to be contemptuous, the obvious course to pursue is to read the offending articles as they stand and to attach to the words used their natural meaning without the assistance of a laborious commentary. The meaning and intent are to be determined by a fair interpretation of the language used and by a consideration of the general tone of the writing. Disclaimer on the part of the publisher as to intentional disrespect to the Court is not a sufficient defence when the purpose and meaning of the writing is obviously of a contrary import. No doubt if the language is fairly capable of an innocent interpretation, the Court will not read into it a sinister import. But if the intent is fairly clear, liability to punishment for contempt of Court cannot be successfully avoided by the use of a transparent artifice [p. 382, cols. 1 & 2.]

Contempt by a speech or writing may be by scandalising the Court itself or by abusing parties to an action or by prejudicing mankind in favour of or against a party before the cause is heard. [p. 388, col. 1.]

A criminal contempt is conduct that is directed against the dignity and authority of the Court. A civil contempt, on the other hand, is failure to do something ordered to be done by a Court in a civil action for the benefit of the opposing party therein. Consequently in the case of a criminal contempt as the primary purpose is the vindication of the public authority by the punishment of an act committed against the majesty of the law the proceeding conforms as nearly as possible to proceedings in criminal cases. In the case of a civil contempt the proceeding in its initial stages at least may be deemed as instituted at the instance of a party and thus to possess a civil character. But here also refusal to obey the order of the Court may render it necessary for the Court to adopt punitive measures against the persons who have defied its authority; at that stage at least the proceedings may assume a criminal character. [p. 389, col. 1.]

A proceeding to punish for contempt has the essential qualities of a criminal proceeding, whether the proceeding is initiated primarily to vindicate the Court's authority or solely as a coercive or remedial measure to enforce the rights of the litigants or for both these purposes combined. [p. 390, cols. 1 & 2.]

Supplementary evidence cannot be given so as to prejudice the position of an accused. [p. 393, col. 1.]

It cannot be held as a matter of law that the directors of a limited company which owns a newspaper are liable to be committed for contempt of Court on account of a libel published in the paper. [p. 392, col. 1.]

Per *Woodroffe and Mookerjee, JJ.*—Secondary evidence of the returns filed with and in the custody of the Registrar of Joint Stock Companies is admissible, as such returns constitute public records of private documents within the meaning of section 74 (2) of the Evidence Act. [p. 392, cols. 1 & 2; p. 376, cols. 1 & 2.]

The term "record" includes a collection of documents. [p. 392, col. 2; p. 376, col. 2.]

A Division Bench (Mookerjee and Cuming, JJ.) held in an appeal that the Calcutta Improvement Trust had no power under the Calcutta Improvement Act to acquire land compulsorily for the purpose of recoupment. In three other cases Greaves, J, sitting on the Original Side, decided that the Trust had such

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power. When the appeals from Mr. Justice Greaves were about to be heard by the High Court hearing appeals from the Original Side, the following two articles were published in the "*Amrita Bazar Patrika*" newspaper in its issues of the 18th and 22nd May 1917, respectively:

"There is a mischievous rumour afloat, which should be contradicted. It is stated that a vigorous attempt is being made to get up a Bench to consider the appeal on the judgment of Mr. Justice Greaves in connection with the acquisition of surplus land by the Calcutta Improvement Trust according to somebody's choice. We do not believe that it is possible for any one, far less the Chairman of the Trust, to secure a Bench after his own heart as a counterpoise to the Mookerjee and Cuming Bench. We are sure the interest of every ratepayer is safe in the hands of the Hon'ble Judges, and we do not think that any Official of the Trust can go so far."

"Something like consternation prevails on account of the proposed new constitution of the Appellate Bench of the Calcutta High Court before which appeals against the awards of the Improvement Trust are to be heard. It is known to the reader how this Bench was originally composed of Sir Asutosh Mookerjee and the Hon'ble Justice Cuming, and how latterly it has come to be presided over by the Hon'ble the Chief Justice and Mr. Justice Woodroffe. Rumour has it that for purposes of hearing Improvement Trust appeals the Bench is going to be strengthened by the appointment of Mr. Justice Chitty. Now what neither the public nor ourselves can understand is this special arrangement for such a Special Bench. If it is contended that two Hon'ble Judges of the highest Court in the land are not competent to decide in appeal cases in which the Improvement Trust is concerned, a contention, however, which we do not believe the Chief Justice will care to advance, why should there be a Special Bench of three and not a Full Bench of five, on which at least two Indian Judges could find seats? As a matter of fact, as landowners in Calcutta are mostly Indians, and as Indian Judges are likely to know more of conditions, practices, etc., prevailing here, it is but meet that the Appellate Bench in the present circumstances should be so composed as to associate Indian Judges with their European colleagues. The withdrawal of Sir Asutosh has given rise to rather unsavoury impressions in the public mind, since this proposed arrangement is to follow close upon the heels of his judgment in the case of *Trustees for the Improvement of Calcutta* v. *Chandra Kanta Ghosh*, (36 Ind Cas 749; 24 C. L. J. 246; 44 C. 219; 21 C. W. N. 8). Be that as it may, we have perfect faith in the present Chief Justice and believe that as soon as Sir Lancelot Sanderson understands the public feeling in the matter, his Lordship will either form a Full Bench or at least associate an experienced Indian Judge with himself for the hearing of Improvement Trust appeals."

Held, (1) that the articles might legitimately be read together to determine their scope and purpose, even though they were proved not to have been written by the same person; [p. 364, col. 1.]

(2) that the articles were calculated to bring the Court and the Chief Justice who was responsible for its administration into contempt, and not only to destroy confidence in the Court but also to undermine and impair its authority and that as such they constituted a contempt of Court. [p. 364, col. 1.]

Rule issued on the Directors, Manager and Printer and Publisher of the "Amrita Bazar Patrika" to show cause why they should not be committed for contempt of Court.

FACTS appear from the judgment.

Mr. *Jackson* (with him Mr. *C. C. Ghose*), for Babu Moti Lal Ghose.—I would ask your Lordships first with reference to this matter in what jurisdiction this Court is sitting. Your Lordships must not fancy that I am putting this without any reason. The whole of this was gone into in the case of *Tayler* (1), and it was held that it ought to be the ordinary criminal jurisdiction.

[SANDERSON, C. J.—We are perfectly ready to hear anything you wish to say on that point.]

Your Lordship has not given me the information I asked for.

[SANDERSON, C. J.—How is it you are entitled to ask me what jurisdiction we are entitled to exercise?]

There is no instance on record of a paper being filed in which the parties are not entitled to know in what jurisdiction it is. There are only three jurisdictions, original, civil and criminal. That has been settled by the Privy Council. I wish to know in which of them the Court is dealing with this matter. It has been held repeatedly as a matter of fact if this is contempt of Court, it is merely a criminal matter and can only be tried on the criminal side. The first matter with reference to that question is with regard to the question of jurisdiction. The Charter simply creates a High Court, but the jurisdictions are all conferred by the Letters Patent. The first case on the point is *Navirahu* v. *Turner* (2). There the jurisdictions are distinctly stated. I may mention further, I have got a *verbatim* copy of what took place before Sir Barnes Peacock in the celebrated *Englishman* case [*Banks and Fenwick, In the matter of* (3).] There the case was first started in the Ordinary Original Civil Jurisdiction. The first objection taken was that it could not be tried as such, and eventually Sir Barnes Peacock said: "I am quite ready

(1) 44 Ind. Cas. 930; 26 C. L. J. 345; 19 Cr. L. J. 492.
(2) 16 I. A. 156; 13 B. 529; 5 Sar. P. C. J. 499; 13 Ind. Jur. 251; 7 Ind. Dec. (N. s.) 345.
(3) 45 Ind. Cas. 113; 20 C. L. J. 40; 19 C. L. J. 449.

to admit that." The law has not been altered, or the Charter or anything since those days.

[FLETCHER, J.—Where is that reported?]

It is not reported anywhere. I have got a *verbatim* copy. Sir Charles Paul argued the case with Mr. Kennedy and he corrected the transcript. I was present throughout the trial and I can assure your Lordships that the report is absolutely correct.

[SANDERSON, C. J.—Would you mind telling me, Mr. Jackson, what is the point of this? Do you dispute the proposition that if, supposing this is a contempt of Court, we have no jurisdiction to deal with it?]

I am not disputing it if you do it in the proper jurisdiction. But it makes all the difference to me whether you are trying it in the criminal or civil jurisdiction. I claim the right, if it is a criminal matter, to be tried criminally and with all the advantages and disadvantages of a criminal trial.

[SANDERSON, C. J.—I suppose sitting here we have every jurisdiction.]

No. I submit you cannot sit in five jurisdictions at the same moment. It makes all the difference in the world under what jurisdiction you are sitting. How can you sit in all of them together? What would be the result? It would be utterly impossible. It must be one jurisdiction or the other. It is a matter of the greatest importance. You find every single case in England that deals with this matter lays the greatest stress on the fact that it is a criminal matter.

After citing the case of *Governor of Bengal* v. *Moti Lal* (4) Mr. *Jackson* continued: I am entitled to know in what jurisdiction I am being proceeded against. There are a whole number of cases in regard to this. This disposes of all this about Courts of Record and so on.

[SANDERSON, C. J.—What do you mean by "all this about Courts of Record and so on"? I think Sir Lawrence Jenkins said that this Court being a Court of Record had power to commit for contempt.]

I am perfectly well aware of that. All I was going to say is that if the Bench of the Privy Council comprising Lords Watson, Macnaghten, Davis and Morris is right, the day is not far distant when they will rule that you have no power, that it is an obsolete power. I wish to draw your attention to *McLeod* v. *St. Aubyn* (5).

[SANDERSON, C. J.—A year or two after that in England itself proceedings were taken against the proprietor of a newspaper for contempt of Court. Even in England itself the matter was not obsolete.]

The whole of this opinion was gone into before Sir Barnes Peacock in the celebrated *Englishman case* [*Banks and Fenwick, In the matter of* (3)].

[SANDERSON, C. J.—What is the point you wish to put now?]

To call attention to the decision in the case of *O'Shea* v. *O'Shea* (6). I protest most respectfully that regularity with regard to these proceedings should be followed with the utmost strictness. That is the one thing which separates us from Courts in the Mofussil. It is the absolute insistence on these matters which simplifies matters and does not impede justice in the least.

[SANDERSON, C. J.—I see the Chief Justice said it is quite immaterial which side of the Court the case is tried.]

Does your Lordship want anything more?

[SANDERSON, C. J.—I don't want anything which you don't want to give me.]

I want to know where I am.

[SANDERSON, C. J.—You will know where you are in time.]

Unless I know that I cannot put my points. Two of my next points depend on that.

[SANDERSON, C. J.—That is your first point. What is your next point?]

There is no point. I want to know what the jurisdiction is. In making the request I was doing nothing unusual. On

(4) 20 Ind. Cas. 81; 41 C. 173 at p. 176; 18 C. L. J. 452; 14 Cr. L. J. 321; 17 C. W. N. 1253.

(5) (1899) A. C. 549; 68 L. J. P. C. 137; 81 L. T. 158; 48 W. R. 173; 15 T. L. R. 487.

(6) (1890) 15 P. D. 59; 59 L. J. P. 47; 62 L. T. 713; 38 W. R. 374; 17 Cox, C. C. 107.

that point I address your Lordships. If you do not tell me in what jurisdiction it is, the best thing I can do is to sit down.

[SANDERSON, C. J.—If you have any more cases you wish to cite, you may do so, but you may assume this is a matter of a criminal nature.]

I will assume that. I wish to cite *Pollard, In re* (7), *Davies, In re* (8) and *Metropolitan Music Hall Co.* v. *Lake* (9). Assuming it is a criminal jurisdiction the next point I am entitled to know is, who is prosecuting. Furthermore, the last Chief Justice and Mr. Justice Mookerjee dealt with that very point and Mr. Justice Mookerjee said that it was a matter of vital importance. One of the points in that case was that the Legal Remembrancer purported to be the prosecutor. As a matter of fact they repudiated the Legal Remembrancer as a person of comparatively no importance. He was dismissed from the case and the order of the Governor-in-Council was relied on. I wish to know who the prosecutor is. If it is the two gentlemen who filed the affidavits, I know where I am. If not, I must know who it is. This is a thing that cannot be postponed and I cannot assume. I want to know, *first*, who my opponent is, and, *second*, what the charge is? Is it the whole Court or one Judge, or two Judges or three Judges or some one wholly irrespective of the Court?

[SANDERSON, C. J.—Anything more on that point?]

No. In the absence of an answer to that point I cannot possibly proceed.

[SANDERSON, C. J.—Why not?]

Without knowing what the charge is, how am I to meet it? Is not this significant of cases of this description? The fact is, I hope the end of the war will see the whole of this sham disappear.

[SANDERSON, C. J.—What sham?]

The Court dealing with cases itself in which it is personally interested. I protest against going on further in this matter.

[SANDERSON, C. J.—We don't think you are entitled to ask questions of the Bench in the way you have been doing on these points, but inasmuch as you assure us you will be hampered in your argument if you do not get certain information, we think it only right to give it to you although we do not think you are entitled to it. With regard to the question of the Rule it was issued by me as Chief Justice of this Court after consultation with the learned Judges of the Court. I thought that would have been apparent from the proceedings which took place when the Rule was issued. As regards the interpretation of the articles, I should have thought that you would have had no difficulty in coming to the conclusion as to what was meant. But if you like I will tell you that. Our impression was that this contained a reflection on the Court in its administration. Among other things it contained a suggestion that the Court was constituted for the purpose of hearing certain appeals with the object of counteracting a decision which had been given on a similar point by two other learned Judges of the Court, namely, Justices Mookerjee and Cuming. That is the broad idea. I don't want to use any unpleasant words but the suggestion was that the Court was to be constituted with the object of counteracting that decision. I have not read the articles this morning, but my recollection is that the second article says "Consternation has been caused by the fact that this Court will be constituted of the Chief Justice, Mr. Justice Woodroffe and Mr. Justice Chitty."]

Mr. *Jackson* said that was one reason he asked whether this was a criminal matter. If it was a criminal matter, there was no legal evidence of any kind connecting his client with this publication. If he was right he need not trouble their Lordships. He then cited *In the matter of a Special Reference from the Bahama Islands* (10).

[MOOKERJEE, J.—I thought you were taking the point that there was no legal evidence to connect Moti Lal Ghose with this publication.]

That is so. There is not one scrap of legal evidence to make him liable. I ought to be treated exactly as I was on the last

(7) (1868) 2 P. C. 106; 5 Moore P. C. (N. S.) 111; 16 E. R. 157.
(8) (1888) 21 Q. B. D. 236; 37 W. R. 57.
(9) (1889) 58 L. J. Ch. 513 at p. 516; 60 L. T. 749.
(10) (1893) A. C. 138.

occasion. It is not because the sun is hotter or cooler than on the last occasion that I should be treated differently now.

[MOOKERJEE, J.—Do you deny that you are a director?]

I am an accused person. Your Lordship will pardon me if I refuse to make any reply.

SANDERSON, C. J.—Does the affidavit prove whether he is a director or not?]

To my mind it does not. But your Lordships have to decide that.

[FLETCHER, J.—The statutory return shows he is a director.]

That does not prove his connection with this publication.

[SANDERSON, C. J.—Is the statutory return an exhibit in this case?]

Yes.

[SANDERSON, C. J.—What was the date of the return?]

March. This is June. It is no presumption that because you are married once you are married always. Is every director supposed to be cognisant of everything that goes out from his office? If you think that is legal evidence, well and good, and I don't wish to address you further in the matter.

[SANDERSON, C. J.—I see he lives at No. 2, Ananda Chatterjee's Lane. That is also the registered office of the Company.]

Mr. *Jackson* said that there were two more cases he wished to cite. One was *Reg.* v. *Stanger* (11). The other was *Reg.* v. *O'Connell* (12).

Continuing, Mr. *Jackson* referred to clause 13 of the Letters Patent and said that the question was whether contempt of Court should be punished under any other provision except that under the Penal Code. He cited *Wincham Shipbuilding and Boilor Co., In re, Hallmark's case* (13) and said that because a man happened to be director of a company, he was not supposed to know what appeared in the paper. There was no legal evidence on which he could be punished for this supposed contempt. There was no disrespect to a Court of Justice which impeded the administration of justice and which could be punished as contempt.

Mr. *Jackson* next proposed to deal with the articles, but before he did so he proposed to refer to the circumstances of the time under which they were written. What was the state of things when these recoupment proceedings began?

[SANDERSON, C. J.—Do you mean these three recoupment proceedings which came up on appeal?]

No. If your Lordship allows me I will deal with it in my own way.

[SANDERSON, C. J.—How are we to go on with other proceedings not before us except on affidavit?]

There are materials before the Court.

[SANDERSON, C. J.—We cannot go on hearsay evidence.]

Your Lordship yourself will not be able to deal with this case without going outside the record.

[SANDERSON, C. J.—Can't you confine yourself within the proceedings of this Court?]

I will refer to Chandra Kanta's case in the lower Court.

Continuing, Mr. *Jackson* said that prior to the appeal in *Chandra Kanta's case* Mr. Justice Greaves dealt with some other Improvement Trust cases. Mr. Bompass placed the matter in the hands of his legal adviser. In the meantime Mr. Justice Greaves delivered judgment before the appeal in *Trustees for the Improvement of Calcutta* v. *Chandra Kanta Ghosh* (14) was heard by a Divisional Bench of this Court. That appeal came on for hearing before a particular Bench consisting of Justices Mookerjee and Cuming. For some particular reason the Improvement Trust was not willing that the appeal should be heard by that particular Bench.

[SANDERSON, C. J.—I don't know that.]

On May 30th an application was made by Mr. Langford James before your Lordship to have the appeal heard by another Bench.

The Improvement Trust wanted to get out the appeal from that Bench by taking postponements, and before the three ap-

(11) (1871) 6 Q. B. 352; 40 L. J. Q. B. 96; 24 L. T. 226; 19 W. R. 640.

(12) (1844) 5 St Tr. (N. S.) 1 (Column 877); 11 Cl. & Fin. 155 at p. 372; 9 Jur. 25; 1 Cox. C. C. 413; 7 Ir. L. R. 261; 8 E. R. 1061 at p. 1143; 65 R. R. 59.

(13) (1878) 9 Ch D. 329; 47 L. J. Ch. 868; 38 L. T. 660; 26 W. R. 824.

(14) 36 Ind. Cas. 747; 24 C. L. J. 246; 44 C. 219; 21 C. W. N. 8.

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peals from Mr. Justice Greaves' judgment were heard they got leave to appeal to the Privy Council in *Chandra Kanta's case* (14). Then the three appeals were heard and Counsel understood that a Full Bench would hear them again. Then, why should not the writer bring it to their Lordships' notice that this matter should go to the Privy Council? Why should the parties be put to unnecessary expense by appointing a Full Bench?

[SANDERSON, C. J.—Will you draw my attention to that part of the article where the Privy Council is referred to?]

These words are not used, but it means that Indian Judges approach the subject from a totally different point of view from that of European Judges who don't possess an inch of land and don't know where the shoe pinches, while in England every member of the judiciary holds land.

Mr. *Jackson* next said that the article began thus: "There is a mischievous rumour afloat which should be contradicted." Was there anything to suggest that the Improvement Trust was trying to remove any particular Judge?

[SANDERSON, C. J.—I should think that the traditions of this Court are such that everybody should know that and it requires no contradiction.]

I know of one case in which a particular Judge was removed during the hearing of the Purnea case at the instance of the Lieutenant-Governor.

[SANDERSON, C. J.—That is not at present. It is absolutely impossible now to get a Court of one's own liking. If there is any such rumour, it should be treated with contempt and should not be published.]

Mr. Langford James made the application for the transfer of the appeal.

[SANDERSON, C. J.—That application was rejected, but it was not an attempt to choose one's own Bench.]

Mr. *Jackson* said that their Lordships should consider the circumstances under which the article was written. It next said: "It is stated that a vigorous attempt is being made to get up a Bench to consider the appeal on the judgment of Mr. Justice Greaves in connection with the acquisition of surplus land by the Calcutta Improvement Trust according to somebody's choice." The writer did not believe the rumour and he wanted to contradict it. People outside this Court, did not understand the difference between appeals from lower Courts and appeals from the original side of this Court. They thought that because one Improvement Trust appeal was heard by Justices Mookerjee and Cuming the other Trust appeals should also be heard by that Bench. The article next referred to the Mookerjee and Cuming Bench, and this, Counsel, thought, was the worst part of the whole thing.

[SANDERSON, C. J.—The article says that a serious attempt is being made by the Chairman of the Improvement Trust to get up a Bench as a counterpoise to the Mookerjee and Cuming Bench.]

What is said is that the rumour is that an attempt is being made in that direction, but the writer does not believe it.

Counsel next referred to the second article which began thus: "Something like consternation prevails on account of the proposed new constitution of the Appellate Bench." It said that originally the Bench was composed of Justices Mookerjee and Cuming and latterly it had come to be presided over by the Chief Justice and Mr. Justice Woodroffe. This was based on an absolute mistake. There was nothing affecting Mr. Justice Chitty.

[SANDERSON, C. J.—Why should a Bench consisting of the Chief Justice and Justices Woodroffe and Chitty cause consternation?]

After the application made against the previous Bench which heard *Chandra Kanta's* appeal (14) this would create consternation. The writer suggested to appoint a Judge who possessed land and the suggestion was made from a totally different point of view.

[FLETCHER, J.—The Improvement Trust wanted to have their cases decided by a particular Bench and the Chief Justice would not consent to that. What does it mean?]

[SANDERSON, C. J.—The meaning is obvious, Mr. Jackson.]

Continuing Mr. *Jackson* said that the article went on to say that Indian Judges were likely to know more of the conditions and practices prevailing here, and it suggested to appoint an Indian Judge

on the Appeal Bench. Counsel said that the Improvement Trust was a Government institution. That being so, it was natural that there was suspicion and the only way to impress confidence was to take a Judge who possessed land. The writer had perfect faith in the Chief Justice and he said, "We have perfect faith in the present Chief Justice." Certainly this was not contempt. Counsel failed to see any contempt in the two articles. Sir Barnes Peacock in the reported case conceded that it was a matter which could be differently interpreted. There was not a single reported case which could approach this in weakness for the matter forming the subject of contempt.

Mr. *Norton*, for Tarit Kanto Bakshi, Printer and Publisher of the *Amrita Bazar Patrika*, said that the position of the printer was quite different and he deserved more sympathy. He was merely a paid servant and had nothing to do with the policy of the paper. His business was to see that the matter was printed and published.

[SANDERSON, C. J.—It has been held that the printer is also responsible.

Yes. If it is held contempt then he is unable to escape the legal liability, but he is worthy of pity.

[SANDERSON, C. J.—Is it not a fact that the directors live in the same house where the paper is published?]

I don't know.

[SANDERSON, C. J.—Can you say who wrote the article?]

The printer does not know that. It does not concern him.

[SANDERSON, C. J.—Apparently the printer printed it at a place where the directors live. They are all living together in the same place.]

It does not contribute to my knowledge of knowing the identity of the writer. I was simply printing the paper and I don't know who wrote it. There is internal evidence that it was not written by a European.

Continuing, Mr. *Norton* referred to the two articles and said that rightly or wrongly the Improvement Trust thought that Mr. Justice Mookerjee's judgment was wrong. This was the rumour and the article described it as mischievous and the writer wanted to contradict it. Counsel admitted for the purpose of his argument that it was a gross libel against the Improvement Trust, but it was not contempt against the High Court.

[SANDERSON, C. J.—When the writer spoke of consternation, what could he mean but that he had lost his confidence in the Judges?]

Mr. *Norton* asked his Lordship not to read the two articles together.

[FLETCHER, J.—Is it not contempt to speak of consternation as regards the constitution of any particular Bench?]

I say no.

Continuing, Mr. *Norton* said that the grievance of the writer was why there should not be a Full Bench and only a Bench of three Judges. If he was acquainted with the form of proceeding, he should have said that as there was a difference of opinion it should go before a Full Bench.

Mr. *Norton* next said that the writer said that it was a matter for regret that there was an unsavoury impression because it was untrue. How could it be contempt when he spoke of unqualified belief in the Bench? That was the key of the whole thing. He only asked to take in an Indian Judge.

Continuing, Counsel said that if it was held to be contempt he asked their Lordships not to take any notice of it and that summary jurisdiction should not be followed. A contempt out of Court should not be treated summarily unless it interfered with the administration of justice. The Trust got all they wanted to get but the writer did not create any impediment. If it was only scandalising the Bench, then Counsel said this class of contempt was practically obsolete. The position of an English Judge was too high to be shaken by criticism like this. The reason why the summary procedure was not desirable was that the prosecutors were the witnesses and judges. In the case of *Tayler* (1) Sir Barnes Peacock wanted to issue a Rule and there was an apology.

[SANDERSON, C. J.—The writer of this article has offered no apology.]

How can I offer an apology for the writer? I on behalf of the printer offer my heartfelt apology to all your Lordships.

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The hearing of the case being resumed on the following morning, Mr. *Norton* said: Before proceeding with my argument I would like to call your Lordships' attention to a statement in the newspapers that I tendered a heartfelt apology for the printer. I tendered no apology, heartfelt or otherwise, because I understood your Lordships agreed with me that in the position in which I was placed it was impossible for me to apologise for another man's acts. That was the reason I tendered no apology. Had the words been my own words I should have tendered an apology at once, but in the circumstances, I can scarcely be called upon to apologise for another man's acts.

[SANDERSON, C. J.—I don't see why your client should not apologise just as much as anybody else.]

What I stated on Monday and I repeat again to-day is this: If your Lordships think that I have not exercised due caution and was negligent in the discharge of my duties as printer, I do offer an unqualified apology with an expression of my regret. My argument, however, is that in truth and fact there is no contempt.

Counsel then cited *R.* v. *Freeman's Journal* (15) and said that in the sense in which reflection constitutes an impediment to the due administration of justice, the reference in that case was whether there had been a contempt or suggested contempt to influence the mind of jurors or to intimidate witnesses from coming forward to assist either side.

[SANDERSON, C. J.—That is not an authoritative proposition that there must be an actual impediment. The test is this, whether a matter has a tendency to obstruct the ordinary course of justice, not that there was an actual disturbance of justice.]

That case is not applicable to Judges but to jurors. I draw a logical differentiation between proceedings calculated to influence the minds of jurors and an attempt to influence the minds of learned Judges.

[SANDERSON, C. J.—You mean to say a juror's mind will be more easily influenced?]

Yes. Our contention has always been that we cannot substitute trial by Judges for trial by Jury on the ground that your Lordships are not accessible to influences which we as Counsel can plead before a Jury.

Counsel then cited the case of *King* v. *Dolan* (16) and said that that was the case which Sir Lawrence Jenkins followed and quoted in *Governor of Bengal* v. *Moti Lal* (4). There the Judges said that the Court should not act unless in fact the contempt was likely to create a tendency, etc.

[SANDERSON, C. J.—It is the same thing, "in fact likely to create." Does the addition of the word "fact" add anything to the principle?]

I submit it does.

[SANDERSON, C. J.—If you say a thing has a tendency to create, is it not the same if you say a thing has, in fact, a tendency to create? You are a master of English. Tell me that? Do you really add anything to the weight of the sentence if you say that has a tendency to create a prejudice, or that has, in fact, a tendency to create a prejudice.]

The difference is this. It is a remote contingency upon a very remote contingency. It is a mere possibility upon a possibility. Whoever wrote those articles was not seeking to influence the minds of jurors. If he was seeking to influence any minds he was seeking to influence your Lordships' minds, not upon the merits of the appeal, but on the constitution of the Bench. How can that have a prejudicial effect upon your Lordships' judicial determination of the merits of the appeal? I submit that cannot have the least influence upon your Lordships' minds. If it was a libel upon the Improvement Trust, the only influence upon your Lordships' minds would probably be to create a bias in favour of the Improvement Trust. It indicated nothing as to what your Lordships ought to do. He asked for the constitution of a Bench which should include one or more Indian Judges. Can it be said there was any danger, real or imaginary, in an application of this kind?

Counsel next cited the case of *Costa Rica (Republic)* v. *Erlanger, Clements, In re* (17) and the case of *Hunt* v. *Clarke* (18).

(15) (1902) 2 I. R. 82; 6 Ir. L. R. 628.

(16) (1907) 2 I. R. 260; 9 Ir. L. R. 647.

(17) (1877) 46 L. J. Ch. 375; 36 L. T. 332.

(18) (1889) 58 L. J. Q. B. 496; 61 L. T. 843; 37 W. R. 724.

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[SANDERSON, C. J.—The test is first whether it tends to prejudice.]

I am willing to apply that test here. No attempt was made by the writer to prejudice your Lordships' minds as to the merits of the appeal. What was there in the nature of urgency in the articles which are now the subject-matter of this enquiry, urgency in the shape of your Lordships' summary interference: Apparently, as far as one can see, they avoided any further comment not in consequence of any order of this Court, but spontaneously? There was nothing really in the nature of any urgency to correct any mischief of that kind, which was likely to spread and create more serious mischief in consequence of that dissemination, to justify the exercise of that jurisdiction which is exercised and which should be resorted to only in cases of extreme urgency.

After citing *In the matter of a Special Reference from the Bahama Islands* (10) Mr. *Norton* said that, however wrong it might be, it could not be stated that these articles were an obstruction to public justice. The writer could not have believed that anything he said in these letters would in any way obscure their Lordships' minds or divert them from the proper functions of the Bench and give him any assistance. If the object of these proceedings be to make it quite clear that their Lordships had the power which they were desirous of exercising in this case to hold it was contempt and exercise their control over that contempt by the summary process with which their Lordships were clothed, what would be the outcome of these proceedings? He was only addressing their Lordships on behalf of the printer, who was, comparatively speaking, the least blamable. There was no suggestion whatever that he was aware of the contents of the documents, and he had sworn himself that he had no such knowledge.

[SANDERSON, C. J.—I was looking at his affidavit this morning. Would you mind looking at paragraph 4 where he says, "I did not read the said articles or either of them when they were given to me for publication." Now turn to paragraph 6 where he says, "I further state the said articles were published by myself in good faith and in the public interest." How can he say that if he did not know what was in them?]

A man may in perfect innocence publish a document of which he knows nothing, believing at the time that it is perfectly innocuous. What he means is this, that if he had any notion that those documents contained anything of an objectionable character, he would not have published them. It is true that he did not read them because he believed that no defamatory matter would be given to him for the purpose of publication.

[FLETCHER, J.—How can he say it is in the public interest if he did not read them?]

Publication in a newspaper involves publication of matter seven-tenths of which, I presume, is of public interest.

[SANDERSON, C. J.—He says: "The said articles were published by myself in good faith and in the public interest." That seems to me somewhat inconsistent with his statement that he put in articles without knowing what was in them.]

Then his drafter must be made liable for that. I know what was intended by those responsible for the drafting: Those who drafted that meant to say in paragraph 4 that he never read the articles and in paragraph 6 that although he never read them he published them in good faith and in the public interest. These are the articles with which he stands charged. He did not read them because he *bona-fide* believed he was asked to publish that which was for the public interest. He is not there for the purpose of printing for private circulation, but for the public. They are not printed to sell to Moti Lal Ghose's children, but to the public.

[SANDERSON, C. J.—They are to sell the paper.]

Who buys it? The public. In paragraph 4, he says: "I never read them." In paragraph 5 he says: "I have now read them and I have ascertained that they contain misstatements of facts." In paragraph 6 he says: "Although I published them without reading them, I acted in good faith and in the interest of the public, because I believed that the authorities in charge of the paper would not ask me to disseminate a libel." If, as a matter of fact, your Lordships' object is to give a warning effective in its character that statements of this character

are contempt and are not to be published, then that object has been achieved by this enquiry. There is no reason why punishment should be meted out to the Printer if your Lordships hold that these articles are really contempt. I would entreat your Lordships not to do that. There is an interval of four days between the publication of these two articles. I don't think it is too much to suggest that a man who read the article of the 22nd would necessarily keep in his mind the contents of the article of the 18th. There is nothing to show that the writer intended the two letters to be read conjointly or that the public on reading the second would take into consideration the contents of the first.

Continuing, Mr. *Norton* said that so far as his client was concerned, he was a subordinate servant who carried out duties more or less of a technical character and he had no interest whatever in the publication of these letters. Further he relied on his superiors not to put him in any jeopardy by publishing articles which were objectionable. He had simply carried out his duties efficiently and loyally to his superiors. He had sworn that he had never read these letters before he published them. If through no act of his own he became an innocent agent in the distribution of that which their Lordships might hold to be a contempt of Court, then that fact would play a very important part in the adjudication of punishment.

[The Chief Justice asked whether it had not always been in the cases Mr. Norton had cited a factor to be taken into consideration by the Court that the printer was willing to disclose the name of the person who brought the matter complained of to him for publication.]

Mr. *Norton* replied that there was no evidence whatever that his client was aware of who wrote these letters.

Mr. *Norton*, continuing, said that it was not a fair interpretation to put on these letters by reading them together. There was nothing to show that the writer intended these two letters to be read jointly, or that the publisher intended that the contents of the first letter should be taken into consideration in reading the second. The printer was entitled to rely on his superior. He simply carried out his duties under the orders of his superior and he never read these letters either then or after the publication. He was at best an unwilling agent in the dissemination of this libel. The whole circumstances showed that he was innocent of complicity on his part. That must be taken into consideration on the question of punishment. There was no evidence to show that this man knew who wrote these letters.

[SANDERSON, C. J.—In the ordinary course of business I suppose he would know from what quarter these letters came. He must have known who was responsible for the publication.]

They came to him in the ordinary course of business from someone in the office.

[SANDERSON, C. J.—This person would be liable for the publication.]

I say I do not know who brought it. Supposing a messenger boy brought it?

[SANDERSON, C. J.—He would know from what quarter the messenger boy came. He would know who would be responsible. I want to reach the man who is responsible for the publication.]

The person responsible for the publication is the editor.

[SANDERSON, C. J.—I suppose your client would know who is the editor.]

Yes, If your Lordship puts me into that position. I say I refuse to say. If the editor has any virtue he ought to have come forward himself. Why should a subordinate on Rs. 200 a month be called upon to appear on this Rule? The other man is in a far higher position. Why don't the editor and proprietor come forward and assume responsibility? Your Lordships will not press me to tell you.

[SANDERSON, C. J.—Please understand me, I do not press you to tell. This is one of the facts that must be taken into consideration. He must know who the editor is.]

That is asking me to play the part of Judas.

[SANDERSON, C. J.—I shall bear in mind what you say about the editor not coming forward.]

Mr Norton referred again to the *Banks & Fenwick, In the matter of* (3) and concluded.

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Mr. *B. Chakravarty*, for Priyus Kanti Ghosh, a Director of the Company, and for Mainal Kanti Ghosh, who was the Secretary to the Board of Directors, said that after the discussion which had already taken place his own submission would be very short. His first submission was that in a criminal contempt case, where the object of the procedure was to punish a man, the gravamen of the charge was that the comment or publication interfered with, or was likely to interfere with, the due administration of justice. He filed two affidavits, one by each of his clients. With regard to the question of interference with the administration of justice, or tendency to interfere with the administration of justice, his further submission was that this might be mixed up with a reflection upon the Judges or a reflection upon one of the parties to the litigation. If it was merely a reflection upon one of the parties and was in the nature of a libel but did not interfere or tend to interfere with the due administration of justice, then the remedy by a summary process for contempt did not apply. In the same way if it was an attack, however improper, or a reflection upon the Court, and such reflection or attack did not interfere or tend to interfere with the due administration of justice, then again the remedy was not by a summary process of contempt but by criminal information or by action. His next submission was that in a case of an original trial pending, whether it was a criminal proceeding or a civil action, any comment with regard to such pending proceedings or pending action, either on the merits or with regard to the conduct of the parties, was *prima facie* likely to interfere with the administration of justice, because it might interfere with the witnesses who had to give evidence, or might interfere with the Jury who had to deal with the facts, or might even interfere with the learned Judge dealing with the case. That was to say it might interfere with an impartial trial. If, on the other hand, the litigation had passed out of the hands of the trying Court, and even where an appeal was allowed on facts, the position was different because the record was complete. No comment could interfere with the witnesses because all the evidence was before the Court and the verdict of the Jury was also before the Court. If the case was an appeal on facts and there might be a necessity to investigate the facts, it might be conceivable that one of the parties to the litigation was held up in contempt or pointed to as being unworthy of belief, and then it might affect the mind of the Judge in dealing with the facts of the appeal. In the case where a Judge is concerned matters were not in the same position as in regard to witnesses or jurors. Where it was a matter of the construction of a Statute, then his submission was that even if there was a comment with regard to the conduct of one of the parties it could not possibly interfere with the due decision of the appeal. If these two articles were offensive and, therefore, matters which contained reflections on either of the parties to the appeal or upon the learned Judges, his submission was that, however reprehensible the attack of the writer might be, it could not possibly interfere with the right decision of the appeal. It was not a question of fact. It was one which involved entirely the question of law which was to be determined upon the basis of the construction to be put upon a Statute. He was not defending the writer of the articles, and he was discussing the articles, whether right or wrong, by assuming that they were offensive, and that they were grossly libellous; yet they could not attack the administration of justice, because in point of fact the question involved was of such a character that the decision could not be affected by any comment made in the public press.

[SANDERSON, C. J.—What do you mean by "due administration of justice?" Is it only confined to the right decision of the case? Is it not necessary that this Court should have the confidence of the people in this country? Assuming that the articles are absolutely unjustifiable and are intended to minimise the confidence which the people ought to repose in this Court, is that not a contempt of Court?]

That may be, I will make my submission with regard to that later on, but what I want to clear up at the present moment is that these articles, however offensive they may be, and whatever action it might be necessary to take in regard to them, could not in the present case affect the

due administration of justice in the sense of a proper decision in the appeal. Whether it is a mere reflection upon the dignity of the particular Judge or whether it is anything more, the proper remedy is not a summary process. This remedy by a summary process is only to be resorted to if the reflection upon the Judge does in fact interfere with, or had a tendency to interfere with, the due administration of justice.

Counsel then cited the case of *Helmore* v. *Smith* (19) and referred to Halsbury's Laws of England, Volume VII.

[SANDERSON, C. J.—That is exactly the point I was putting to you—that it is calculated to undermine or impair the authority of the tribunal.]

Undermined or impaired with regard to a list pending before the Court.

[WOODROFFE, J.—Supposing the list has already come to an end?]

You are entitled to criticise and, in doing so, to point out that the learned Judge is wrong.

[WOODROFFE, J.—Supposing the writer imputes corrupt motives to the Judge after the list is over?]

I have not considered this particular case, but my answer to that would be that such a matter would not be dealt with by a summary process but by a criminal action for libel. The position would be the same if you defame and maliciously or otherwise impute misconduct. I may have stated my proposition too broadly but still my first point remains. In this particular instance my submission is that this is a matter in which these offensive articles could not possibly interfere with the right decision of the case.

Counsel then dealt with the point as to whether it was a libel against the Judges and cited *In the matter of a Special Reference from the Bahama Islands* (19). The nature of the libel contained in the letters was not of such a character as to undermine and impair generally the dignity of the Court. In that case their Lordships held that it did not constitute contempt.

[SANDERSON, C. J.—That is to say that he did not undermine and impair the authority of the Court. Surely if the Privy Council had come to the conclusion that this letter had impaired and undermined the authority of the tribunal, it must have come to the conclusion that it was contempt of Court.]

Mr. *Chakravarty* submitted that it was not such a contempt of Court as required that it should be proceeded against by summary process. What he was insisting upon was although it might be contempt of Court, it did not necessarily mean that the remedy was a summary process for contempt.

[SANDERSON, C. J.—That must be a matter of discussion.]

Mr. *Chakravarty* agreed that it was a matter of discussion, but, even assuming that it was contempt of Court in so far as it cast a reflection on the Court, it was not a proper case in which their Lordships should apply a remedy of a summary procedure.

Counsel then read the affidavit he had put in. One of his clients was a director and the other was secretary of the company, and both said that they had no control over the paper. They did not know who was responsible for the publication of the two letters in question.

[FLETCHER, J.—The director must know. Where you delegate your power to conduct a newspaper you must know who the responsible Editor is.]

Mr. *Chakravarty* submitted that this being in the nature of a criminal trial, there was no positive proof before their Lordships of any legal offence connecting his clients with these two articles. He cited Odger on Libel and Slander, page 472, *Reg.* v. *Judd* (20), Palmer on Company Presiding, First Volume, 11th Edition, page 546.

[WOODROFFE, J.—Is not there against you presumptive publication? Either you bring forward evidence which rebuts presumption or there must be presumptive publication Consider this case from this point of view. A director is a person who directs. Then the question is what does he direct? He directs the business. This particular business is the carrying on of a newspaper. Would not there be presumptive publication against your clients? You seek to meet it in two ways—(1) that you had no control over the paper; (2) by saying that you were not

(19) (1886) 35 Ch. D. 449; 56 L. J. Ch. 145; 56 L. T. 72; 35 W. R. 157.

(20) (1889) 37 W. R. 143; 16 Cox. C. C. 559; 59 L. T. 993; 53 J. P. 215.

present. Apart from your allegations in the affidavits that you have no control over the contents of the paper, and apart from your statement that you were away from Calcutta, would not these facts referred to constitute a case of presumptive publication?]

In law there is no presumption.

[WOODROFFE, J.—Why not?]

The company is the proprietor. Supposing there are 20,000 share-holders in the country. Because I happen to have one share in such a company can you attribute to me knowledge of the publication of the article as proprietor?

[WOODROFFE, J.—There would be inference unless and until you show that you were not concerned with the publication.]

I say that such an inference does not arise. In a criminal trial you have to prove by positive evidence either that I was the writer or that I authorized the publication of it. You cannot attribute to me the liability of the proprietor. In the case of editors and printers, whether they do in fact know or not, the law in fact attributes knowledge to them because it is in fact their business to know. Although they may be ignorant they cannot take shelter in that ignorance.

Counsel cited the case of *Reg.* v. *Judd* (20) and went on to say that in the absence of proof of individual complicity his clients could not be indicted. He cited *Governor of Bengal* v. *Moti Lal* (4) and *Reg.* v. *South Staffordshire Waterworks Co.* (21). Except in the case of editors, proprietors and printers, they could not rely upon any presumption or inference. They must prove it by positive evidence. He then cited *Reg.* v. *Holbrook* (22) and *Reg.* v. *Holbrook* (23) and Odgers 470.

Continuing, he said that, with whatever disfavour or disapprobation they viewed the matter, he submitted that there was no evidence for the purpose of establishing the complicity of these two men. It was no doubt very impertinent advice given by ignorant men with regard to the formation of a Bench for the trial of a particular matter.

[FLETCHER, J.—Are the readers equally as ignorant as the writer?]

There is noting on the record and I should not like to say. If you think that very much importance attaches to newspaper articles, you are very much mistaken. We here do not attach any importance to newspaper articles. We are very fond of talking.

[SANDERSON, C. J.—I beg your pardon. Fond of what?]

Fond of talking.

[SANDERSON, C. J.—I thought you said fond of toffee. (Laughter.)]

Mr. *Chakravarty* said that it seemed to him to be a very impertinent suggestion made by an ignorant person who knew nothing about how the High Court Benches were formed.

[SANDERSON, C. J.—You can hardly say that. He seems to know what is happening in the High Court. He also knew that Mr. Justice Chitty was to be one of the Judges sitting on that Bench. How he came to know that I do not know. Therefore, he could not have been very ignorant.]

That is the knowledge of a man who goes about eavesdropping. In spite of the Official Secrets Act, it is astonishing how people in the bazar come to know of what is happening in Simla in the matter of frontier wars, loans, etc. You always find everything talked of in the bazar. My submission is that the matter being in appeal at the time and involving a question of law, it could not interfere with the due administration of justice, and there could be no tendency to interfere with the due administration of justice. Notwithstanding my clients' position—one as director and the other as secretary—they have no control over the contents of the paper and have in no way been shown to be liable for these offensive matters.

[WOODROFFE, J.—After the adjournment will you kindly refer to *Green, Ex parte*; *Robbins, In the matter of* (24)?]

Continuing, Mr. *Chakravarty* said that under the Companies Act, section 32, clause (*l*), the names and addresses of the directors or managers were to be furnished. In the return Mrinal Kanti Ghose was described as

(21) (1886) 16 Q. B. 359 at p. 364; 55 L. J. M. C. 88; 54 L. T. 782; 34 W. R. 242; 50 J. P. 20.

(22) (1878) 3 Q. B. D. 60; 47 L. J. Q. B. 35; 37 L. T. 530; 26 W. R. 144; 13 Cox. C. C. 650.

(23) (1879) 4 Q. B. D. 42; 48 L. J. Q. B. 113; 39 L. T. 536; 27 W. R. 313; 14 Cox. C. C. 185.

(24) (1891) 7 T. L. R. 411.

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the secretary and Golap Lal Ghose as the financial manager.

[CHITTY, J.—Mrinal is both manager and secretary.]

He is only secretary.

[SANDERSON, C. J.—In the exhibit he is described as manager and secretary.]

In his affidavit Mrinal says he is secretary and not manager.

[SANDERSON, C. J.—If he was secretary alone he would not have been put in the category of manager in the return].

The return was made by Golap and not by Mrinal. Although he is put under the heading of manager he is only secretary.

Counsel next cited a case reported as *Green, Ex parte; Robbins, In the matter of* (24) in which Mr. Robins, manager of the Press Association, was prosecuted in connection with the alleged publication of a paragraph in the papers sent by the Press Association. His position was, according to his own showing, that he was in charge of the various departments.

[SANDERSON, C. J.—Here we have got the printer. He simply prints what is given to him. The director has no control over the matter that appears in the paper. Then whom are we to hold responsible for the publication?]

Under the law the printer is responsible.

[SANDERSON, C. J.—If we are left in the dark we must draw our own inferences. What are we to assume? The director says he does not exercise any control. Then there must be an editor.

All I can say is that he is not before your Lordships. You can condemn my action for keeping my mouth shut, but you can't punish me for that.

Counsel then gave an illustration. He said there was a dacoity in Barisal and a man was brought up who lived not far from the scene of the dacoity. The Judge told the man that he must know who committed the dacoity. Their Lordships could not draw the inference that his clients were liable because they were connected with the company. The conduct of the director was open to comment but he was not responsible for the offence with which he was charged.

[SANDERSON, C. J.—But they have not suggested that there is an editor.]

We have not made any such suggestion. I am not here to give any information.

Mr. *C. R. Das*, for Golap Lal Ghose, said that his client was Director and Financial Manager. The first question which must be determined was whether this was a criminal proceeding or not. On their Lordships' decision would rest other questions. He did not like to raise the question of jurisdiction but that was a substantial question in the case. Once he established that it was a criminal proceeding it required evidence to prove the charge. Counsel said there was no evidence against his client. The materials upon which this Rule was granted did not call for an answer from an accused person.

Counsel next proceeded to show that it was a criminal proceeding and cited several cases. He added that once it was admitted to be a criminal proceeding, the next point was, what was the evidence against his client. He pointed out that in a criminal proceeding they must have absolutely clear proof. That which was accepted as *prima facie* proof in a civil action was no proof in a criminal proceeding.

Mr. *Das* next cited cases reported as *Martin* v. *Mackonochie* (25) and *Holt, In re* (26) and quoted from Woodroffe's "Evidence" that the question was not whether substantial justice was done but whether justice was done according to law. In accepting evidence they must be satisfied that it was according to law. Then they could not draw an inference in conformity with his guilt but in conformity with his innocence. In a criminal proceeding the inference must be drawn which was mostly in favour of the accused.

Continuing, Mr. *Das* said that the return filed by the Secretary of the Company giving the names of the directors and managers, being a private document, must be strictly proved as to handwriting and signature. Therefore, the production of a certified copy was of no use. He then read sections 74 and 65 of the Evidence Act and sections 31, 32, 40, 240 and 248 of the Indian Companies Act, and said that that was not a public record. It was a private document. It was sent to the Registrar but that did not make it a public document.

[MOOKERJEE, J.—Is it a public record of a private document?]

(25) (1878) 3 Q. B. D. 730.

(26) (1879) 11 Ch. D. 168; 40 L. T. 207; 27 W. R. 485.

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No. I say that it is a private document.

[FLETCHER, J., referred Mr. Das to section 87 of the Companies Act, and asked whether it was not public document.]

How is it a public document? Public record means any record which is concerned with the public.

[SANDERSON, C. J.—The public are entitled to get copies of the document by paying certain fees?] Yes.

[SANDERSON, C. J.—Then is it not a public document?]

The whole question is whether it is a public record. What does the expressions "public record" mean? Section 87, as it, is worded, does not make this document a public document

[SANDERSON, C. J.—Is this copy, of which this document purports to be a certified copy, made under section 87 of the Companies Act?]

No. Under section 32 of the Companies Act. The affidavit says that.

[FLETCHER, J.—That is Mr. Hechle's view.]

These are the materials upon which we have come to answer.

Mr. *Das* then read clause (*l*) of sections 32 of the Companies Act and said that they were to send information to the Registrar, who, under the Act, had some power of supervision over Joint Stock Companies. There were many documents of which they could get copies, but those could not be regarded, and never had been regarded, as public documents. If in pursuance of section 32 of the Companies Act, the copies being sent by them to the Registrar's office, the office had to do something and to keep some records of those documents, these copies would be public records of private documents. The mere fact that these copies were sent and that the Registrar's office kept copies of them did not make those copies public documents. The Registrar's office was only the custodian of those documents under the Act.

The hearing being resumed on the following morning, Mr. *C. R. Das*, continuing his address on behalf of Golap Lal Ghose, Financial Manager of the *Amrita Bazar Patrika*, said that section 87 of the Indian Companies Act, to which Mr. Justice Fletcher had referred the day before, referred to a totally different document, not the one referred to in section 32 of the Indian Companies Act. The document with which their Lordships were now concerned was a document mentioned in section 32, and not in section 87. That would bear on the next question he would argue as to the presumption that if they were Directors in March they were Directors in May. The certificate filed stated the facts as they stood on March 5th.

[SANDERSON, C. J.—Look at the end where it states "filed this 9th day of May."]

I see that. Your Lordship will allow me to deal with it after I have disposed of the first point. The question which your Lordships have got to decide first of all in this connection is whether it comes under clause 2 of section 74, as to whether it is a public document or not. I submit the words "public record" show it must be a record made of private documents when they are sent on to the Registrar's office. What the Legislature contemplated is that unless some record is directed under the law to be kept of these documents it cannot become a public record of private documents. This is the view which Mr. Justice Woodroffe takes in his book on the Law of Evidence at page 517 (reads). Therefore your Lordship's view is that it must be a record kept in the Registrar's office, made in the Registrar's office, and that the record is to be a record of or relating to private documents. Something has got to be done by the public officer with reference to that document—a note or entry or something which will make that document a public document.

[CHITTY, J.—What meaning do you put on the word "record" in that section? Do you mean to say there must be some writing by the public official?]

Yes. I shall show your Lordships that that is the view of eminent authorities in England on public documents.

Counsel then cited Tayler on Evidence, Volume II, 10th Edition, page 1078, Powell on Evidence, 9th Edition, page 271, Lord Blackburn's judgment in the case of *Sturla* v. *Freccia* (27) and *Mercer* v. *Denne* (28)

(27) (1880) 5 A. C. 623 at p. 642; 50 L. J. Ch. 86; 43 L. T. 209; 29 W. R. 217; 44 J. P. 812.

(28) (1905) 2 Ch. 538; 74 L. J. Ch. 723; 93 L. T. 412; 54 W. R. 303; 3 L. G. R. 1293; 70 J. P. 65; 21 T. L. R. 760.

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and said: That is my submission on the point that this is not a public document. If it is not a public document Exhibit F is not admissible in this case, and if it is not admissible there is no evidence of any kind in this case. There is no inference of any kind.

[MOOKERJEE, J.—Assume secondary evidence is admissible what is your point?]

I submit the certified copy does not prove the signature. There must be evidence before your Lordships that the signature appearing on the original is the signature of accused before your Lordships, and there is absolutely no evidence of that. Section 77 is not a section which would authorise the reception of this evidence without proof that the signature upon the original is the signature of this man.

[SANDERSON, C. J.—For the purpose of this part of your argument you would take the certified copy as if it were the original?]

Yes. They are entitled to put in the certified copy without proof of the loss of the original. Section 77 merely says it is to be taken as proof of the contents, that is word for word it is the same as the original.

[MOOKERJEE, J.—You would take this objection even if the original was exhibited.]

Yes. There must be evidence that the signature is the signature of this man. I can find no authorities according to which you may take the certified copy not only as proof of the contents of the original but over and above that as proof of the signature of the particular man before your Lordships.

[SANDERSON, C. J.—If we find that is a statutory return, is there not some inference to be drawn from the fact that the man's name appears there as director of the company?]

The furthest you can go is that a man of that name was Director or Financial Manager. In a criminal trial you must prove the identity of the accused.

[WOODROFFE, J.—Why do you come before us?]

Because notice is served upon me. I would have been most happy not to have come.

[WOODROFFE, J.—As what? As Director of the Company?]

No, as Golap Lal Ghose. Suppose I have been served with notice as Director. The fact they served a notice upon me as Director does not prove that I am he. These are technical points no doubt but I submit I am entitled to take them. Your Lordships are exercising very extraordinary jurisdiction, and if I can take any technical point I am entitled to take it on behalf of my client.

[MOOKERJEE, J.—If section 90 applies?]

Then it would be different. I am very much obliged to your Lordship. That strengthens my argument. If a document is 30 years old and is produced from proper custody, then the Court may take it that the signature of the person which it purports to contain is the signature of that person. Then there are various provisions in the Companies Act itself which show that certain documents may be taken as *prima facie* evidence of their contents, but in this case there is no such provision. If your Lordships accept this as secondary evidence of proof of the original then there is no proof of the signature, and unless there is such proof I cannot be convicted of this offence. Secondly, it shows that on March 5th, 1917—I am assuming your Lordships are against me on the other points—I was a Director and Financial Manager. In a criminal trial you cannot draw an inference from that that because I was Financial Manager or a Director on March 5th, 1917, therefore on the date on which these paragraphs appeared in the *Amrita Bazar Patrika* I still hold that office. Suppose I was prosecuted for criminal breach of trust as a servant and the prosecution prove that three months before the occurrence I was their servant. I submit no conviction could rest on that evidence. The prosecution must in that case carry further and say that on the date of the offence. I hold that office.

[MOOKERJEE, J.—It will be proved by oral evidence that no change had been notified under section 87.]

That will be. Such returns have got to be made from time to time. If there is a question of presumption your Lordships may draw the inference that those returns were made and if they were made they should be produced. Then you Lordships would have had before you all the

documents which would have shown or might have shown that the accused was in that position on the dates on which those paragraphs appeared. That, however, is wanting. Matters which have to be proved by evidence cannot be made the subject of inferences, which must be under these circumstances conjectures. There is nothing in the law to prevent my giving up that appointment the very next day. Before your Lordships can convict me there must be evidence before you that on the dates on which these paragraphs were written or published I was a Director or Financial Manager.

The next point I desire to discuss in this connection is that suppose you take it I was a Director and the Financial Manager on the date when those paragraphs appeared—I am assuming that against me —what does it prove? I take the case of my being the Financial Manager first. The evidence upon which I have been asked to show cause indicates my duties are in the financial line and, therefore, so far as that is any indication, it shows that I have nothing to do with the editing of the paper or the editing of the paragraphs or any work with reference to the publication of these paragraphs. I submit, therefore, that that is in my favour.

I ask your Lordships to consider whether it is not a fact that out of the Directors some are appointed Managers and of the Directors I am appointed Financial Manager. Different duties are cast on different Directors. Your Lordships cannot suppose that in a meeting of the Directors it was discussed that these paragraphs showing contempt of the High Court should be published in the paper. My liability must entirely depend upon how far I was engaged in the work of publishing this paper. That must be alleged. Where is there such an allegation against me except that I am a Director and a Financial Manager? There is no reason to suppose in the face of that certificate that directors—except those holding such a post as Manager or Financial Manager—have anything to do with the editing of articles or the publication of the paper. A reasonable way of reading that document is this,—there are so many Directors that so far as the executive work is concerned with regard to the publication of the paper it has two sides, namely, the editorial side and the financial side. The financial side is not concerned with the editing and publishing of the paper. It is alleged against me that, apart from being a Director who has got a right to attend Directors' meetings and deliberate and discuss matters placed before the Directors there, I am entrusted with the work of financial management. These are the allegations made against me and these are the allegations I have come to meet. I am showing your Lordships that I have nothing to meet. The case for the prosecution—if I may use that expression—is that I am a Director who attends meetings of the Directors, and over and above that I am the Financial Manager. Therefore, in the face of these allegations, I venture to sumbit that your Lordships cannot draw any inference or conclusion—or even a reasonable conjecture does not arise—that I have anything to do with the publication of the paper. Therefore from that point of view there is no evidence against me. Then I go further than that. As a Director there are sections in the Indian Companies Act which provide for the Memorandum of Association being sent to the Registrar's office as well as the Articles of Association. The duties of Directors so far as the Company is concerned are duties which are defined and circumscribed by the Articles of Association. Why is it that a copy of the Memorandum is before your Lordships and not the Articles of Association?

[SANDERSON, C. J.—We have the Articles of Association.]

It is not part of the affidavit.

[SANDERSON, C. J.—No. It has been put in by one of the respondents. It was read on Tuesday. It is attached to the affidavit of Mrinal.]

I have not put that in and I know nothing about it. I don't know whether that is for me or against me. I put my case on a different footing. There is abundant authority for the proposition that directly the name of the Director of a Company is announced, it would not do to say that a director is he who directs or that a Director is he who manages.

[SANDERSON, C. J.—Suppose the Articles say that the Directors are to manage the business and that the business is that of

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pubishing and printing. Is it not *prima facie* that they do publish and print?]

That would depend on whether the only business indicated in the articles is the conduct of the paper.

[SANDERSON, C. J.—Leave out the word "only." If a Company is formed the main object of which is to carry on the paper and the articles say the Directors are to manage and publish the paper, I would assume *prima facie* they were managing.]

With regard to every Director?

[SANDERSON, C. J.—I assume that would be their duties.]

Suppose one of the articles was they were to hold meetings of the Directors in which the question of finance, appointment of editor and so on, was to be discussed and the article went further and said Director so and so was to be responsible for finance?

[SANDERSON, C. J.—Of course that would make a difference. Suppose it says, as it says here, the business of the Company shall be managed by the directors who shall pay all expenses and so on?]

I cannot submit my case on documents which are not part of the evidence against me at present. Apart from the question of this man being a Director, as soon as that is done it raises the legitimate proposition that his duties are regulated by the Articles of Association. The Articles of Association are not pleaded against me. It was not one of the grounds on which this Rule was issued.

Counsel then cited the case of *Imperial Hydropathic Hotel Co., Blackpool* v. *Hampson* (29) and said that there the matter was discussed as to what were the duties of a Director and his rights and liabilities. He submitted that in this case their Lordships could not arrive at any such conclusion that because this man was a Director he must know this, that because he was a Manager he must know this. For a criminal trial something more definite was necessary, that it was his duty to look after the printing or the publishing of the paper in question. After all, if their Lordships took it as a matter of legitimate inference, they must take it in connection with the usual way in which business was done under these circumstances. If there was a Company for the purpose of publishing a newspaper and other things as well, as the memorandum showed, what would their Lordships expect? Their Lordships would expect in the usual course that for the purpose of editing the paper the Company would appoint an Editor and that it should be in the discretion of the Editor as to the manner in which he edited the paper They might reasonably infer that probably the general policy of the paper was indicated to the Editor. After all, the question as to which particular articles should or should not be published must be left to the discretion of the Editor. Therefore *prima facie* a man who was a Director and nothing more than a Director would not look to the printing or publishing of different paragraphs which came in the different issues of the paper. Of course if their Lordships had evidence before them that a particular Director was also entrusted with the duty of looking after the newspaper and doing the work of Editor, then the matter would have stood on a different footing. Their Lordships had not got that evidence, the only evidence they had was that he was a Director. They could not draw the inference from that that because he was a Director, he must be taken to be aware of what articles were published and, therefore, he must have known before the publication of those articles that they were of this character and, therefore, he was liable for a criminal offence. Mr. *Das* submitted that that conclusion was too remote having regard to the facts which their Lordships had before them.

Then with regard to the matter of these Directors and Managers their Lordships had had the case put before them of *Green, Ex parte, Robbins, In the matter of* (24), from which they would see that in that case the argument was not because he was Manager he was responsible. In that case the Judges had carefully gone into all the circumstances, the previous correspondence and the admission of the Manager and it was upon the admission of the Manager and the contrast between these letters and correspondence and his affidavit filed in Court at the time of the trial that the Judges came to the conclusion that he was responsible. Here their Lordships must

(29) (1883) 23 Ch. D. 1; 49 L. T. 147; 31 W. R. 330.

have evidence before them to show that this man was responsible for the publication.

Counsel next cited the case of *O'Shea* v. *O'Shea* (6) and said it very often happened that even with regard to a paper the editor was responsible for the editorials while the advertisement department was left in somebody else's charge. It would be impossible to manage the publication of a paper unless there was a division of labour like that. Their Lordships were not considering the question of civil liability but the question of criminal liability. The mere fact that these people were Directors or Managers or Financial Managers would not justify their Lordships in coming to the conclusion that they were responsible.

[WOODROFFE, J.—What is the difference between civil and criminal liability? Ordinarily we regard as a civil liability that which results in damages and so forth. A decree is awarded to give reparation to a plaintiff. A criminal liability is that in which the Court puts proceedings in motion for the purpose of punishing a person who does something wrong. If you take this question of civil contempt and criminal contempt you find in both cases the Court awards punishment whether it is civil contempt or criminal contempt.]

Even in civil contempt these proceedings have been described by decisions to be decisions *in penum*.

[WOODROFFE, J.—They don't come under the ordinary civil and criminal proceedings. Whether you call it civil or criminal they result in punishment. Therefore, it is nothing more than this, that the law has attached certain epithets to certain classes of contempt and they call one class contempt of a criminal nature and the other class contempt of a civil nature.]

It is only for the purpose of deciding the question of jurisdiction but so far as the offence is concerned it is in both cases criminal. It is a proceeding *in penum*.

[WOODROFFE, J.—Then how do you say about jurisdiction?]

The one is criminal jurisdiction, the other is civil jurisdiction. I am addressing your Lordships from the point of view that it is a proceeding *in penum* and, therefore, you must look at the evidence strictly.

[WOODROFFE, J.—All evidence must be looked at strictly.]

[MOOKERJEE, J.—Strict proof is required in criminal cases. Equally strict proof is required in civil cases.]

That is so. I am pleading for the application of strict proof. If your Lordships apply strict proof I have nothing to complain of.

Counsel next cited Statutes 6 and 7 Victoria, the case of *Harding* v. *Greening* (30) and the case of *Reg.* v. *Holbrook* (22) and *Reg.* v. *Holbrook* (23).

[SANDERSON, C. J.—The procedure for civil contempt and criminal contempt is the same?]

Yes. It is a proceeding *in penum*.

[WOODROFFE, J.—Does it not come to this that both the jurisdiction to commit for contempt and the contempt itself are *in sui generis*.]

Yes. The point of view from which I am addressing your Lordships is that it is a proceeding *in penum*. Therefore according to your Lordships' ruling in *Governor of Bengal* v. *Moti Lal* (4), the proceedings ought to conform as nearly as possible to the proceedings in criminal cases.

Mr. *C. R. Das*, continuing, said that the last two cases showed that whether or not the Common Law of England at one time was that the proprietor could be punished even although it was proved that he was not responsible for the particular libellous matter, it certainly was not the law of England now by reason of 6 and 7 Victoria. Be that as it may, there could not be any doubt that it was not the law in India at present and it was impossible to argue that that law applied in this country to convict people who were not directly responsible for the publication of the libel. He referred to section 499 of the Penal Code and also to section 501. He had been described as a Director and Financial Manager. It did not follow from that that he was personally responsible for the publication. That responsibility must be fixed upon him by some evidence, direct or indirect. The only evidence there was here was the statement referred to and that did not establish

(30) (1817) 8 Taunt. 42; 1 Moore. 477; 129 E. R. 297.

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his responsibility. He next submitted that there was no necessary connection between the two articles of May 18th and May 22nd. In the first place there was no reasonable ground upon which that could be assumed. Then there was nothing to suggest that they were not written by two different persons on two different dates, unless their Lordships by way of inference read into these two matters something which was not there. In the first article the writer did not believe that any official of the Trust would dare to go so far as to approach the Chief Justice or any Judge of this Court. In the next article he said that consternation prevailed, but it was not a fair reading of it to assume that the official did approach the Chief Justice. There were words put in as a sort of protection.

[SANDERSON, C. J.—Which words?]

That there was a mischievous rumour which should be contradicted. He also said that "we are sure that every ratepayer is safe in the hands of the Honourable Judges. We are sure that the officials of the Trust will not go so far." He did not intend that the contradiction should come from the Judges of the High Court. He himself contradicted.

[SANDERSON, C. J.—If his object wss not to draw attention to the rumour, why publish it?]

Mr. *Das* said he would deal with this point later on. Supposing there were two views possible the Court was bound to see which was consistent with the writer's innocence. If once they started with the idea that the writer was innocent, then everything pointed to these paragraphs being read absolutely in favour of his innocence. Why should their Lordships put something else into the articles which was not there and draw adverse inferences? The facts according to the rumour were that Mr. Justice Mookerjee and Mr. Justice Cumming, who had decided *Chandra Kanta's case* (14) against the Trust, were withdrawn and the Bench was altered and was constituted by the Chief Justice and Mr. Justice Woodroffe coming in and Mr. Justice Chitty was to join their Lordships. Upon that the writer said, why should that be so? Is not the Chief Justice and Mr. Justice Woodroffe quite competent to try the case? As regards their reason for suggesting the addition of two Indian Judges, Mr. *Das* desired to dissociate himself from the arguments put forward by Mr. *Jackson*. Mr. *Jackson* had suggested that the writer wanted two Indian Judges because the Indian Judges were interested as landowners and were affected by the Improvement Trust. That would be the strongest ground for suggesting that Indian Judges should not be on the new Bench.

[SANDERSON, C. J.—Is not this a sort of suggetion that the Indian Judges would themselves resent very strongly?]

I should submit so myself.

Continuing he said that the writer was considering the mysterious rumour in the public mind which was strengthened by the unfortunate fact that just after the decision of *Chandra Kanta's case* (14) Justices Mookerjee and Cuming were removed.

[SANDERSON, C. J.—It is only the withdrawal of Sir Asutosh that is mentioned.]

Before that the writer says that Judges who decided the case were Justices Mookerjee and Cuming. Therefore it did not mean the withdrawal of Sir Asutosh alone but the withdrawal of the Bench. The writer was not drafting a plaint or a written statement. The writer is debating the matter with himself. He is putting forward different reasons and disposing of them one by one. It might be impertinent for him to advise the Chief Justice as to the way in which he should form his Benches, but it is not contempt of Court.

[WOODROFFE, J.—If it only means what you said, why should he say if you are going to have more than two Judges have a Full Bench and have Indian Judges, and why should he say that unless you do what he tells you to do, that will leave an unsavoury impression?]

He says that the rumour is strengthened by these facts. He is putting forward the public view which might be unjust and mischievous, but, at any rate, he is expressing the public view, and he says that the unsavoury impression will be removed because it follows close upon the heels of *Chandra Kanta's case* (14).

[FLETCHER, J.—That means that there is

some hidden meaning for importing Mr. Justice Chitty on to the Bench.]

That is not the reason. It is to allay the suspicion of the public that a Full Bench is suggested with two Indian Judges. Why should you suppose that there is any hidden attack on Mr. Justice Chitty? It was not only the withdrawal of the Bench which decided against the Trust but close upon it came the formation of a new Bench. He says that this rumour was strengthened in the mind of the public by these events, *first* ,by the withdrawal of Justices Mookerjee and Cuming who decided the case against the Trust, and *secondly*, that the new Bench was to be strengthened by bringing in Mr. Justice Chitty. Then the writer suggests that these facts would leave a mischievous impression on the mind of the public and the suggestion which the writer makes is this: He says we have perfect faith in the Chief Justice; still to allay public feeling a Full Bench should be formed with two Indian Judges.

[WOODROFFE, J.— Supposing the suggestion is exactly what the writer says, namely, that it has given the unsavoury impression that Sir Asutosh Mookerjee was withdrawn because he had decided against the Trust?]

Not only the withdrawal but the withdrawal following close upon the decision.

[WOODROFFE, J.—Yes, because he had given judgment against the Trust. It was supposed that my learned brother would try the other cases and he was withdrawn because he had given his judgment against the Trust?]

That is the meaning. He says that this was the rumour.

[SANDERSON, C. J.—Do I understand you to say that this was the clear meaning of the article that Sir Asutosh Mookerjee had been withdrawn because he had given judgment against the Improvement Trust?]

I beg pardon: What I said is that the two events were following each other closely. He is not giving them as his own ground. He is speaking of the unfortunate chain of events.

[SANDERSON, C. J.—I thought my learned brother had put the question and your answer was that this was a clear meaning of the article.]

If this was so, I did not hear Mr. Justice Woodroffe properly. I do not say that the writer suggests that Justice Mookerjee was withdrawn because he had decided against the Trust.

[WOODROFFE, J.—I put it to you that one of the suggestions made in this article was that the Trust were moving in this matter because Mr. Justice Mookerjee had given his decision against them, and the writer was under the impression that all the cases dealing with the Improvement Trust were to be heard and disposed of by Justices Mookerjee and Cuming, and that in order to aid these manoeuvres of the Trust my learned brother had been withdrawn, and you said that this was clearly the meaning.]

If I said so I did not mean that the writer meant this. He refers to the chain of events and he speaks of the apprehension in the mind of the public.

[SANDERSON, C. J.—Do I understand you to say that the meaning was that Sir Asutosh had been withdrawn on account of his judgment against the Trust?

Not only that but the whole chain of events. It is not the isolated fact but all the things taken together which had caused the impression. The writer does not say that this is well founded but he is giving some sort of excuse for the public feeling.

Counsel then went on to explain the meaning of the second article and submitted that there was nothing in it which showed that there was any contempt.

[SANDERSON, C. J.—Who does he suggest as being responsible for the withdrawal of Sir Asutosh?]

He does not suggest that. He says that the public have taken it in that way because of the chain of events. He speaks of his perfect faith in your Lordship. How then could it be contempt of your Lordship? That expression in itself contradicts that idea and is inconsistent with it. He was not saying anything which is insulting or contemptuous. Your Lordship put it to me a little while ago that if it was a mischievous rumour why did he express it? If it, was with reference a private person, of course, he should not have expressed it, but in this case it might be a source of incalculable mischief and if it went uncontradicted, it might gather strength and result in

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a universal belief that the High Court is no longer to be trusted. That would be a state of affairs which would be a thousand times more mischievous than giving expression to the rumour and trying to combat it.

Counsel went on to say that their Lordships should start with the idea that the writer did not write this article with any intention to insult or annoy or give any offence. What was the good of holding this trial if they started with the idea that there was no such rumour and that the writer's sole object was to attack the High Court, and that as he could not do it on facts, he tried to do it on invented facts? In this case their Lordships were both prosecutors and judges at the same time and they should not start with an idea like this. They must start with the idea that the man was an innocent man. It was only when they found that they could not accept this view that they must take the other view. This was the basic principle of British justice. Where was the contempt in saying that two Indian Judges should be associated with the Bench, unless it was assumed that the mischievous facts were purposely put in that way? The sentence referring to the withdrawal of Mr. Justice Mookerjee giving rise to an unsavoury impression should not be taken by itself. It must be taken in connection with the rumour that the Improvement Trust were taking some steps, that Justices Mookerjee and Cuming had decided the case against the Trust, that following upon it was the so-called withdrawal and it did not rest there. Then the writer referred to the constitution of a new Bench, comprising the Chief Justice and Mr. Justice Woodroffe, and the appointment of Mr. Justice Chitty to this Bench. All these facts together had given rise to the impression in the public mind and yet he said that he had perfect faith in the Chief Justice. He submitted that there was nothing which showed any intention of any contempt of Court. There was no circumstance from which their Lordships could gather clearly that the writer had any intention to commit contempt of Court. Unless they came to that conclusion they could not convict. They must convict on a clear case and not upon suspicions or conjectures. It might be impertinent but there was nothing improper in suggesting how a Bench should be formed. The suggestion that the Bench should consist of three European and two Indian Judges could not be called contempt of Court. A suggestion like that might be impertinent, but it was not necessarily improper and was not contempt of Court. From it they could not draw any inference adverse to the accused.

In conclusion Mr. *Das* submitted that even if their Lordships came to the conclusion that it was contempt, it must according to his argument be a very technical contempt. He then drew attention to a number of cases on this point and following Mr. *Chakravarty's* argument, submitted that there was no tendency in this case to obstruct the course of justice.

JUDGMENT.

SANDERSON, C. J.—In this matter the Rule was issued by me as Chief Justice of this Court after consultation with the learned Judges in consequence of two articles which appeared in the "Amrita Bazar Patrika" newspaper on the 18th and 22nd of May 1917, respectively. The Rule was directed to Tarit Kanti Biswas, the printer and publisher of the newspaper, and to Moti Lal Ghose, Golap Lal Ghose and Pijush Kanti Ghose, Directors, and Golap Lal Ghose and Mrinal Kanti Ghose, the Managers of the Company called the "Amrita Bazar Patrika Ltd.," having its registered office at No. 2 Anando Chatterjee's Lane, Calcutta, and the Rule called upon them to show cause why they should not be committed or otherwise dealt with according to law for contempt of Court alleged to have been committed by them by unlawfully publishing the two articles concerning the High Court and the Chief Justice in his administration thereof.

The respondents to the Rule have all appeared by learned Counsel.

The first question which it is necessary to consider is whether these articles or either of them constitute a contempt of Court. The appeals from Mr. Justice Greaves, to which both the articles refer, are the appeals in the three cases mentioned at the head of the Rule. These cases were decided by Greaves, J., sitting

on the Original Side, and the appeals in which the Improvement Trust were respondents were about to be heard by the Court hearing appeals from the Original Side at the time of the publication of the the two articles in May 1917.

The first article is as follows:—"There is a mischievous rumour afloat which should be contradicted. It is stated that a vigorous attempt is being made to get up a Bench to consider the appeal on the judgment of Mr. Justice Greaves in connection with the acquisition of surplus land by the Calcutta Improvement Trust according to somebody's choice. We do not believe that it is possible for any one, far less the Chairman of the Trust, to secure a Bench after his own heart as a counterpoise to the Mookerjee and Cuming Bench. We are sure the interest of every rate-payer is safe in the hands of the Hon'ble Judges, and we do not think that any official of the Trust can go so far."

The reference to the "Mookerjee and Cuming Bench" is to an appeal which was disposed of by Mookerjee, J., and Mr. Cuming when he was temporarily acting as a Judge of the High Court in August 1916, when the decision was against the Improvement Trust.

The second article is as follows:—"Something like consternation prevails on account of the proposed new constitution of the appellate Bench of the Calcutta High Court before which appeals against the awards of the Improvement Trust are to be heard. It is known to the reader how this Bench was originally composed of Sir Asutosh Mookerjee and the Hon'ble Mr. Justice Cuming, and how latterly it has come to be presided over by the Hon'ble the Chief Justice and Mr. Justice Woodroffe. Rumour has it that for purposes of hearing Improvement Trust Appeals the Bench is going to be strengthened by the appointment of Mr. Justice Chitty. Now what neither the public nor ourselves can understand is this special arrangement for such a Special Bench. If it is contended that two Hon'ble Judges of the highest Court in the land are not competent to decide in appeal cases in which the Improvement Trust is concerned, a contention, however, which we do not believe the Chief Justice will care to advance, why should there be a Special Bench of three and not a Full Bench of five, on which at least two Indian Judges could find seats? As a matter of fact, as landowners in Calcutta are mostly Indians and as Indian Judges are likely to know more of conditions, practices, etc., prevailing here, it is but meet that the Appellate Bench in the present circumstances should be so composed as to associate Indian Judges with their European colleagues. The withdrawal of Sir Asutosh has given rise to rather unsavoury impressions in the public mind, since this proposed arrangement is to follow close upon the heels of his judgment in the case of *The Improvement Trust* v. *Chandra Kanta Ghosh* (14). Be that as it may, we have perfect faith in the present Chief Justice and believe that as soon as Sir Lancelot Sanderson understands the public feeling in the matter, his Lordship will either form a Full Bench or at least associate an experienced Indian Judge with himself for the hearing of the Improvement Trust appeals."

It was admitted by the learned Counsel for the respondents at the hearing of the Rule that the statements of facts contained in this article were in many material respects untrue. There was not an Appellate Bench constituted to hear appeals "against the awards of the Improvement Trust" as the article assumes. Such Bench was not originally composed of Sir A. Mookerjee and Mr. Justice Cuming as stated in the article: such Bench had not latterly come to be presided over by the Chief Justice and Woodroffe, J., and it is untrue that Sir A. Mookerjee had been withdrawn from the Court.

Though these admissions have been made, it may be advisable to state the real facts.

In August 1916, as already stated, Mookerjee, J., and Mr. Cuming were sitting as a Division Bench on the Appellate Side and an appeal by the Improvement Trust from the Sub-Judge of the 24-Perganas, having come before them in the ordinary course, was disposed of by them. One of the questions was the alleged power of the Improvement Trust to acquire land compulsorily for the purpose of recoupment and the decision was against the Improvement Trust.

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In July 1916, Greaves, J., sitting on the original side, had decided the same question in three cases in favour of the Improvement Trust, and in May of this year the appeals from Greaves, J.'s judgment in the three cases were about to be heard by Woodroffe, J., and myself, the Judges who were then taking the appeals from the original side. Under these circumstances the articles were published.

As regards the inclusion of Chitty, J., in the Court, no explanation is necessary: it would be sufficient for me to state that I, as Chief Justice, thought it desirable to have three Judges to hear the appeal. But the reason in this case must have been obvious to every one. It was within my knowledge, as it was within every one's knowledge, that Mookerjee, J., had decided one way and Greaves, J., had decided another way on the construction of the Act on which the cases depended. It was obviously, therefore, a matter on which difference of opinion was possible; moreover it was a case of general importance and in order to avoid a further disagreement which might occur if the Court was constituted of two Judges only, and to avoid the further proceedings and delay which would undoubtedly be consequent on such a disagreement, I thought it advisable to have three Judges instead of two, and accordingly I requested Chitty, J., the next Judge in order of seniority who had not already had the matter before him, to sit with Woodroffe, J., and myself, and hear the appeals. I may mention here that in my opinion all appeals from a Judge sitting on the original side, except interlocutory appeals, should be heard by a Court constituted by three Judges, and when I first sat in this Court it was so constituted; but I found that the allocation of three Judges to that Court dislocated the work in other departments of the Court so much that I came to the conclusion with much reluctance that with our present staff of Judges I could not allocate more than two Judges to the original side appeals, except in special cases.

These being the facts, I now proceed to consider whether the articles are a contempt of Court.

I take the definition given by Lord Russell of Killowen in *Reg.* v. *Gray* (31) :—

"Any act done or writing published calculated to bring a Court or a Judge of the Court into contempt, or to lower his authority, is a contempt of Court. That is one class of contempt. Further, any act done or writing published calculated to obstruct or interfere with the due course of justice, or the lawful process of the Courts, is contempt of Court. The former class belongs to the category which Lord Hardwicke, L. C., characterised as 'scandalising a Court or a Judge.' That description of that class of contempt is to be taken subject to one and an important qualification. Judges and Courts are alike open to criticism, and if reasonable argument or expostulation is offered against any judicial act as contrary to law or the public good, no Court could or would treat that as contempt of Court. The law ought not to be astute in such cases to criticise adversely what under such circumstances and with such an object is published; but it is to be remembered that in this matter the liberty of the press is no greater and no less than the liberty of every subject of the Queen."

With regard to the first article I have no doubt it constitutes a contempt of Court. It was admitted by the learned Counsel appearing for the printer and publisher that it was a gross libel upon the Improvement Trust, one of the litigants. It alleges that it is stated that a vigorous attempt is being made to get up a Bench to consider the appeal on the judgment of Greaves, J., in connection with the acquisition of surplus land by the Calcutta Improvement Trust according to somebody's choice, which Bench is referred to thereinafter "as a counterpoise to the Mookerjee and Cuming Bench," which, as I have stated, had decided against the Improvement Trust. It was urged that this should not be regarded as a contempt, because the matter which would be argued on the appeals was the construction of an Act, and would be decided by Judges who would not be affected by such remarks.

(31) (1900) 2 Q. B. 36 at p. 40; 69 L. J. Q. B. 502; 82 L. T. 534; 48 W. R. 474; 64 J. P. 484; 16 T. L. R. 305.

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The question is not whether the article in fact obstructed or interfered with the due course of justice, but whether it is "calculated" to obstruct and interfere with the due course of justice. No matter what the tribunal may be, I am at a loss to understand how it can be seriously argued that such a grave allegation against one of the litigants that he was attempting to get a Bench constituted in such a way as would in his opinion give him a favourable decision, is not calculated to obstruct or interfere with the course of justice. Further, the mere suggestion that such a thing is within the bounds of possibility is a grave reflection upon the Court and the persons responsible for its administration. I am not unmindful of the argument that the article refers to a "mischievous rumour which should be contradicted" and that confidence is alleged in the Hon'ble Judges. The fact that the article is based on a rumour, even if it existed, cannot, in my judgment, excuse the publication of it. It must have been known to the person responsible for the publication that it was absolutely impossible for a litigant to get a Bench constituted according to his own choice. It is, however, a well-known method of spreading a libel for the publisher, who does not wish to take responsibility for it, to say there is a rumour to this or that effect, but that he himself does not believe it. It was admitted by one of the learned Counsel for the respondents that some words may have been inserted in the article by the person responsible therefor in order to protect himself in case of emergency, and having regard to the whole tenor of the article, I have very little doubt that this was the object of the writer in concluding in the manner referred to. If the matter had stopped there, although the paragraph was reprehensible and a clear contempt of Court, it might not have been necessary for the Court to take any steps of its own motion.

The second article, however, appeared four days later on the 22nd May. As already mentioned the facts therein stated are admittedly untrue; and consequently the insinuations based thereon are equally groundless. The only part of the article which is based on an alleged remour is that Chitty, J., was to be appointed to the Bench, which was to hear the Improvement Trust Appeals. For the rest of the statements in the article the author makes himself responsible.

The statement that "something like consternation prevails on account of the proposed new constitution of the Appellate Bench" taken by itself is a grave allegation. Why should a Bench which is to be composed of the Chief Justice and two of the most experienced Judges of the Court cause consternation? But when it is taken with what follows it assumes a much more serious complexion. After misstating the facts as to the previous constitution of the Bench and referring to the proposed inclusion of Chitty, J., it proceeds "now what neither the public nor ourselves can understand is this special reason for such a Special Bench." It then proceeds to argue that the proper thing would have been to have a Full Bench on which at least two Indian Judges could have seats. Reading so far, there may be some reason for doubt as to the meaning of the article, though the above allegations go the length of alleging that for some reason which no one could understand, the Chief Justice was about to include Chitty, J., in the Bench, and that such constitution of the Bench had caused something like consternation. But I think all doubt is set at rest by what follows when the author makes himself responsible for the statement that Mookerjee, J., has been withdrawn from the Bench and that such withdrawal "has given rise to rather unsavoury impressions in the public mind since this proposed arrangement is to follow close upon the heels of his judgment in the case of the *Calcutta Improvement Trust* v. *Chandra Kant Ghosh* (14)." Reading that in the ordinary way, can it mean anything except that Mookerjee, J., has been withdrawn from the Bench, taking the appeals against the awards of the Improvement Trust: that such Bench was originally composed of Mookerjee, J., and Cuming, J., that it is now composed of the Chief Justice and Woodroffe, J., that Chitty, J., is about to be included which is a special arrangement which neither the author of the article nor the public can understand, that if any special arrangement is necessary why should

not Indian Judges be included and that the withdrawal of Mookerjee, J., coming as it does so soon after his judgment against the Improvement Trust, has caused an unsavoury impression in the public mind. Consequently something like consternation prevails at the proposed new constitution of the Bench.

I think it is clear that it means that Mookerjee, J., has been withdrawn from the Bench taking the appeals against the award of the Improvement Trust and insinuates that it is because of his judgment against the Trust, and, therefore, an unsavoury impression has arisen. I fail to see any other meaning which can be attributed to it, and I have no doubt that this article, read by itself constitutes a very serious reflection upon the administration of the Court, which everyone knows is in the hands of the Chief Justice. But if it is read in conjunction with the previous article, the above-mentioned meaning is made plain beyond dispute. I think the articles should be read together. They were published with only four days' interval, they refer to the same subject-matter, they are written in the same strain and in the same style, and each article appeared in the colums of the newspaper which are devoted to leading articles. When read together what do they mean? It is obvious to my mind they mean to suggest that a vigorous attempt had been made by the Improvement Trust to secure a Bench composed according to their choice and that the attempt has succeeded; that otherwise the proposed constitution of the Bench is inexplicable and something like consternation prevails. If this be the correct meaning, there is no doubt that it is calculated to bring the Court and the Chief Justice, who is responsible for its administration, into contempt and it is calculated not only to destroy confidence in the tribunal but also to undermine and impair the authority of the Court. If so, there is no doubt that it is a contempt of this Court.

There are two other matters to which I wish to refer. It was argued that the object of the second article was to procure the appointment of two Indian Judges or one Indian Judge to the Bench which was to hear the appeals, and the suggestion contained in the article was that as the land-owners in Calcutta were mostly Indians, and Indian Judges are likely to know more of conditions and practices prevailing, that it was but meet that Indian Judges should be associated with their European colleagues. The question at issue in the appeals depended on the construction of the sections of a certain Act, and had nothing to do with the conditions and practices, etc., relating to Indians. This, however, might be put down to ignorance on the part of the author of the article, though from the references made in the article to such matters as the constitution of the Courts, Full Bench and other matters, the writer appears to be fairly familiar with the proceedings of the Court and the nature of the appeals in question. A futher argument, however, was adduced by the learned Counsel for Moti Lal Ghose, *viz.*, that the real object of the article was to get an Indian Judge, who possessed land, appointed to the Bench in question, because Indian Judges would approach the subject from a totally different point of view from that of European Judges, who do not possess land and who do not know where the shoe pinches. This to my mind was an astonishing argument. I was not surprised, therefore, when Mr. C. R. Das, appearing for another of the respondents at a later stage of the hearing, disassociated himself from that argument and stated that in his opinion the above-mentioned argument would be the strongest ground for suggesting that Indian Judges should not be on the Bench in question. Assuming, however, that the learned Counsel for Moti Lal Ghose was correct in his statement as to the meaning and object of the article, it is not only one which would be rightly and strongly resented by my Indian colleagues but it also provides an additional reason for holding the article a contempt of Court: for it involves the suggestion that one of my Indian colleagues should be added to the Bench in question because he possessed land and would approach the question from a different point of view from a Judge who possessed no land and who would, therefore, be entirely independent and it thereby constitutes a very grave and unjustifiable reflection on my Indian colleagues.

It is also to be noted that if this was the object, the author of the articles was endeavouring to obtain the constitution of a Bench after his own heart, the very thing which he had professed to condemn so

strongly when attempted, as alleged, by the Improvement Trust. Assuming, however, that the object of the article was to get an Indian Judge appointed, no matter for what reason, that does not justify the publication of the untrue statements of facts and the unworthy and groundless insinuations based thereon.

The other matter to which I refer is the passage at the end of the article in which the author expresses perfect faith in the Chief Justice. This, to my mind, is so inconsistent with the insinuations previously made in the articles, that it is impossible to conceive that it was genuinely intended. It is much in the same style as the conclusion of the previous article, and I do not think there can be any doubt as to the object of the author in using these words, *viz.*, to try and provide a means of escape for himself if he is taken to task for the previous matter contained in his article.

No one has come forward to acknowledge the authorship of the articles or the responsibility of the publication, and we have, therefore, had no opportunity of hearing or considering any explanation from the individual, in person, who was so responsible. Consequently the meaning and the intention of the writer must be gathered from the articles themselves. They must be read as they stand, giving to the words used their natural meaning. We have had many arguments and many commentaries upon the articles addressed to us by all the learned Counsel on behalf of the respondents. I have considered them carefully and though I should like to have come to the conclusion that the articles do not and were not intended to constitute an attack on the Court, I regret to say I am unable to come to that conclusion. It might possibly have been different if the author of the article or the person responsible for its publication had come forward and personally explained what was in his mind; but he has not chosen so to do, and we must construe the articles as they stand, and I have no doubt that any one reading them would come to the conclusion that a very serious aspersion was cast upon the Court and the administration thereof, and that consequently they do constitute a contempt.

If then the articles constitute a contempt the next question is, whether the Court has jurisdiction to deal with it by these proceedings. There can be no doubt as to this: it was held in 1883 in *Surendra Nath Banerjee* v. *Chief Justice of Bengal* (32) by the Judicial Commitee that the High Courts in the Indian Presidencies are Superior Courts of Record. The offence of contempt of Court and the powers of the High Court to punish it are the same in such Courts as in the Superior Courts in England, and the jurisdiction was exercised by the High Court in that case.

This jurisdiction was affirmed in 1913 in the case of *Governor of Bengal* v. *Moti Lal* (4), when Sir Lawrence Jenkins, C. J., said at page 215*: "Now this Court is a Court of Record in all its jurisdictions, and it thus has power to commit for any contempt in relation to any of those jurisdictions."

Then Mookerjee, J., at page 242* said: "Now, it is indisputable that a Court of Record has authority to punish for contempt. Sir Barnes Peacock, C. J., observed in *Abdool and Mahtab, In re* (33) that this Court by the express terms of the Letters Patent is a Court of Record and there can be no doubt that every Court of Record has the power of summarily punishing for contempt", and indeed the learned Counsel appearing for the printer and publisher of the newspaper admitted the jurisdiction of the Court but argued that in this case it should not be exercised. The suggestion that this jurisdiction is obsolete and ought not to be exercised is futile, in view of the fact that it was exercised by this Court in 1883 and affirmed to be in existence in 1913. It was also exercised in England as recently as 1900 in the case of *Reg.* v. *Gray* (31) already referred to.

The question remains then whether the Rule should be made absolute against the respondents or any of them.

As regards the case of Tarit Kanti Biswas, the first respondent on the record, there is evidence that he was the printer and publisher of the newspaper. We have before us a certified copy of the return made

(32) 10 C. 109; 10 I. A. 171; 4 Sar. P. C. J. 474; 5 Ind. Dec. (N. s.) 76.

(33) 8 W. R. Cr. 32.

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by him under the Act (XXV of 1867), his name appears in the newspaper as printer and publisher and he has himself put in an affidavit admitting that he occupies such position and that he printed and published the articles in question.

As already stated, his learned Counsel admitted the jurisdiction of this Court and further admitted his legal responsibility if the articles constituted a contempt. This responsibility could not be denied, for it has been held in many cases that the printer and publisher is liable for contempt even though he was not aware of the subject constituting such contempt, and the reason for that is given by Lord Morris, in *McLeod* v. *St. Aubyn* (5) as follows:—"A printer and publisher intends to publish and so intending cannot plead as a justification that he did not know the contents." Again it was pointed out by Stirling, J., in *American Exchange in Europe* v. *Gillig* (34) that the foreman printer (who was the person concerned in that case) is the person who is held out to the public as the publisher, and under these circumstances he is answerable for publishing the article complained of although he is ignorant of its contents. This has been the law since the well-known decision of Lord Hardwicke in the case of *St. James Evening Post* (35).

I refer to the above-mentioned cases to show that in my judgment the learned Counsel was correct in making the admission that this Court has jurisdiction in these proceedings, and that if the articles constitute a contempt of Court, the printer and publisher is legally liable in respect thereof.

Having held that the articles are a contempt, it remains to be considered whether the Rule should be made absolute. The printer and publisher has put in an affidavit in which he alleges he did not read the articles when they were handed to him for publication, which was done in the ordinary course of his business. He admits that certain statements in the second article are incorrect, and he then proceeds to argue that the publication was in the public interest. Paragraph 6 of his affidavit runs thus:

"That I further state that the said articles were published by myself in good faith and in the public interest and without any intention whatsoever of offending against the dignity or integrity of this Hon'ble Court or of prejudicing the due course and administration of justice in the matter of the appeals referred to in the said articles."

7. "That long before the appeals referred to in the said article came on to be heard by this Hon'ble Court, it was well known among the public of Calcutta how the Calcutta Improvement Trust had objected to the hearing of the appeal in which the question of the powers of the Calcutta Improvement Trust was involved by any of the Indian Judges of this Hon'ble Court and how, as a matter of fact, they through their Counsel, Mr. Langford James, adopted the very unusual course of applying in open Court to the Hon'ble the Chief Justice that the appeal case of *Trustees for the Improvement of Calcutta* v. *Chandra Kanta Ghosh* (14) should not be heard by the Hon'ble Mr. Justice Mookerjee, and how after the decision in the last mentioned case by the Hon'ble Mr. Justice Mookerjee and the Hon'ble Mr. Justice Cuming they had unsuccessfully applied to the Government for legislation for the purpose of doing away with the effect of the said decision. In the circumstances recited the public were watching with deep interest the action of the Hon'ble the Chief Justice, in constituting the Court which would hear the appeals from Mr. Justice Greaves' decision."

8. "I further state that the said articles were published to give expression to public feeling in Calcutta and, as stated above, without the remotest intention of scandalising this Hon'ble Court or of reflecting on the conduct of the Hon'ble the Chief Justice or of any other Judges of this Hon'ble Court."

If it be true that the public were watching with such deep interest the action of the Chief Justice in constituting the Court, it seems to me that fact enhances the serious nature of the publication of the articles. For the public in the ordinary course might not trouble its head about the constitution of the Court, and might not pay much attention to the articles; but if, on the other hand, the public really was interested in the matter, it would pay

(34) (1889) 58 L. J. Ch. 706 at p. 707; 61 L. T. 502.
(35) (1742) 2 Atk. 469; 26 E. R. 683.

attention to them, and it was all the more incumbent upon the author and publisher to abstain from making false statements and groundless insinuations. I may have my doubts as to the "deep interest" alleged in the affidavit, but if it did exist, the seriousness of the publication is greatly increased.

The learned Counsel for the printer and publisher urged that his client would be sufficiently dealt with by the proceedings which had been taken and that the Rule should not be made absolute against him. I take into consideration all the learned Counsel urged and I sympathise with his argument that the editor if there be one, or the person responsible for the publication, ought in common fairness to have come forward and borne the burden in respect thereof; the fact that the printer and publisher does not disclose the name of the person responsible for the publication is a factor to be considered when deciding how the printer and publisher should be dealt with. In this case, the printer and publisher has not disclosed the person responsible for the publication, whom of course he must know, though he may not know the actual writer of the articles. On the contrary he has attempted to justify the publication by the paragraphs of his affidavit to which I have referred. It was said by Lord Hardwicke in the case already cited, "nothing is more incumbent upon Courts of Justice than to preserve their proceedings from being misrepresented;" and the reason for this must be obvious to every one. My attention has been drawn on other occasions to articles criticising the High Court. I have found that many of them were unjustifiable, because they were based on statements of facts which were incorrect: but the Court has not taken any notice of them because they were not worth the time of the Court. But this is a different matter, the allegations contained in the articles exceed the bounds of any legitimate criticism and strike at the very root of the administration of justice.

People who are familiar with the administration of the Court would know how impossible the allegations were, but among people who are not so familiar with the Court's administration, such articles as those in question with their groundless insinuations may be very mischievous and pernicious. They contain grave misrepresentations of the proceedings and administration of this Court, and in my judgment we should be failing in our duty if we did not take such steps as are within our power to counteract the effect of them and to vindicate the Court and its authority.

In my judgment, therefore, the Rule should be made absolute against Tarit Kanti Biswas, the printer and publisher.

As regards the other four respondents, the evidence before us, apart from the question of its admissibility on the technical grounds which were put forward during the argument, raised a strong *prima facie* case that they were responsible for the publication of the newspaper containing the articles.

The "Amrita Bazar Patrika Co., Ltd.," was incorporated in 1908, the original Directors being Sisir Kumar Ghose, Moti Lal Ghose and Golap Lal Ghose, for the purpose of acquiring and taking over as a going concern the business of newspaper proprietors, printers and publishers then carried on, and in connection therewith the entire rights including the goodwill of the newspaper called the "Amrita Bazar Patrika," then being published from No. 2, Ananda Chatterjee's Lane, in Calcutta and all or any of the assets and liabilities of the proprietors of the business in connection therewith, and with a view thereto to enter into the agreement referred to in clause 3 of the Company's Articles of Association and to carry the same into effect with or without modification, with the usual subsidiary powers contained in the Memorandum of Association.

The Company gave the statutory notices that it intended to carry on its business at No. 2, Ananda Chatterjee's Lane, which was to be deemed its registered office: that it possessed a printing press at 19 and 20, Bagbazar Street, which the Company purchased from Golap Lal Ghose. On the 5th March 1917, the respondents Moti Lal Ghose, Golap Lal Ghose and Pijush Kanti Ghose were the Directors. Golap Lal Ghose and Mrinal Kanti Ghose were the Managers, and it further appeared that Golap Lal Ghose acted as Financial Manager and Mrinal Kanti Ghose as Secretary. The address of all

the four was given No. 2, Ananda Chatterjee's Lane. The Articles of Association (which were put in evidence by M. K. Ghose) provided that the business of the Company should be managed by the Directors, who might pay all expenses incurred in getting up and registering the Company and might exercise all such powers as are not by the Indian Companies Act required to be exercised by the Company in general meeting subject to the provisions of the Act and of the Articles, etc.

It was obviously a family business converted into a Limited Company. This is confirmed by the list of persons holding shares exhibited in Mr. Hechle's affidavit. The evidence shows that the Directors and Managers were living at the premises which are the registered office of the Company; that the newspaper was published at those premises; that it was the duty of the Directors to manage the business; there was no editor disclosed or any other person occupying a position similar to that of an editor who would be responsible for the publication and the contents of the newspaper.

From these facts it would naturally be presumed that these respondents were actually engaged in the management of the newspaper and personally responsible for its publication. These Directors were occupying positions very different from those generally occupied by Directors of Companies, whose duties are restricted to attending periodical meetings and directing the policy of the Company.

Two of the respondents, Pijush Kanti Ghose and Mrinal Kanti Ghose, however, have put in affidavits and it appears therefrom that Mrinal Kanti Ghose was away from Calcutta on private business at the time when both the articles in question were published, and that Pijush Kanti Ghose was away on private business when the second article was published and under these circumstances I think that the *prima facie* case against them may be said to have been met, and I do not think that either of them should be held responsible in these proceedings for the publication and that consequently the Rule should be discharged as against them.

There are, therefore, two Directors left to manage the business of this newspaper at the material times, *viz.*, Mati Lal Ghose and Golap Lal Ghose. Golap Lal Ghose in the evidence is described as Director and Manager and also as Financial Manager. Mrinal Kanti Ghose has sworn that Golap Lal Ghose has only to do with receipts and disbursements of the Company and keeps the accounts thereof.

Under these circumstances, I think the *prima facie* case made against him may be rebutted, and that he should not be held responsible in these proceedings for the publication of the articles, even though it is not alleged that he was not at the premises when the paper was published at the material times, and in my judgment the Rule should be discharged against him.

With regard to Moti Lal Ghose, the case is different: I think under the circumstances mentioned above, it may not unreasonably be presumed that he was responsible for or privy to the publication. It was the Director's duty to manage the business: such business was the publishing of the newspaper: one of the three Directors was away from Calcutta another, it is sworn, had only the financial matters to attend to; Moti Lal Ghose, therefore, is the only Director to whom the particular duty of editing and publishing the newspaper can be ascribed. As already mentioned, he was not in the position of an ordinary Director, who makes periodical visits to the Company's premises at stated and regular intervals. He was living on the premises where the paper was published and carrying on the family business which had been turned into a Limited Company.

There is no Editor disclosed, and even in the affidavits which have been put in by Pijush Kanti Ghose and Mrinal Kanti Ghose there is no specific reference to any editor. There is a general statement only, *e. g.*, the affidavit by Pijush Kanti Ghose runs as follows:—"Neither I nor my co-Directors exercise any control whatever over the contents of the 'Amrita Bazar Patrika' newspaper, but we perform duties and exercise such powers as are mentioned and defined in the Articles of Association of the Limited Company." This is not a convincing statement. It is to be noted that it does not go the length of saying that the Directors did not know of,

or were not privy to, the publication of the articles : if they did know of the inclusion of the articles and allowed the newspaper containing the articles to be published, they would be responsible.

Further the main duty of the Directors "mentioned and defined in the Articles of the Company" is to manage the business of the Company, which business is the publication of the newspaper. Under such circumstances the natural presumption would be, I think, that Moti Lal Ghose, either was responsible for, or at all events, was privy to the publication of the articles. But it has always been held that the jurisdiction which the Court has in respect of a contempt of Court should be exercised with great care and should only be exercised when the case is beyond all reasonable doubt, and this should especially be the case when the proceedings are at the instance of the Court itself. Moti Lal Ghose has made no affidavit nor has he offered any explanation of his position in connection with the newspaper at No. 2, Ananda Chatterjee's Lane, and if the above-mentioned presumption of responsibility were drawn against him, I do not think he could complain. But I think it is just possible that he may not have been responsible for or privy to the publication of the article. Although no reference is made to the existence of an editor, or some person in the position of an editor, it is still possible that there may be one who is not before the Court. For there is the general statement by Pijus Kanti Ghose and Mrinal Kanti Ghose made on oath that the Directors do not exercise control over the contents of the newspaper. Though this general statement be unsatisfactory, it cannot be wholly disregarded and it may be that the general control as to the contents of the newspaper may be vested in the hands of some person who occupies the position of an editor and who, for reasons known only to the respondents, has not been disclosed, and that consequently these articles may have been inserted without the responsibility or knowledge of Moti Lal Ghose. It is not likely that this was so, but still it is *just possible* and having regard to the principle that in proceedings of this nature we should be scrupulously careful to see that the case is clear beyond all reasonable doubt, I think Moti Lal Ghose should be given the benefit of that doubt and that the Rule should not be made absolute against him.

In view of the attitude taken up by the respondent Directors, we considered whether a Rule should not be issued against the Company itself with respect to which the considerations which affect the positions of the Directors would not arise : but in view of the fact that the object of the proceedings, *viz.*, the vindication of the Court and its authority, had been obtained by the proceedings already instituted, we came to the conclusion that it was not necessary to take up the time of the Court by adding the Company, which would necessitate a further hearing.

Before leaving the case of the Directors, I desire to refer to the attitude adopted by them. If the articles were innocently intended, the natural thing would have been for the person responsible for them, or for their publication, to come forward and declare his intention : on the other hand, even if they were not innocently intended, one would have expected the person really responsible for their publication to come forward and take the responsibitity on his own shoulders as was done in the case of two well-known newspapers in Calcutta on previous occasions. * They have chosen not to do so but to leave the printer and publisher to bear the brunt of the matter.

It is further to be noted that, although it was evident that the Court, by issuing the Rule, regarded this as a matter reflecting upon the Court, although it has been admitted that the second article contained statements of fact which were entirely untrue, and consequently that the insinuations based thereon were groundless, although two of the respondents' learned Counsel admitted that the article, to say the least of it, was a piece of great impertinence, not one word of apology has fallen from the Directors of the Company.

As regards the many technical points raised by learned Counsel as to the admission of the evidence, I do not think it is necessary for me to discuss them : none of them affect the case of the printer and publisher. I would only say that I

* *Banks and Fenwick, in the matter of*, 45 Ind Cas 113; 26 C. L. J. 401; 19 Cr. L. J. 449 and *Surendra Nath Banerjee* v. *Chief Justice of Bengal*, 10 C 109; 10 I. A. 171; 4 Sar. P. C. J. 474; 5 Ind. Dec. (N. S.) 76.

have had the opportunity of reading Woodroffe, J.'s judgment, and I agree with him that most of them were trivial and unsubstantial. The Court was occupied over these proceedings for two and a half days: some part of the time no doubt was taken up by the discussion of the meaning of the articles, but the greater part was devoted to technical objections relating to the evidence and to the question as to who was really responsible for the publication. This fact shows how essential it is that the Legislature should provide for the registration of the editor or the person really responsible for the contents of a newspaper, so that the responsibility might be placed in the proper quarter without any difficulty or delay.

For the above-mentioned reasons, in my judgment, the Rule should be made absolute against Tarit Kanti Biswas, the Printer and Publisher, and it should be discharged as against the other respondents.

WOODROFFE, J.—The arguments before us (other than those of Mr. Norton for the printer) would suggest that the parties regarded this Rule as an opportunity for a legal *tamasha*, to use an expressive if not judicial term, rather than as a proceeding taken in the public interest to ascertain the true facts. Divorced from the lengthy and unnecessary discussions before us and freed of obstructive tactics the matter is really quite a simple one and might have been decided with but little delay. In that case too our judgments might have been short but the exuberant argument calls for some answer.

The parties before us are the directors, managers, and secretary of the "Amrita Bazar Patrika, Ltd.," a small Company, seemingly a family business, which owns and runs a Calcutta newspaper called the Amrita Bazar Patrika. With them is joined their printer. Ordinarily of course a newspaper has an editor but this Company or some of its members have been very secretive on the question whether there is an editor and if so, who he is. This is not the first time that the editor, if there be one, has been kept in the background. Perhaps it was considered that such secrecy was a convenient policy in defence of proceedings against the paper. Whatever be the object these persons have so far successfully concealed the fact and name of their editor. In the present proceedings it was not unreasonable for the Court to think that a summons to the directors, managers and secretary was sufficient without notice on the company and that the officers of the company would disclose the actual facts. What actually occurred at the trial has shown that no assistance can be expected from the company's officers and on a future occasion it will be necessary to consider whether the Court should not proceed against the company and its property. Such difficulties as we have experienced would be remedied were a law enacted compelling the registration of the names of editors just as the English Newspaper and Registration Act, 1881, (44 and 45 Vic. c. 6) compels the registration of the names of the proprietors. As the Court was not in possession of evidence whether there was an editor or who he was, proceedings were instituted against those persons who are empowered to manage the business of the company and against its printer.

On the 18th and 22 May last two articles appeared in this newspaper which seemed to the Chief Justice in consultation with the Judges of the Court to be a contempt. The writer circulates what he calls "mischievous rumours" and "unsavoury impressions" and makes statements which suggest that a litigant before the Court, namely, the Calcutta Improvement Trust, had been successfully intriguing to get a Bench of its choice to hear an appeal from the decision of Greaves, J. As such an intrigue could not succeed without the connivance of the Court, such a statement was scandalising the Court as it is technically called. *Nextly*, as the allegation of such an intrigue touches the party said to be carrying on this intrigue the tendency of such writing is to prejudice that party. *Thirdly*, the articles are calculated to interfere with the administration of justice, for the writer seeks to do, though in his own way, what he complains of in the case of the litigant Trust, namely, to influence the Chief Justice to form a Bench to hear the appeal in

question, the Bench to be of such composition as the writer approved. As it seemed to the Court that *prima facie* a contempt had been committed, a Rule was served upon the persons mentioned to show cause: that is, they were given the opportunity of showing that the articles were not contemptuous, and if they were, that they were not responsible for them.

The parties whom we called for, have come before us. Leaving aside the printer, their substantial contention (to be extracted from the general mass of objections and arguments) is that the business in which they are each engaged has nothing to do with the control of the contents of the paper; that is, their work is not of an editorial character. One of them swears that he was out of Calcutta when both the articles were published and another that he was away from Calcutta when the second and chief article appeared. The printer says that he has no control of the contents of the paper and that he printed what was given him without first reading it. Two parties, Moti Lal Ghose and Golap Lal Ghose, have filed no answer at all. All parties have refused to state whether there is an editor, but they all contend that we are quite mistaken in supposing that the articles are a contempt. On the contrary we are told that the writer of these articles was a man who had perfect faith and confidence in the Chief Justice and Judges; that he was solicitous for their honour and was only seeking to protect and counsel the Court from and in respect of certain "mischievous rumours" and "unsavoury impressions." In short he was the Court's benefactor who thought that if it would but follow his advice as to how it should conduct its business, it would escape the "unsavoury" imputations which the public were making against it. This was said by some of the learned Counsel to be so clear that Mr. Jackson affirmed that no case could be found in all the reports which approached the present one in the weakness of the alleged contempt. If there be anything in all this, what should the parties have done? Each of the directors should have put in an affidavit exculpating themselves from being privy to the publication. The reading and examination of these affidavits might have taken half an hour. If these affidavits were accepted as truthful and the editor had been named, these parties other than the printer would have been discharged within about half an hour of their appearance before us instead of, as now, after a protracted argument for three days. We should have then expected that the parties would have named and produced their editor, the more particularly that the articles for which he would have been responsible are alleged to be of a wholly innocuous character, and their author to be one who cherishes the honour of this Court and would be its adviser and protector. But strange to say, this man of alleged good and disinterested motives is not named or produced. What had he or the parties to fear assuming that their argument as to the meaning of the articles is correct. Can it be said that notwithstanding such excellent intentions he was yet afraid that we might deal with him unjustly? If so, the writer's professions of his perfect faith and confidence in the Court are a pretence. If he had come here and had explained what notwithstanding the form of his expression he actually meant; if he had come here and said (as has been suggested by others in his absence) that he gave no credence to these rumours, that he personally made no suggestion against the Court, which in fact he was seeking to counsel and protect: if, I say, he had satisfied the Court of his innocence, then he too would have been discharged, and necessarily with him the printer. As a fact, the position taken up before us is "we refuse you all information. Prove what you can against us." Such affidavits as have been put in show that they have been elaborately drawn so as to keep out information. If, as in my opinion, there is a case made out, calling for an answer, it is obvious that the non-disclosure and non-production of the editor or writer leads to the inference that he or they are withheld because upon a true construction of the articles they do in fact constitute a contempt and that there is no reality in the argument which would have us hold that there was no contempt at all. If so, why all this secrecy and technical objections as to jurisdiction, procedure, nature of contempt, evidence and so forth?

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It is first objected that we have no jurisdiction and if we have and if there was a contempt, the affidavits issued with the Rule do not make any case calling for an answer, and if it did call for an answer on the assumption that the articles constituted a contempt, they are not a contempt in fact, and lastly, if they do constitute a contempt, two of the parties were not in Calcutta at the time of the publication of one or both of the articles.

As regards jurisdiction a number of stale objections were taken. It is not necessary to go into the history and nature of contempt. It is too late now to contend that we have no other jurisdiction than that conferred by the Indian Penal Code or that in exercising this jurisdiction we are judges in our own cause. The jurisdiction has been approved many years ago by, amongst other Judges, their Lordships of the Privy Council. The second observation applies to all cases of contempt, and if it were given effect to, the Court would be deprived of its jurisdiction in every case. In the present one, the Court, as it is entitled to do, issued the Rule of its own motion. The Court, however, in such cases does not seek to vindicate any personal interests of the Judges but the general administration of justice, which is a public concern. It is not a fact that proceedings for contempts by scandalising the Court are obsolete, as Mr. Jackson argued. There are, moreover, special reasons in this country why this jurisdiction should be maintained, which I need not here develop. I may, however, refer in this connection to the observations in *McLeod* v. *Aubyn* (5). The point of jurisdiction has been laboured with a view to establish the point that the case before us should be decided as a criminal one. It is what is called a "criminal" contempt, but all proceedings whether in respect of civil or criminal contempts are, in my opinion, of a criminal nature in the sense that they are *in pœnam*, that is, when their object is to punish by fine or imprisonment. It does not, however, follow that the procedure in such cases is in all respects the same as an ordinary criminal case. It is obviously not. For if it were, the parties before us would have been in the dock and (not to speak of other matters) no affidavits could have been filed by or against them. In fact both the offence as also the jurisdiction and procedure under which it is tried are *sui generis*. As regards the question of proof, no case either civil or criminal should be tried and determined otherwise than according to the law governing it. It is not the fact that civil proceedings may be slack and criminal proceedings must be strict. A dereliction of duty may, of course, be of greater or less moment according to the nature of the proceeding in which it happens. As regards the standard of proof I would repeat what was held in *Weston* v. *Peary Mohun Das* (36), that there is but one rule of evidence which in India applies to both civil and criminal trials and that is contained in the definition of "proved" and "disproved" in section 3 of the Evidence Act. Whether the case is civil or criminal, a fact is only proved or disproved if it comes within the terms of that section. It may be conceded that the case against the persons before us must be proved strictly, which means according to law. That charge is that the two sets of parties before us, namely, printer and publisher of the newspaper "Amrita Bazar Patrika" and the directors and manager of the "Amrita Bazar Patrika, Ltd.", committed a contempt of Court by publishing and being privy to the publication of the articles of the 18th and 22nd May set out in the affidavit of the Registrar. The first question is whether these articles constitute a contempt of Court, and then if so, who, if any, of the parties before us are responsible for it. Learned Counsel who appeared for the various parties have offered different arguments as to the construction of the articles. The actual facts which are undisputed are that some cases were instituted against the Calcutta Improvement Trust on the original side of this Court before Greaves, J., which failed, that learned Judge holding that the Calcutta Improvement Act gave the Trustees a power to acquire land by way of recoupment. Another case against the same Trust came up for hearing on appeal from the Moffussil. Previous to the hearing by this latter Bench on the appellate side of the Court an application was made by Counsel for the Trust to the Chief Justice for the transfer of the case from the last mentioned Bench on the ground that Mookerjee, J., was a landowner

(36) 23 Ind. Cas. 25; 40 C. 898; 18 C. W. N. 185.

and, therefore, personally interested. That application was refused, on the ground that the learned Judge would himself determine whether the circumstances were such that he should hear the case or not. The objection was not repeated before the learned Judge himself and the case was then heard on the appellate side of the Court by Mookerjee and Cuming, JJ., who held that the Trustees had no such powers. After that there was then an appeal to the Privy Council by the Trust against the decision of Mookerjee and Cuming, JJ., and an appeal by the parties suing the Trust against the decision of Greaves, J., to this Court hearing appeals from the original side. The Judges who had been previously taking such appeals were the Chief Justice and myself. On the 18th May 1917, the first of the articles appeared. Its salient points are these :—It alleges the existence of a "mischievous rumour which should be contradicted." The writer does not himself contradict the rumour but gives it further currency. That rumour was stated to be that an attempt was being made by or on behalf of the Calcutta Improvement Trust "to get up" and "secure" a Bench after its "own heart" to deal with the appeal from the decision of Greaves, J., so that that Bench might act "as a counterpoise" to the Bench of Mookerjee and Cuming, JJ. Expressing confidence in the Judges the writer says that he does not think that any official of the Trust "can go so far."

The Benches of this Court are appointed by the Chief Justice, it may be, in some cases, after consultation with the Judges. It is of course plain that a litigant could not "get up" or "secure" a Bench of his own "choice" and after his own heart except with the complicity of the Chief Justice or Judges. Of this the writer of the articles is well aware, for he says that he is "sure the interest of every rate-payer is safe in the hands of the Hon'ble Judges," and he "does not think that any official of the Trust can go so far." As I have said, the original side appeals were then being heard by a Bench of two Judges, namely, the Chief Justice and myself. A hearing of original side appeals by two Judges is not a convenient one nor in conformity with old practice, but it has been in existence for several years since Sir Lawrence Jenkins' time owing to the great bulk of work and the shortage of Judges to deal with it. It is not convenient, because it is advisable that there should be a third Judge to turn the scale in cases of difference of opinion. As the appeals under consideration involved a question of great public interest and might involve a reference to a Full Bench, the Chief Justice with my concurrence determined to appoint a third Judge to meet the possible case of a difference of opinion and a practically infructuous hearing. A third Judge has been added to the usual Bench of two Judges on previous occasions. The third Judge added was Chitty, J., the next senior Judge to myself excluding Mookerjee, J., who had tried the Improvement appeal which raised the same question as that which the appellate Court hearing the appeal from Greaves, J.'s decision had to determine. Before the constitution of the Bench was actually published, the second article of the 22nd May appeared. That article is based on a number of misstatements. It wrongly assumes that there was an Appellate Bench constituted to hear "appeals against the awards of the Improvement Trust." It wrongly states that this supposed Bench was composed of Mookerjee and Cuming, JJ. It then wrongly states that this Bench had latterly come to be presided over by the Chief Justice and myself. It then says that the "withdrawal" of Mookerjee, J., (which is not true) had "given rise to rather unsavoury impressions in the public mind" since this supposed "withdrawal" and supposed reconstitution of the Bench followed "close upon the heels of his judgment" in the case I have mentioned. The suggestion involved in these alleged impressions is of course that Mookerjee, J., who is supposed to have had charge of Improvement Trust cases, was "withdrawn" because he had decided against the Trust. He could not himself "withdraw" of his own motion, nor can any one else but the Chief Justice who appoints the Benches. But why should he be so "withdrawn?" The first article suggests the reason, namely, that the Improvement Trust was endeavouring to get up and secure a Bench after its own heart as a counterpoise to the decision of Mookerjee and

Cuming, JJ. Then it says, "something like consternation prevails on account of the proposed new constitution of the Appellate Bench," that is, by the substitution of the Chief Justice and myself for Mookerjee and Cuming, JJ., the "withdrawal" of Mookerjee, J., which had given rise to rather "unsavoury impressions," the addition of Chitty, J., and the non-selection of any Indian Judge. It suggests that the presence of one or more of these was necessary because of their knowledge of local conditions. I may here observe that the printer sought to prove good faith by, amongst others, the allegation that it was well known that the Trust objected to their case being tried by any Indian Judges. The point before the Court in the Trust cases was a pure question of law equally well triable by either an English or Indian Judge, unless we accept Mr. Jackson's strange argument (from which Mr. C. R. Dass dissented) that that Judge is best qualified to try such cases who is interested therein by reason of his possession of land in Calcutta. Reading this second article in connection with the first, the inference to be drawn from it, in the absence of any explanation from its writer, is that the alleged machinations of the Trust to secure a Bench "according to somebody's choice" had succeeded and that the Bench which was to hear the appeal from the decision of Greaves, J., was packed. Of course, there is no question but that if this was the suggestion, there has been a gross contempt of Court. Mr. Norton who appeared on behalf of the printer and publisher contended that the two articles should not be read together. There is no substance in this. But he frankly conceded that if the two articles be read together then they were capable of the above-mentiond interpretation, though he did not admit that that was meant, and suggested that the writer did not understand the meaning of the word "unsavoury." But how can we say that when the writer and editor are not before us?

Mr. Jackson's argument lends support, though perhaps unconsciously, to the construction I give to these articles. For he has endeavoured to re-construct what he called the atmosphere in which they were written with a view to show that the writer acted in the public interest and in good faith. But when a person has written nothing which is *prima facie* an offence, a plea of good faith is unnecessary. It is only relevant on the assumption that the articles do on their face appear to be contemptuous. It is then said that the writer was only repeating rumours to which he himself did not give credence. One cannot escape either contempt or libel merely by alleging that there was a rumour. This is a common way in which libels are spread. The existence of a rumour, if there was one in fact, is no justification in itself for its repetition. Moreover, the writer associates himself with these alleged public suspicions. Thus he says, "now what neither the public nor ourselves can understand", and so forth. And in further dealing with the matter he refers to a contention which the Chief Justice will not "care to advance."

Then it is said that the writer was merely stating the existence of these "unsavoury impressions in the public mind" in the interest of the Court so that they might be contradicted. It is said that he has more than once expressed his perfect faith and confidence in the Chief Justice and Judges. That is so. It is an obvious question to ask why, if the writer meant no offence but was only acting for the Court's good, he was not brought forward. What had he to fear? Will it be suggested that the fear is that nevertheless the Court might deal with him unjustly? If so, this is, as I have said, the strongest argument against the sincerity of his professions of faith and confidence in the Judges. In my opinion, it is not possible to accept an argument that the writer meant no offence and was merely acting in protection of the Court from unsavoury public impressions, when he is not even named much less brought forward. Moreover, the article itself does not, in the absence of any explanation from him, support this view It states certain alleged rumours. It misstates the facts which are supposed to be the cause of these rumours. It does not contradict these rumours and say and show that there is nothing in them. It on the contrary gives them circulation. The writer

associates himself with those who are said to entertain these alleged unsavoury impressions. He writes in a way open to the inference that the alleged manœuvres of the Trust had succeeded. It may be that these expressions of faith and confidence and so forth were inserted, to use an expressive phrase of Counsel, for the "protection" of the writer. It is possible that if the editor or writer had appeared before us, he might have succeeded in showing that, however apparently unfavourable to him the language of these articles is, yet in fact no offence was intended. But he is not produced and we must give them what seems to us their natural meaning. It has been held that even where the writer knew that proceedings were still pending, the fact that he did not desire or intend to prejudice the case is immaterial (except as to the extent of his punishment) if the Court be satisfied that such was the obvious and necessary result of his words. *Daw* v. *Eley* (37), *Martindale, In re* (38) and *Townshend* (*Marquis*), *In re* (39). In the absence of the editor or writer, I can only and do infer the intent from a consideration of the natural meaning of the words used and the impression which I believe they would convey to the ordinary reader of them.

In the present case the articles not only scandalise the Court but are otherwise a contempt. For it is a contempt to prejudice or attempt to prejudice a litigant and to interfere with the course of justice. Here the Trust is a litigant in this Court and it is suggested that it has been attempting to influence the course of justice by trying to "get up" a Bench of its "choice", of which allegation there is no proof whatever. Nextly, the writer of the article himself seeks to control the formation of the Benches in his own way by putting forward alleged unsavoury impressions in the public mind based on a number of wholly unfounded statements, adding that as soon as the Chief Justice understands the supposed public feeling in this matter, his Lordship would form a Bench of a nature which the writer approved. In my opinion, the articles do constitute a contempt of Court.

I now pass to the question as to which, if any, of the parties before us are responsible for it. Mr. Norton for the printer and publisher Tarit Kanti Biswas has conceded that if we hold that there is a contempt, then his client is liable though he pleads for mitigation of punishment—a matter with which I later deal. This liability is obvious, because *scienter* is attributable both to printer and editor. Neither can escape liability by alleging that he did not know that the contemptuous words had been inserted in his newspaper. *Chesshire* v. *Strauss* (40), *Rex* v. *Parke* (41), *Rex* v. *Davies* (42), *Jones, Ex parte* (43). As regards the others, the affidavit of Mr. Hechle the Registrar shows that the paper is, according to the imprint, printed and published at the Patrika Press, 19 and 20, Bagbazar Street, and issued by the Patrika Post Office, Calcutta. This Patrika Press works for the "Amrita Bazar Patrika Company, Ltd.", which was incorporated with the object amongst others of carrying on the business of newspaper proprietors by printing and publishing newspapers and taking over the rights in the previously existing Amrita Bazar Patrika newspaper. The registered office of the company is No. 2 Ananda Chatterjee's Lane, Calcutta. A certified copy of the annual summary shows that Moti Lal Ghose, Golap Lal Ghose and Pijus Kanti Ghose are directos and Golap Lal Ghose above mentioned and Mrinal Kanti Ghose are managers. It will be observed that all these persons are named Ghose and they all give the same address, which happens also to be that of the registered office of the company.

The total number of shares taken up is 766. Of these only 16 were issued for cash, probably for the expenses of incorporation, and 750 for a consideration other than cash. These shares of Rs. 100 each are held by 15 persons. The Ghose directors and managers hold 369 shares, three other

(37) (1869) 7 Eq. 49; 38 L. J. Ch. 113; 17 W. R. 245.

(38) (1894) 3 Ch. 193 at p. 200; 64 L. J. Ch. 9; 8 R. 729; 71 L. T. 468; 43 W. R. 53.

(39) (1906) 22 T. L. R. 341.

(40) (1896) 12 T. L. R. 291.

(41) (1903) 2 K. B. 432; 72 L. J. K. B. 839; 89 L. T. 439; 52 W. R. 215; 67 J. P. 421; 19 T. L. R. 627.

(42) (1906) 1 K. B. 32; 75 L. J. K. B. 101; 93 L. T. 772; 54 W. R. 107; 22 T. L. R. 97.

(43) (1806) 13 Ves. (Jun.) 237; 33 E. R. 283.

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persons of the name of Ghose hold 224 shares. There are four lady proprietors holding 112 shares and against the name of the first the father's name is given as Moti Lal Ghose. It is not clear from the summary whether the latter stands in the same relation to the other three ladies. There is one person of the name of Datta who holds 51 shares. The addresses of all these persons (the ladies and N. G. Datta included) is given as No. 2, Ananda Chatterjee's Lane, showing that this is a place of residence as well as being the registered office of the company. It is obvious on this evidence that these persons are related, that they live at the same address which is the registered office, and that the company is merely a small family business incorporated.

All the persons cited except Mrinal Ghose are directors. The latter is described as manager (with Golap Lal Ghose) and also as secretary. That Pijus Ghose and Mrinal Ghose are director and manager respectively, is also admitted in their affidavits. As regards Moti Lal Ghose and Golap Lal Ghose who have filed no affidavits, a number of technical, and in my opinion trivial, objections have been taken. The first objection taken by Mr. C. R. Das is that there is no proof that they are directors, notwithstanding that their co-director and secretary have sworn that they are, and they have themselves declined to give any information on any point to the Court. The argument is based on the contention that the certified copy of the summary filed on the 9th May 1917 of share capital and shares, etc., as they stood on the 5th Mrch 1917, purporting to be signed by Golap Lal Ghose as financial manager, was not admissible. Mrinal Ghose's affidavit states that Golap Ghose is a director and financial manager, but Mr. C. R. Das contended that this is not admissible against him nor (it must follow) against Moti Lal Ghose. It is not necessary to go into this last objection, for I think that the summary was a public record of a private document, of which a certified copy is admissible [Evidence Act, sections 74, 75, 65 (*e*)]. It has been argued that "record" in section 74, clause 2, refers only to the case where the public office itself makes a copy, that is, record of a private document, and keeps it. If it does, it is certainly a public record. But "record" does not merely mean this. The word record also means a collection of documents. Section 74 (2) refers to private documents made by private persons and kept as a record in public offices to which the public have generally access. If this were not so, how could the public get such documents? The originals being in the custody of a public office the latter would not part with them, and not being a public document no certified copy could be given.

The next objection is that if the certified copy is admissible, there is no proof of the signature of Golap Ghose. Assuming that the mere production of a certified copy is not such proof where proof is necessary, it is not necessary here. Such certified copy is proof that some person giving the name of Golap Lal Ghose and describing himself as financial manager of the company signed such document. As that document was accepted by the Registrar of Joint Stock Companies, it is common sense to assume that he was satisfied that it was a return by the financial manager of the company. The objection, therefore, in substance is that the Golap Lal Ghose who purports to sign this document is not or at any rate has not been shown to be the identical Golap Lal Ghose for whom Mr. C. R. Das has pleaded before us. It is admitted that the objection is technical. That is true, but we must see if the alleged technicalities are sound and we must give as much play to common sense as the law permits. The Rule was served on Moti Lal Ghose and Golap Lal Ghose as directors of the company. These are the persons whom we wished to see, not anybody else. The persons so served come here. If they were not the persons described in the summons they need not have come here. They can only be heard in these proceedings on the supposition that they are what the Rule states them to be. It is not open to anybody and everybody to come and show cause against this Rule. Mr. C. R. Das's title to be heard at all is dependent on the assumption that he represents the person described in the Rule. The unreal nature of the objection is enhanced by the fact that the secretary of the company

has sworn in these proceedings that Golap Ghose and Moti Lal Ghose are Directors. If it be, as contended, that we cannot refer to this affidavit when dealing with the case of Golap Ghose and Moti Lal Ghose (a matter I do not decide), this does not make the taking of such an objection any the more sensible. Objections should, even when legal, have some relation to reality.

The third legal objection is that assuming that the return is proof of the state of affairs on the 5th March 1917 and shows that these two persons were Directors on that date, it does not follow that they were Directors when the Rule was issued on the 30th May, 1917. It is to be observed, *firstly*, that apart from any presumption of continuance, the summary was filed on the 9th May, only three weeks before the issue of the Rule, which was not likely to be done had there been any change between the 5th March and that date. Further under section 87 of the Indian Companies Act VII of 1913 changes of directorship are required to be notified by the Company, and had there been any change, it would have appeared in the affidavit of Mr. Hechle, the Registrar, as the result of his recent enquiry in the matter. Nor it is likely that the Registrar of Joint Stock Companies would issue to an enquirer a certified copy of a return which had been changed. This objection is as unreal as the rest. I have no doubt whatever that Moti Lal Ghose and Golap Ghose are Directors apart from the affidavit of the Secretary of the Company who states that they are in fact such.

According to the Articles of Association produced with the affidavit of Mrinal Ghose, the business of the Company is to be managed by the Directors, that business being according to the Memorandum of Association the carrying on of the *Amrita Bazar Patrika* newspaper. But here again with further luxury of objection it is protested that we cannot look at the Articles of Association of the Company of which these two persons are Directors and which have been actually produced by the Secretary of the Company with his affidavit. It is sufficient to say that the affidavit of the Rule states who are Directors; the nature of the Company and the facts proved indicate that its business must be carried on by them; and the provisions of this article are the same as and are indeed copied from section 75 of Schedule I, Table A of Act VII of 1913, the provisions of which, unless otherwise arranged, apply to all Companies. The table of the earlier Act is on this point substantially the same. It has been, therefore, proved as against the parties named as Directors that they are such.

The question whether persons in the position of Directors are responsible must depend on the facts of each case. In *In re Judd* (20) the directors of Judd & Co. used to print and deliver a newspaper to another Company who published the same. They did not, it was held, sell or deliver, a fact which would relieve them from even civil liability. In *Ex parte Green* (24) the manager of a Limited Company which disseminated paragraphs amounting to contempt of Court was held responsible. In that case the manager denied that he had seen the matter before it was published and that, in general, it was no part of his duty to supervise the reading out of news. The affidavit of the party taking proceedings spoke only to his "information and belief" as to the responsibility of the manager. This was held to be, *prima facie*, sufficient and on the letters and affidavit, he was held guilty. In one case it was held that the individual liability had not been directly established and in another that it had been. Doubtless, in the case of an ordinary large newspaper Company where the Directors meet together once a week to transact business in the Board rooms, the ordinary inference might be (in the absence of direct evidence) that they were not conscious of the publication of a particular article, for in the case supposed they would have appointed an editor.

The facts in the present case are very different and peculiar. In *Governor of Bengal* v. *Moti Lal* (4) a statement resting on information and belief that Moti Lall Ghose was editor was ruled out as not being legal evidence and the fact that Moti Lal Ghose did not in that proceeding deny the allegation was held immaterial. No disclosure was made as to whether there was an editor or who he was. Ordinarily,

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of course, a newspaper has an editor, but we have no legal evidence of that in this case and the affidavits filed by one of the Directors and the Secretary, and the printer, do not even mention the existence of such a person. The Company, as I have said, appears to be a small family affair composed, in the main, of Ghoses, whose address is that of the registered office of the Company which is also given as that of some ladies, one of whom at least is the daughter of Moti Lal Ghose. Three of these Ghoses including Moti Lal Ghose are Directors and another Ghose is Secretary. The Articles of Association direct, not that the business shall be under their control, but that they shall manage the business. That business is shown to be the carrying on of the newspaper *Amrita Bazar Patrika*, which is "now being published from No. 2, Ananda Chatterjee's Lane." Some one must see to the literary part of this business. In the absence of evidence as to there being a separate editor, *prima facie* the Directors who are authorised to manage the business are the persons who do so in all its aspects. They must have authorised the circulation of the paper. Had there been reliable evidence that there was an editor who was some person other than the defendants even though his name was not disclosed, *prima facie* the responsibility for the articles would have lain with the editor, though of course the Directors or other persons would also have been liable who were shown to be privy to the publication. Here there is evidence that the management of this business is entrusted to the Directors. That business includes every department of it, financial, literary and so forth, for there is nothing to prevent one or other of the Directors being also editor. This is the inference which arises on the facts here proved. If the Directors have in fact delegated any of these functions to some other person, it is for them to show that fact. I am of opinion, therefore, that the affidavit in support of the motion disclosed a *prima facie* case against the Directors as such and calling for an answer from them. As regards the permanent Manager and Secretary, I deal later. Having regard to the facts proved I need not further consider their case here.

But assuming that the affidavit accompanying the Rules does make a case calling for an answer, the matter does not rest there. Pijus Kanti Ghose has put in an affidavit and has sworn that neither he nor his co-director exercise any control over the contents of the newspaper and exercise "only such powers as are mentioned in the article." Who does control the paper is not stated. A similar statement is made in the affidavit of Mrinal Kanti Ghose. Nextly, the affidavit of Pijus Kanti Ghose swears that he was away from Calcutta on the date of the second or chief article. Therefore he is shown not to have been directly privy to it. Simlarly, the affidavit of Mrinal Kanti Ghose states that he exercises no control over the contents of the newspaper, that his duties are to keep the minutes, registers and records of the Company, to issue notices and to make returns. Further, he swears that he was absent from Calcutta on both the dates when the articles appeared. He has, therefore, also met the case against him. There remains the cases of Golap Lal Ghose and Moti Lal Ghose, neither of whom have given any answer. The above-mentioned affidavits state that Golap Lal Ghose also has no control over the contents of the paper, and this statement is supported by the fact that the return the latter made to the Registrar of Joint Stock Companies shows that he is Financial Manager. Ordinarily, therefore, he would attend to this side of the business and probably to this only. There lastly remains amongst the directors the case of Moti Lal Ghose. He also has not filed an affidavit and we are told less about him than any one else. The affidavits offered to us seem to be of what is called a "tricky" character. The wording is in the present tense. As was pointed out by my brother Fletcher, they might not support a prosecution. They do not deal with the condition of things when the articles were published. They do not state precisely what powers the Directors do exercise, or whether there is an editor. The statement that the Directors have no control over the contents does not show that they were not aware of the articles before they were published and circulated by their authority. Had there been no affidavits, I would have been disposed to

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adjudge that Moti Lal Ghose was in contempt; even after the reading of these affidavits, my mind has been in doubt, for the affidavits are deliberately drawn to keep all information from the Court and are, as above stated, otherwise unsatisfactory. Moti Lal Ghose has filed no affidavit. Though it has been objected by Counsel (Mr. C. R. Das) for one of the parties that we cannot consider as against any particular party the affidavits offered in defence by other parties (a point I need not consider), still I am unwilling as against Moti Lal Ghose to rest the case on any such technicality. I cannot shut my eyes to the fact that there are three sworn statements before us that neither the Directors, Financial Manager, Secretary or Printer have control over the contents of the newspaper. As I said, I have had my doubts as to the sufficiency of this statement. Moti Lal Ghose (whose case I regard with strong suspicion) is, however, entitled to the benefit of them. As some one must have such control, we must now assume after the reading of these affidavits that there is an unnamed editor who is not before the Court. I conclude then that the affidavits offered in reply to the Court's Rule are such that it should be discharged against the parties to these proceedings other than the printer and publisher, Tarit Kanti Biswas. We might, without all this complex argument, have come to the same conclusion within half an hour if all the parties had sworn that they were not responsible and disclosed the name of the editor who, subject to any explanation he might make, was liable. As already stated, it is conceded by his Counsel, Mr. Norton, that the printer is liable provided that the articles constitute a contempt. He has, however, argued that the case is not of so serious a character as to call for the exercise of this jurisdiction, and if it is, he lastly pleads that the position of his client should excite our pity and that we should discharge him without penalty.

In my opinion, the case does call for the exercise of this jurisdiction by reason of the articles scandalizing the Court having a tendency to prejudice the parties and to interfere with the administration of justice. As regards the action to be taken and penalty to be awarded, each case must depend on its own facts.

As regards the second point, I cannot yield to the suggestion that merely because a man is a printer and publisher he should escape scot-free. Did we hold this, it would be open, as in this case, for the parties to exculpate themselves by affidavit and to suppress all information as to who was in fact responsible. The printer might also be put up to refuse such information and be told, "it is all right, say you are only the printer and ask for pity and then we shall all be excused." Our jurisdiction would thus become largely illusory. I do not say that there may not be cases where the Court will deal leniently with the printer, but this is not one. In the first place, he states in his affidavit that it was known to him that the matter dealt with by these articles was the subject of concern to the public "who were watching with deep interest" the action of the Chief Justice in constituting the Court to hear the appeal from the decision of Greaves, J. He then says that the articles were published to give expression to public feeling in Calcutta and that the "articles were published by myself in good faith and in the public interest," This statement is, on its face, in conflict with paragraph 3 of his affidavit, where he says that he did not read the articles before publication nor did he consider at any time prior to their publication their meaning or purport. If this be true, how could they have been published by him in good faith and in the public interest? According to his own statement, he was aware that the subject was creating public interest, and he is prepared to swear that the articles were published to give expression to public feeling. If there were, in fact, such an interest, there was the greater necessity for caution on his part in seeing what he published with reference to it. His statement that in fact he did not see the articles before publication is weakened by the attempted justification that they were published "by myself in good faith and in the public interest," though it is of course possible that this inconsistency was due to bad drafting.

As, however, the affidavits are in general astutely drawn, we cannot well assume

this. He denies that the articles are a contempt and seeks to justify himself. In this he fails. Nextly, he says that he has no control over the contents of the newspaper and that they were handed to him for publication in the usual course of his business. He carefully refrains from saying who gave him the articles, whether it was the editor who did so, or who he was. His Counsel justifies this refusal on the ground of loyalty to his employers. If he esteems that loyalty above his public duty to inform the Court who committed this alleged offence, he cannot complain that we do not show him indulgence. He joins with the others in refusing information and if, apart from such refusal, he is liable, he must take the consequence. The Courts in England have held [as for example in *American Exchange in Europe* v. *Gillig* (34)] that this refusal by the printer to give up the name of the editor is a matter which will weigh with it in determining whether a penalty shall be awarded against the printer or not. Mr. Norton has complained (I thought with that moderation which rarely goes with real zeal) that his client should be left to suffer because his employers have not produced their editor. In the *Englishman Contempt case* [*Re Banks and Fenwick* (3)] Captain Fenwick, the editor of that paper, came forward to bear the brunt of what was in reality done by him or his order, on which the Rule was withdrawn against the printer. Sir Barnes Peacock observed that in doing that Captain Fenwick had only done "that which every honourable gentleman who fills the editor's chair would do, in not allowing a publisher of a paper to take the consequence of articles written and published by his order by not coming forward to avow the authorship." This was also done by Babu Surendra Nath Banerjee in the well-known *Bengalee Contempt case* [*Surendra Nath Banerjee* v. *Chief Justice of Bengal* (32)], where Garth, C. J., said that Babu Surendra Nath Banerjee had properly done his best to protect his printer. There is no disposition, however, upon the part of any one in this case to adopt this proper and honourable course. But the printer himself does not deny that he is ignorant who the editor is and he himself through his Counsel declines to give his name. There are some cases in which one might sympathise with the printer, but here he has not only declined to give up the editor's name, but has otherwise associated himself with the other parties in the case and has sought to justify both himself and them in what I hold to be a contempt, and he must, therefore, take the consequences such as they are. In, however, adjudging the penalty I have not wholly left out of count the fact that he is the printer, for, had the editor been found guilty of contempt, he would, in my opinion, have been subject to much heavier punishment.

The defence to these proceedings except as to the construction of the articles—a legitimate argument—was ill advised and a waste of time. If the Directors, Managers and Secretary were not personally responsible for the contempt, they had only to frankly state the facts on affidavit and disclose who was so liable. The printer similarly, who in law is liable, might have stated the persons from whom he got the articles he printed and thus have personally freed himself from all further action against him. We should then on the supposed facts have only had to deal with the person primarily liable, namely, the editor. He could, then, if he had wished, have personally put forward the plea here advanced that the articles have been misunderstood and that on the contrary he was moved by a desire to act in the interest of the Court and to protect it from "mischievous" and "unsavoury" rumours. If this were the fact, he would have nothing to fear from Judges who, according to the argument before us, had the complete confidence of the writer of these articles. Even if these articles were ill expressed and capable of a bad interpretation, their effect might have been negatived by the public avowal of their author that for him they had no such meaning. These proceedings might have thus been disposed of within an hour or less, with the result that either all parties might have been freed of penalty or if penalty were awarded it would have fallen on the party primarily liable, namely, the editor. On the contrary, all the parties before us have adopted a hostile attitude to the Court, have refused all information, concealed the name of the editor and put forwad every technical objection to defeat

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an enquiry which has thus been prolonged over three days with unnecessary delay and expense to the public and the parties concerned. For this the parties, by the course they have adopted, are responsible. This course further has strengthened the inference which is to be drawn from the natural language of the articles in the absence of explanation from their writer. It is not in such absence to be supposed that the intentions of the writer and editor of these articles were as innocent as the argument before us suggests and that the name of one who was, it is said, only seeking to protect this Court from unsavoury rumours and to give it what he thought good advice, should be kept concealed. It is absurd also to suppose that the party responsible would himself, if innocent, carefully avoid his presence in the Court, which it is said he honoured and was seeking (however ill-considered his language might be) to counsel and protect.

I, therefore, concur in the order which the Chief Justice has made.

MOOKERJEE, J.—On the 18th May 1917 the following paragraph appeared in the editorial columns of the *Amrita Bazar Patrika*:—

"There is a mischievous rumour afloat which should be contradicted. It is stated that a vigorous attempt is being made to get up a Bench to consider the appeal on the judgment of Mr. Justice Greaves in connection with the acquisition of surplus land by the Calcutta Improvement Trust according to somebody's choice. We do not believe that it is possible for any one, far less the Chairman of the Trust, to secure a Bench after his own heart, as a counterpoise to the Mookerjee and Cuming Bench. We are sure the interest of every rate-prayer is safe in the hands of the Hon'ble Judges and we do not think that any official of the Trust can go so far."

Four days later, on the 22nd May, the following paragraph appeared in the editorial columns of the same paper:—

"Something like consternation prevails on account of the proposed new constitution of the Appellate Bench of the Calcutta High Court, before which appeals against the awards of the Improvement Trust are to be heard. It is known to the reader how this Bench was originally composed of Sir Asutosh Mookerjee and the Hon'ble Mr. Justice Cuming, and how latterly it has come to be presided over by the Hon'ble the Chief Justice and Mr. Justice Woodroffe. Rumour has it that for purposes of hearing Improvement Trust Appeals, the Bench is going to be strengthened by the appointment of Mr. Justice Chitty. Now, what neither the public nor ourselves can understand is this special arrangement for such a Special Bench. If it is contended that two Hon'ble Judges of the highest Court in the land are not competent to decide in appeal cases in which the Improvement Trust is concerned—a contention, however, which we do not believe the Chief Justice will care to advance—why should there be a Special Bench of three and not a Full Bench of five, on which at least two Indian Judges could find seats? As a matter of fact as land-owners in Calcutta are mostly Indians, and as Indian Judges are likely to know more of conditions, practices, etc., prevailing here, it is but meet that the Appellate Bench in the present circumstances should be so composed as to associate Indian Judges with their European colleagues. The withdrawal of Sir Asutosh has given rise to rather unsavoury impressions in the public mind, since this proposed arrangement is to follow close upon the heels of his judgment in the case of *The Improvement Trust* v. *Chandra Kanta Ghosh* (14). Be that as it may, we have perfect faith in the present Chief Justice and believe that as soon as Sir Lancelot Sanderson understands the public feeling in the matter, His Lordship will either form a Full Bench or at least associate an experienced Indian Judge with himself for the hearing of Improvement Trust Appeals."

On the 30th May 1917 the Chief Justice, after previous consultation with the other members of the Court, directed the issue of a Rule on Tarit Kanti Biswas (the printer and publisher of the *Amrita Bazar Patrika*), Moti Lal Ghose, Golap Lal Ghose and Pijush Kanti Ghose, Directors, and Golap Lal Ghose and Mrinal Kanti Ghose, Managers, of the Company called the *Amrita Bazar Patrika, Ltd.*, to show cause why they should not be committed or otherwise dealt with according to law for contempt of Court committed by the publica-

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tion of the two articles mentioned concerning the High Court and the Chief Justice in his administration thereof. The materials whereon the Rule was issued were contained in two affidavits sworn by the Registrar on the Original Side and the Registrar on the Appellate Side as to the actual publication of the articles in the paper and the position the opposite parties occupied in relation to the paper and the Company, which were its proprietors. The opposite parties have appeared in Court in person and have been represented by Counsel; three of them, Tarit Kanti Biswas, Pijus Kanti Ghose and Mrinal Kanti Ghose, have filed affidavits which will require examination hereafter. On the elaborate arguments addressed to the Court, the following points emerge for consideration, namely, *first*, what is the true meaning of the two articles mentioned; do they constitute contempt of Court; *secondly*, if the articles constitute contempt of Court, has this Court jurisdiction to punish the offenders summarily, and should such authority, if any, be exercised in the present instance; *thirdly*, what is the true nature of the present proceedings; is it civil or criminal in character, and *fourthly*, have the opposite parties or any of them been proved to be so connected with the publication of the articles as to render them liable to punishment for contempt of Court.

As regards the first question, namely, the true meaning of the two articles set out above, there can, in my opinion, be little room for doubt, notwithstanding the able and ingenious arguments, which have been addressed to us. The obvious course to pursue in a case of this description is to read the offending articles as they stand and to attach to the words used their natural meaning without the assistance of a laborious commentary. The general rule of interpretation cannot be formulated in more precise terms, because objectionable language may take an infinite variety of forms; this much is clear that it is incumbent on the Court, in all cases, to consider the general tone of the writing. The meaning and intent are to be determined by a fair interpretation of the language used and are matters of law for the Court as to whether or not they constitute contempt. Disclaimer on the part of the publisher as to any intentional disrespect to the Court is consequently not a sufficient defence, when the purpose and meaning of the writing is obviously of a contrary import. No doubt, if the language is fairly capable of an innocent interpretation, the Court will not be astute to read into it a sinister import. [*Governor of Bengal* v. *Moti Lal* (4), *Townshend* (*Marquis*), *In re* (39), *Martindale, In re* (38) and *Daw* v. *Eley* (37)]. But, if the intent is fairly clear, liability to punishment for contempt of Court cannot be successfully evaded by the use of a transparent artifice. Tested from this point of view, how do these articles stand? The first article makes reference to an alleged rumour which the writer describes as mischievous and worthy of contradiction. The rumour is stated to have been to the effect that a vigorous attempt was being made to get a Bench constituted according to the choice of somebody to hear the appeal from the judgment of Mr. Justice Greaves in a suit in connection with the acquisition of surplus land by the Calcutta Improvement Trust. The writer expresses his belief that no official of the Trust, far less the Chairman, could go far as to make an attempt of this character, and that it was not possible for anybody to secure a Bench after his own heart as a counterpoise to what is called the Mookerjee and Cuming Bench. The writer concludes with an assurance that the interest of every citizen is safe in the hands of the Judges. If this article had stood by itself, it might perhaps have been argued with seeming plausibility that, however much open to reproach on the ground of indiscretion and impropriety, the writer had no intention to commit a contempt of Court. But the second article, which is written in a very different tone, shows convincingly the true intent and purpose of the first article. The question, however, was raised before us, whether the two articles should be read together. It was contended that they should not be so read, as there was nothing to indicate that they had emanated from the same individual. In my opinion, the two articles may legitimately be read together to determine their scope and purpose, even though they were proved not to have been written by the same person. They obviously relate to the same topic and were published in the editorial columns of the same newspaper, there was a very brief interval of time between them and the first obviously led up

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to the second, though not expressly mentioned therein. The first article has, I think, a sinister import, and conveys the insinuation that one of the litigant parties in the appeals about to be heard was endeavouring to have a Bench constituted according to its choice. There is no room for controversy that imputation of this character constitutes a contempt of Court. Contempt by speech or writing may be by scandalising the Court itself or by abusing parties to actions or by prejudicing mankind in favour of or against a party before the cause is heard; as has been said, there is nothing of more pernicious consequence than to prejudice the minds of the public against persons concerned as parties in causes before they are finally heard and thus to attempt to obstruct or interfere with the due course of justice. [*St. James Evening Post case* (35), *Cann* v. *Cann* (44), *American Exchange in Europe* v. *Gillig* (34), *R.* v. *Gray* (31), *Rex* v. *Davies* (42) and *McLeod* v. *St. Aubyn* (5)]. But, from my point of view, it is really immaterial whether the two articles are considered separately or are regarded as component parts of one aggregate, for even if there were any real doubt as to the purpose of the first, there can be no serious dispute as to the meaning of the second.

The second article, when carefully analysed, may be resolved into the following propositions:—

(1). That the Appellate Bench of the Calcutta High Court before which appeals against the awards of the Improvement Trust are to be heard was originally composed of myself and Mr. Justice Cuming.

(2). That I had been withdrawn from this Bench, and that the withdrawal had given rise to rather unsavoury impressions in the public mind, as it followed close upon the heels of the judgment in the case of *Trustees for the Improvement of Calcutta* v. *Chandra Kanta Ghosh* (14), to which I was a party.

(3). That this Appellate Bench had latterly come to be presided over by the Chief Justice and Mr. Justice Woodroffe.

(4). That there was a rumour that the Appellate Bench so constituted was about to be strengthened by the appointment of Mr. Justice Chitty and this proposed new constitution of the Appellate Bench had created something like consternation.

(44) (1754) 2 Ves. (Sen.) 520; 2 Dick. 795; 28 E. R. 332.

(5). That if the Bench was to be composed of more than two Judges, it should consist of not three but five Judges, of whom two at least should be Indian Judges, because land-owners in Calcutta (who were principally affected by the operations of the Calcutta Improvement Trust) were Indians, and Indian Judges were likely to know more of conditions and practices prevailing here than European Judges.

These statements constitute a tissue of falsehoods, and, to my mind, one of the most conspicuous features of this trial is that not only has not even the semblance of an attempt been made to establish the truth of these allegations, it has actually been conceded that they are vitiated by a fundamental error. No Bench composed of myself and Mr. Justice Cuming had, at any time, been constituted to hear appeals against what are inaccurately termed the awards of the Improvement Trust. The plain truth is that last year, when Mr. Justice Cuming and myself were in charge of the Bench which had to take cases of what is called the First group of the Districts, the appeal of the Calcutta Improvement Trust against Chandra Kanta Ghosh came up before us, inasmuch as the appeal had been preferred from the decision of a Subordinate Judge of the 24-Pergannahs. The appeal belonged to our group, was heard by us in due course, and was dismissed. We had at no time been constituted a Special Bench to hear appeals in all cases in which the Improvement Trust was concerned, and there is no foundation whatever for the first proposition that the Appellate Bench, before which appeals against the awards of the Improvement Trust were to be heard, was originally composed of myself and Mr. Justice Cuming. Consequently, the suggestion contained in the second proposition that I had been withdrawn from the Appellate Bench, which in fact had never been constituted, is equally groundless. Here I may observe that as under section 108, sub-section 2 of the Government of India Act, 1915, the duty devolves upon the Chief Justice to determine, from time to time, what Judges of the Court are to constitute the several Division Courts, the

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second proposition necessarily involves an imputation against the Chief Justice that he had withdrawn me from the Appellate Bench he had previously constituted, composed of myself and Mr. Justice Cuming, to hear appeals in cases in which the Calcutta Improvement Trust was concerned. There is clearly the further imputation that the Chief Justice had taken this action by reason of my judgment in the appeal preferred by the Improvement Trust against Chandra Kanta Ghosh. As the Appellate Bench had never in fact been constituted in the manner stated by the writer, the charge that I had been withdrawn therefrom for the reason assigned was evidently baseless. The third proposition, namely, that the Appellate Bench had been constituted of the Chief Justice himself and Mr. Justice Woodroffe, in supersession of the previously constituted Bench composed of myself and Mr. Justice Cuming, was consequently equally unfounded; as a matter of fact, long before the constitution of the Bench to hear the appeals from the Original Side, Mr. Justice Cuming had ceased to be a member of this Court. The fourth proposition refers to the rumour that the Appellate Bench presided over by the Chief Justice and Mr. Justice Woodroffe was about to be strengthened by the appointment of Mr. Justice Chitty, and that something like constrenation prevailed on account of the proposed new constitution of the Bench. As I read the article, the consternation was due, not so much to the fact that the Chief Justice and Mr. Justice Woodroffe composed the Bench, as to the fact that the Bench was about to be strengthened by the appointement of Mr. Justice Chitty. This implies most unmistakably that a just decision, that is, a decision just in the estimate of this impartial writer, could not be expected from a Bench so constituted. If language has any meaning, this was clearly a libel on Mr. Justice Chitty, if not also upon the other two members of the Bench. The fifth proposition involves a libel upon Indian Judges but in the opposite direction. No doubt, it is very artfully suggested that Indian Judges should be on the Bench to hear this class of cases, because they are likely to know more of conditions and practices prevailing here than European Judges. But, as was well known, the matter in controversy in the appeals had not the remotest connection with a knowledge of local conditions and practices. The point in issue was a dry question of law as to the true interpretation of a legislative enactment. The writer, however, unmistakably insinuates that land-owners in Calcutta (who are principally affected by the operations of the Trust) are mostly Indians, and Indian Judges on the Bench might be expected to give a decision in their favour. I do not appreciate the distinction between an insinuation that a European Judge is likely to decide in favour of the executive, because he is a European, and an insinuation that an Indian Judge is likely to decide in favour of Indian land-owners, because he is an Indian. To my mind, the two statements are equally reprehensible as libels on the Judges of this Court. I cannot, in this connection, pass by in silence the observations of Mr. Jackson as to the constitution of the Bench which actually heard the appeals from the judgment of Mr. Justice Greaves. The Court is called upon, in the present Rule, to consider the true character of the allegations contained in the two articles published in the *Amrita Bazar Patrika*, and to determine whether they do or do not constitute a contempt of Court. We have no concern whatever with the question, whether the Chief Justice, who alone is charged with the duty to constitute Division Courts, has in this particular instance exercised wisely or otherwise the discretion vested in him by law. The remarks of Mr. Jackson on this subject were absolutely irrelevant for the determination of the question before the Court, and exhibited, I feel constrained with regret to hold, an unusual and unwarranted lapse from that decorum which we are accustomed to associate with the transaction of public business in a Court of Justice. I cannot but deem it significant that the other Counsel engaged in the case expressly dissociated themselves with special care from the comments made by Mr. Jackson in this behalf. Here I may observe that in the judgment just delivered by the Chief Justice he has taken pains to explain the reasons which moved him to constitute the Bench as he did; Mr. Justice Woodroffe also has touched on the subject and expressed his

opinion thereon. But, for obvious reasons, which need not be dilated upon, I must respectfully decline to examine the question. Besides, the exercise of discretion by the Chief Justice in the matter of constitution of a Division Court to hear the appeals against the judgment of Mr. Justice Greaves, is, under the law, not liable to be reviewed by this Bench and is not subject to our approbation or disapprobation. I desire, consequently, to guard myself most carefully from the discussion of a question, which, notwithstanding what fell from Mr. Jackson, does not, in my judgment, properly arise even as a side-issue in these proceedings; such a discussion is not likely to advance any useful purpose, because it cannot be of real assistance in the solution of the very narrow issue comprised in the scope of our enquiry, namely. the real import of the two articles published in the *Amrita Bazar Patrika* and whether, on a fair interpretation, they did or did not constitute a contempt of this Court; upon that matter, which alone it is our function to decide, I feel no reasonable doubt. I desire, however, to repudiate most emphatically the astonishing assertion made by Mr. Jackson that landless Judges, as he called them, were, merely because they were landless, less competent and less trustworthy as interpreters of a statutory enactment than Judges of any other class, and that Indian Judges, because they might possibly be proprietors of land, were for this purpose more capable and reliable as expounders of the law than their European colleagues. But to return to the two articles: it seems to me indisputably plain that the implication of the second article, whether taken along with or independently of the first, is that, at the instance of persons interested in the Calcutta Improvement Trust, the Chief Justice has constituted a Special Bench to ensure a decision favourable to the Trust in the appeals against the judgment of Mr. Justice Greaves. This brings me to the question which is the *crux* of the whole matter, namely, whether an imputation of this character constitutes a contempt of Court.

It is not necessary for our present purpose to give an exhaustive enumeration of acts which amount to contempts of Court. It is sufficient to state that scandalous attacks upon Judges, calculated to cause an obstruction to public justice, do constitute such contempts. Blackstone, in a celebrated passage of his Commentaries (Volume IV, page 285) which will be found quoted in *Governor of Bengal* v. *Moti Lal* (4), specifies, in his description of contempts of Court, contempts which arise "by speaking or writing contemptuously of the Court or Judges, acting in their judicial capacity and which demonstrate a gross want of that regard and respect, which, when once Courts of Justice are deprived of, their authority, so necessary for the good order of the kingdom, is entirely lost amongst the people." Sir John Wilmot, C. J., in *Rex* v. *Almon* (45) justifies a similar view in a passage which may be usefully recalled here:—

"By our constitution, the King is the fountain of every species of justice, which is administered in this kingdom. The King is *de jure* to distribute justice to all his subjects; and, because he cannot do it himself to all persons, he delegates his power to his Judges, who have the custody and guard of the King's oath, and sit in the seat of the King 'concerning his justice.' The arraignment of the justice of the Judges, is arraigning the King's justice; it is an impeachment of his wisdom and goodness in the choice of his Judges, and excites in the minds of the people a general dissatisfaction with all judicial determinations, and indisposes their minds to obey them; and whenever men's allegiance to the laws is so fundamentally shaken, it is the most fatal and most dangerous obstruction of justice, and, in my opinion, calls out for a more rapid and immediate redress than any other obstruction whatsoever; not for the sake of the Judges, as private individuals, but because they are the channels by which the King's justice is conveyed to the people. To be impartial, and to be universally thought so, are both absolutely necessary for the giving justice that free, open, and uninterrupted current, which it has, for many ages found all over this kingdom, and which so eminently distinguishes and exalts it above all nations upon the earth."

It is needless to multiply early instances of the application of this doctrine, which will be found collected

(45) (1765) Wilm. 243 at p. 255; 97 E. R. 94.

in 3 Howell State Trials, 1074-1080. and 8 Howell State Trials, 50. Amongst modern instances reference may be made to the observations *In the matter of a Special Reference from the Bahama Islands* (10), *Reg.* v. *Staffordshire County Court Judge* (46), *Reg.* v. *Gray* (31), *Rex* v. *Davies* (42), *Surendra Nath Banerjee* v. *Chief Justice of Bengal* (32), *Sashi Bhushan Sarbadhicary*, *In the matter of* (47), *Tayler's case* (1), and *Banks and Fenwick*, *In the matter of* (3). The principle deducible from these cases is that punishment is inflicted for attacks of this character upon Judges, not with a view to protect either the Court as a whole or the individual Judges of the Court from a repetition of the attack, but with a view to protect the public, and specially those who, either voluntarily or by compulsion, are subject to the jurisdiction of the Court, from the mischief they will incur, if the authority of the Tribunal be undermined or impaired. The contention has been advanced, however, that if this be the true reason for the rule, it is necessary to establish, as a matter of fact, that the actual effect of the publication has been an obstruction to public justice, and, that, in the absence of such proof, it cannot be held that there has been a contempt of Court. In support of this position, reliance has been placed upon the decisions in *R.* v. *Freeman's Journal* (15) and *King* v. *Dolan* (16). The cases mentioned do not support this proposition, which is, on the other hand, negatived by the decisions in *Reg.* v. *Gray* (31), *Hunt* v. *Clarke* (18), *In re Pall Mall Gazette Jones Flower* (48), *Grimwade* v. *Cheque Bank Ltd.* (49), these show that a contempt of Court is committed by libellous attacks on a Judge for what he did judicially, if such attacks are likely, or tend in any way, to interfere with the due administration of justice. As Elliott, J., well puts it in *People* v. *Stapleton* (50), it would be as reasonable to require proof of actual hinderance in the administration of justice by reason of a libellous attack on a Judge in his judicial capacity as for a person who has made a violent assault on another to plead that he has committed no offence because he has not succeeded to overcome his victim. It is not only important that the trial of causes shall be impartial and that the decisions of the Courts shall be just; it is equally important that causes shall be tried and judgments rendered without bias, prejudice or improper influence of any kind. He who scandalises the Court or a Judge in relation to a particular litigation, commits an offence, not merely against the rights of those litigants, but also against public justice: *In the matter of a Special Reference of the Bahama Islands* (10). It is a public wrong, a crime against the State, to undertake, by libel or slander on the Judges, to impair confidence in the administration of justice. That a party indulges in calumny of the gravest character, and, consequently, does not succeed in his endeavour to shake the confidence of the public in the Court, surely does not alter the quality of his act or make it any the less reprehensible. From this standpoint, it is immaterial whether the attack on the Judge is with reference to a cause about to be tried, or actually under trial, or recently adjudged; in each instance, the tendency is to poison the fountain of justice, to create distrust, and to destroy the confidence of the people in the Courts, which are of prime importance to them in the protection of their rights and liberties: *Reg* v. *Gray* (31). Upon my construction of the second article, read with or without reference to the first, I hold that it undoubtedly constitutes a contempt of Court.

As regards the second question, there is no room for controversy that this Court has power to punish summarily a contempt of Court committed by the publication of a libel on the Court or on the Judges, when the Court is not sitting. By clause 1 of the Letters Patent of 1862 and clause 2 of the Letters Patent of 1865, the Court was constituted as a Court of Record; and, as a superior Court of Record, it has summary jurisdiction to punish for contempt of Court. This was affirmed in respect of the Superior Courts at Westminster by Wilmot, C. J., in *Rex* v. *Almon* (45) and his opinion has been quoted with approval in

(46) (1888) 57 L. J. Q. B. 483; 36 W. R. 796.

(47) 34 I. A. 41; 29 A. 95; 4 A. L. J 34; 9 Bom. L. R. 9; 17 M. L. J. 74; 11 C. W. N. 273; 5 C. L. J. 130; 2 M. L. T. 1; 5 Cr. L. J. 152 (P. C.).

(48) (1894) 11 T. L. R. 122.

(49 (1897) 13 T. L. R. 305.

(50) (1893) 18 Colorado 568; 23 L. R. A. 787; 33 Pacific 167.

a long line of decisions, the most notable whereof is, perhaps, the judgment of Cockburn, C. J., in *Reg.* v. *Lefroy* (51). Mr. Jackson contended that this view will not stand scrutiny and may properly be described as "law taken for granted." In this connection, he invited our attention to a celebrated passage from the judgment of Lord Denman, L. C. J., in *Reg.* v. *O'Connell* (12): "A large portion of that legal opinion, which has passed current for law, falls within the description of 'law taken for granted'; if a statistical table of legal propositions should be drawn out, and the first column headed 'law by Statute,' and the second, 'law by decision,' a third column, under the heading of 'law taken for granted' would comprise as much matter as both the others combined. But when, in pursuit of truth, we are obliged to investigate the grounds of the law, it is plain, and has often been proved by recent experience, that the mere statement and re-statement of a doctrine,—the mere repetition of the *cantilena* of lawyers, cannot make it law unless it can be traced to some competent authority, and if it be irreconcilable to some clear legal principle." But the question remains, whether the proposition that a Superior Court of Record has power to punish summarily for contempt of Court, can appropriately be treated as "law taken for granted." I am not unmindful that a learned writer (Mr. John Charles Fox in the Law Quarterly Review, Volume XXIV, pages 184, 266) has maintained the view that the opinion expressed by Wilmot, C. J., in *Reg.* v. *Almon* (45) is not historically accurate. Let us assume that this criticism is well established on the ancient authorities and that while originally the superior Courts of Common Law had jurisdiction to punish only disobedience to the King's writ summarily by fine and imprisonment upon attachment, they had jurisdiction only on indictment or bill to punish contempts *in facie* and other obstructions to the administration of justice, such as libelling the Court or the Judge. Let us assume also that the development of the summary jurisdiction to punish contempts has been of slow growth and that the earliest recorded case of libel or slander on the Court or a Judge by a stranger unconnected with the service of process, which was punished summarily by attachment, cannot be traced to a period anterior to 1720. Surely, this cannot but be regarded now as a matter of other than antiquarian interest. We have abundant "competent authority" "not irreconcilable to clear legal principles," in support of the view that a Superior Court of Record does possess the power to punish summarily contempts of Court of the description now before us. Sir Barnes Peacock, C. J., maintained and applied this principle in *Abdool and Mahtab, In re* (33) and *Re William Tayler* (1), which, upon a full review of the authorities, was re-affirmed in *Governor of Bengal* v. *Moti Lal* (4). We have also the pronouncement of the Judicial Committee to the same effect in *Mc Dermott* v. *Judges of British Guiana* (52), where they confirmed the view indicated in the earlier cases of *Smith* v. *Sierre Leone* (*Justices of*) (53) and *Rainy* v. *Sierra Leone* (*Justices of*) (54). As regards the power of Indian High Courts in a case of this character, we have two decisions by the Judicial Committee, namely, *Surendra Nath Banerjee* v. *Chief Justice of Bengal* (32) and *Sashi Bhushan Sarbadhicary, In the matter of* (47). In the former case it was ruled that the High Court had power to punish in a summary manner, by fine or imprisonment or both, a contempt of Court, which in that case, as in the present, consisted in the publication out of Court of a libel on one or more of the Judges. In the latter case, the Judicial Committee held that there was no doubt that the publication of the libel in question constituted a contempt of Court, which might have been dealt with by the High Court in a summary manner, by fine or imprisonment or both. In my opinion, these repeated pronouncements by the Judicial Committee conclude the matter, so far as "competent authority" is concerned, and no useful purpose can be served by an examination of the historical basis of the opinion expressed by Wilmot, C. J.

(51) (1873) 8 Q. B. 134; 42 L. J. Q. B. 121; 28 L. T. 132; 21 W. R. 332.

(52) (1868) 2 P. C. 341; 5 Moo. P. C. (N. S.) 466; 38 L. J. P. C. 1; 20 L. T. 74; 17 W. R. 352; 16 E. R. 590.

(53) (1841) 3 Moore 361; 13 E. R. 147.

(54) (1853) 8 Moore P. C. 47; 14 E. R. 19; 97 R. R. 26.

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That the possession of this power by a Judicial Tribunal (however cautiously and sparingly it may have to be exercised) is not also "irreconcilable to clear legal principle" is beyond serious controversy; indeed, the summary power to commit and punish for contempts tending to obstruct or degrade the administration of justice, is essential to the preservation of order in judicial proceedings, to the maintenance of the authority of a Court and to the enforcement of its judgments; it is a necessary incident and attribute of a superior Court, without which it could no more exist than without a Judge. [See the cases reviewed in *Governor of Bengal* v. *Mati Lal* (4).] It was argued, however, on the authority of the decision of the Judicial Committee in *Mc Leod* v. *St. Aubyn* (5) that committals for contempt of Court by scandalising the Court itself had become obsolete in England. It may be observed here parenthetically that this very decision of the Judicial Committee is an authority for the proposition that, as laid down by Lord Hardwicke in *St. James Evening Post case* (35), the publication of scandalous matter in respect of the Court itself is a contempt and that power summarily to commit for contempt of Court is considered necessary for the proper administration of justice. I do not read the statement, that committals for contempt of Court by scandalising the Court itself had become obsolete in England, as destructive of the authority of the earlier decisions on the subject. Indeed, the proposition taken literally seems to go too far and it is significant that, in the very next year, proceedings were taken in England for contempt of Court in the case of *Reg.* v. *Gray* (31). There can, I think, be no doubt that where the circumstances clearly demand action of this description, the Court will not hesitate to exercise its undoubted power to punish on summary process the contempt of scandalising it and thereby attempting to interfere with the due course of justice. No doubt, as Lord Morris observes in *McLeod* v. *St. Aubyn* (5), Courts may be satisfied sometimes to leave to public opinion attacks or comments derogatory or scandalous to them. But I do not accede to the argument that it is invariably prudent for the Court to assume an attitude of indifference or to institute regular criminal proceedings against the offender. In this connection, reference may appropriately be made to the weighty words of Kent, C. J., in *Yates* v. *Lansing* (55): "Whenever we subject the established Courts of the land to the degradation of private prosecution, we subdue their importance and destroy their authority. Instead of being venerable before the public, they become contemptible; and we thereby embolden the licentious to trample upon everything sacred in society and to overthrow those institutions which have hitherto been deemed the best guardians of civil liberty." [See also the very pertinent observations of Marshall, J., in *State* v. *Shepherd* (56) quoted in *Governor of Bengal* v. *Moti Lal* (4).] In my opinion this Court has undoubted jurisdiction to deal summarily with persons who have committed contempt by scandalous attack upon the Judges, and such power should be exercised in the present instance. When I hold this, I do not overlook the assertion of the printer and publisher that the articles before us were published by him in good faith and in the public interest. The sincerity of this plea appears to me to be open to the gravest doubt. But, even on the assumption that this allegation is literally true, I desire to add that, while I do not underrate in the least degree the importance of the liberty of the press, I cannot hold it expedient that any class of the community should be privilged to attack the Courts so as to interfere with the rights of litigants or to embarrass the administration of justice. The publishers of newspapers have the right, but no higher right than others, to bring to public notice the conduct of Courts, and *provided the publications are true and fair in spirit*, there is no law to restrain the freest expression of the disapprobation that any person may entertain of what is done in or by the Courts. But liberty of the press must not be confounded with license or abuse of that liberty, and though it may be true that where the liberty of the press and freedom of public comments end, there tyranny begins, it is at least equally true that where vituperation begins, there the liberty of the press ends; and the

(55) (1810) 5 Johnson 282.
(56) (1900) 113 Geo. 114; 15 L. R. A. 225.

inherent power of the Superior Courts of the Record to punish any publication calculated to interfere with the administration of justice cannot be deemed in any way restricted by considerations of the kind urged by the printer and publisher.

As regards the third question, namely, what is the true nature of the present proceedings, is it civil or criminal in character, the matter is of practical importance from the point of view of the mode of trial to be adopted. In the case of *Governor of Bengal* v. *Moti Lal* (4) I had occasion to examine fully the distinction between a criminal and a civil contempt, which is of a fundamental character.

A criminal contempt is conduct that is directed against the dignity and authority of the Court. A civil contempt, on the other hand, is failure to do something ordered to be done by a Court in a civil action for the benefit of the opposing party therein. Consequently, in the case of a criminal contempt, the proceeding is for punishment of an act committed against the majesty of the law, and, as the primary purpose of the punishment is the vindication of the public authority, the proceeding conforms, as nearly as possible, to proceedings in criminal cases. In the case of a civil contempt, on the other hand, the proceeding, in its initial stages at least, when the purpose is merely to secure compliance with a judicial order made for the benefit of a litigant, may be deemed instituted at the instance of the party interested and thus to possess a civil character. But, here also refusal to obey the order of the Court may render it necessary for the Court to adopt punitive measures against the person who has defied its authority: at that stage, at least, the proceedings may assume a criminal character. In this manner, the dividing line between acts which constitute criminal and others which constitute civil contempt may become indistinct in those cases, where the two gradually merge into each other: see *St. James Evening Post case* (35), *Scott* v. *Scott* (57), *Lechmere Charlton's case* (58), *Wallace, In re* (59), *Davies, In re* (8), *Onslow's and Whalley's case* (60) and *Skipworth's case* (61). A careful scrutiny of the cases in the books shows, however, that much confusion exists in the reported decisions as to whether or not contempt proceedings are civil or criminal, where the contempt is committed in relation to a civil proceeding, and, it is consequently desirable to investigate briefly the true test for differentiation.

The power to punish for contempt is inherent in the very nature and purpose of Courts of Justice. It subserves at once a double purpose, namely, as an aid to protect the dignity and authority of the tribunal and also as an aid in the enforcement of civil remedies. The power may consequently be exercised in civil or criminal cases or independently of both, and either solely for the preservation of the authority of the Court or in aid of the rights of the litigant or for both these purposes combined. By reason of this twofold attribute, proceedings in contempt may be regarded as anomalous in their nature, possessed of characteristics which render them more or less difficult of ready or definite classification in the realm of judicial power. Hence, such proceedings have sometimes been styled *sui generis*. That they are largely of a criminal nature, inasmuch as the Court has power to convict and punish for the wrong committed, cannot be disputed, and yet it must be recognised that, in some respects, by reason of the end subserved, they partake of the nature of a civil remedy. This dual characteristic has given rise to many controversies, specially when questions have arisen as to right of appeal from the order passed [as in *Reg.* v. *Barnardo* (62), *Barnardo* v. *Ford* (63), *Helmore* v. *Smith* (64), *A. G.* v. *Kissane* (65), *Hunt* v. *Clark* (18), *Reg.* v. *Staffordshire County Court Judge* (46), *O'Shea* v. *O'Shea* (6), *Bessette*

(57) (1913) A. C. 417; 82 L. J. P. 74; 109 L. T. 1; 57 S. J. 498; 29 T. L. R. 520.

(58) (1837) 2 My & Cr. 316; 40 E. R. 661; 45 R. R. 68.

(59) (1866) 1 P. C. 283; 4 Moore. P. C. (N. S.) 140; 36 L. J. P. C. 9; 15 W. R. 533; 16 E. R. 269.

(60) (1873) 9 Q. B. 219.

(61) (1873) 9 Q. B. 230.

(62) (1889) 23 Q. B. D. 305; 58 L. J. Q. B. 553; 61 L. T. 547; 37 W. R. 789.

(63) (1892) A. C. 326; 61 L. J. Q. B. 728; 67 L. T. 1; 56 J. P. 629.

(64) (1886) 35 Ch. D. 449; 56 L. J. Ch. 145; 56 L. T. 72; 35 W. R. 157.

(65) (1893) 32 Ir. L. R. 220.

In the matter of AMRITA BAZAR PATRIKA.

Conkey Co. (66), *Christensen Engineering Co., In the matter of* (67), *Worden* v. *Searls* (68), *Gompers* v. *Buck's Stove Co.* (69)], the applicability of rules of evidence [*Celluloid Co.* v. *Chrolithian Co.* (70), *Bullock Co.* v. *Westinghouse Co.* (71), *Ex parte Gould* (72)], the finality of the judgment [*Fischer* v. *Hayes* (73) and *Re Mullee* (74)], liability for payment of costs, *Cornish, In re* (75), *Martindale, In re* (38) and *Day* v. *Longhurst* (76)], right of trial by Jury, [*Tinsely* v. *Anderson* (77), *Re Debs* (78) and *Eilenbecker* v. *District Court of Plymouth County, Iowa* (79)] and other like matters. The difficulty in each case is to determine when a particular proceeding assumes the criminal rather than the civil aspect, or when of both, and, if the latter, which feature must control. The question has been repeatedly and elaborately discussed by the Supreme Court of the United States: *Kearney Ex parte* (80), *New Orleans* v. *New York Mail Steamship Co.* (81), *Chiles, In re* (82), *Hayes* v. *Fischer* (83), *Warden* v. *Searls* (67), *Ex. Debs In re* (78), *O'Neal* v. *United States* (84), *Christensen Engineering Co. In the matter of* (67) *Bessette* v. *Conkey Co.* (66), *Doyle* v. *London Guarantee Co.* (85) and *Gompers* v. *Buck's Stove Co.* (69). The view deducible from these decisions is in general agreement with what is indicated above, namely, a proceeding to punish for contempt has the essential qualities of a criminal proceeding, whether the proceeding is initiated primarily to vindicate the Court's authority or solely as a coercive and a remedial measure to enforce the rights of the litigant or for both these purposes combined. This must be so, since it necessarily results from the nature of the power to punish for contempt that whatever the primary purpose of such a proceeding may be, it is always within the power of the Court to make its judgment, in part, at least, punitive or vindicatory in character; in other words, where the sole purpose sought by initiating the proceeding is to secure the coercive and remedial action of the Court against a party, the Court may nevertheless, in its discretion, add a punishment, by way of fine or imprisonment, for the failure of the person in contempt to obey its mandate, I think it undeniable that the proceeding must be regarded from its inception to the point of judgment as of a criminal nature, or, at least potentially so, since until the judgment is given, it cannot be known what its character will be. It is the judgment, therefore, which must eventually in any case determine the character of the proceeding, and this leads to the conclusion that logically, perhaps, instead of characterising contempt proceedings as criminal or remedial according to circumstances, it is contempt judgments that should be so classified. In any view, there is no room for controversy that where, as here, the contempt consists in an attack upon the Court, the proceedings, instituted to vindicate its dignity, are of criminal nature, even though the attack has been made in connection with civil suits or appeals, either actually decided or pending or about to be taken up for disposal [*Governor of Bengal* v. *Moti Lal* (4)].

As regards the fourth question, we have to consider separately the liability of each of the five persons who have been called upon to show cause why they should not be committed for contempt of Court. Tarit Kanti Biswas has filed an affidavit to the effect that he is the printer and publisher of the *Amrita Bazar Patrika* and that in such capacity he printed and published the articles mentioned. He states, however, that he exercises no control whatever over the contents of the newspaper, that he did not read the articles when they were handed over to him for publication, that he did not consider, at any time prior to publication, their meaning or purport, that

(66) (1904) 194 U. S. 324; 48 Law. Ed. 997.
(67) (1904) 194 U. S. 458; 48 Law. Ed. 1072.
(68) (1887) 121 U. S. 14; 30 Law. Ed. 853.
(69) (1911) 221 U. S. 418.
(70) (1885) 24 Fed. 585.
(71) (1904) 63 C. C. A. 607; 194 U. S. 636.
(72) (1893) 99 Cali. 360; 21 L. R. A. 751; 37 Am. St. Rep. 57.
(73) (1881) 19 Blatch 13; C. Fed. 63.
(74) (1869) 7 Blatch 23; 17 Fed. Cas. 9911.
(75) (1893) 9 T. L. R. 196.
(76) (1892) 62 L. J. Ch. 334; 2 R. 234; 68 L. T. 17; 41 W. R. 283.
(77) (1898) 171 U. S. 101; 43 Law. Ed. 91.
(78) (1895) 158 U. S. 564; 39 Law. Ed. 1092.
(79) (1890) 134 U. S. 31; 33 Law. Ed. 801.
(80) (1882) 7 Wheat. 38; 5 Law. Ed. 391.
(81) (1874) 20 Wall. 387; 22 Law. Ed. 354.
(82) (1875) 22 Wall. 157; 22 Law. Ed. 819.
(83) (1880) 102 U. S. 12]; 26 Law. Ed. 95.
(84) (1903) 190 U. S. 36; 47 Law. Ed. 945.
(85) (1907) 204 U. S. 559.

he inserted them in the paper in the usual course of business, that he acted *bona fide* and was not actuated by a disrespectful or other improper feeling or motives towards the Court or the Chief Justice, and that he did not intend to excite contempt or to reflect in any way upon the integrity or dignity of the Court or of the Chief Justice in his administration thereof. Notwithstanding this defence there can be no doubt as to the liability of the printer and publisher; for as Lord Morris observed in *McLeod* v. *St. Aubyn* (5), a printer and publisher intends to publish and so intending cannot plead as a justification that he did not know the contents. Indeed, this has been the settled law ever since the decision of Lord Hardwicke in *St. James Evening Post case* (35), which was followed by Lord Erskine in *Jones, Ex parte* (43), and by Stirling, J., in *American Exchange in Europe* v. *Gillig* (34), *Cheshire* v. *Strauss* (40), *Rex* v. *Parke* (41), *Emmens* v. *Pottle* (86), *Rex* v. *Davies* (42), *Daw* v. *Eley* (37), *Tichborne* v. *Tichborne* (87), *Cheltenham & Swansea Ry. Carriage and Waggon Co., In re* (88) and *Littler* v. *Thomson* (89). The Rule must consequently be made absolute against the printer and publisher. With regard to his allegation that he had no intention whatever to offend the dignity or integrity of the Court and that in reality he was helpless in the position he occupied as a servant of the Company, one cannot but feel that the value of such assurance is considerably discounted by the fact that he has given no information to the Court. I am not unmindful that as ruled *In the matter of a Special Reference from the Bahama Islands* (10), he was under no legal obligation to assist the Court in any way, and to disclose the name of the person primarily responsible for the articles; still his conduct serves to throw doubt in a considerable measure on the genuineness of his profession that he had no intention to prejudice the due course of administration of justice or to cast any reflection on the Judges of this Court. He must accordingly take the consequences of his act, and cannot reasonably urge that he has established a claim for specially considerate treatment. See the observations of Stirling J., in *American Exchange in Europe* v. *Gillig* (34).

As regards the other four defendants, it is necessary to state that they have not all taken up the same attitude in this matter. Counsel on behalf of Moti Lal Ghose declined to answer, as he was entitled to do, the question put by me, whether he was in reality one of the Directors of the Company as stated in the return of Golap Lal Ghose alleged to have been filed under section 32 of the Indian Companies Act, 1913. Pijush Kanti Ghose has filed an affidavit in which he admits that he is one of the Directors of the Company, but that neither he nor his co-directors exercise any control over the contents of the newspaper and perform such duties and exercise such powers only as are mentioned and defined in the Articles of Association. He further alleges that he was absent from Calcutta from the 21st May to the 4th June and was not here on the date when the second article appeared. Mrinal Kanti Ghose has filed a similar affidavit, in which he admits that he is the Secretary of the Company. He further alleges that Moti Lal Ghose, Gopal Lal Ghose and Pijush Kanti Ghose are Directors of the Company, that Golap Lal Ghose is also the Financial Manager, that neither he nor the Directors nor the Financial Manager exercises any control whatever over the contents of the paper and that the Directors perform such duties and exercise such powers only as are mentioned and defined in the Articles of Association (extracts wherefrom are appended to the affidavit). He enumerates also the duties of the Secretary and of the Financial manager, and finally adds that he was absent from Calcutta from the 4th May to the 22nd May and was not here on either of the two dates when the articles mentioned appeared. Golap Lal Ghose has not filed any affidavit, and on his behalf, Counsel has contended that there is no legal evidence whatever to connect him in any way with the publication of either article. This argument is based on three grounds, namely, *first*, that secondary evidence of the return alleged to have been filed under

(86) (1885) 16 Q. B. D. 354 at p. 357; 55 L. J. Q. B. 51; 53 L. T. 808; 34 W. R. 116; 50 J. P. 228.

(87) (1867) 7 Eq. 55 note; 15 W. R. 1072 at p. 1073; 17 L. T. 5.

(88) (1869) 8 Eq. 580; 38 L. J. Ch. 330; 20 L. T. 169; 17 W. R. 463.

(89) (1839) 2 Beav. 129; 48 E. R. 1129; 50 R. R. 124.

section 32 of the Indian Companies Act was not admissible; *secondly*, that even if secondary evidence were held admissible, evidence was requisite to prove that the original had been filed by Golap Lal Ghose who is Director and Financial Manager of the Company and has been called upon to show cause; and, *thirdly*, assuming but not admitting that he was a Manager on the 5th March 1917, as stated in the return, there is no evidence that he was Manager on either of the dates when the offending articles were published.

Before I deal with these objections and their effect upon the Rule, I may make the preliminary observation that the materials which were placed before the Court when the Rule was issued amply justified the action then taken, indeed, made it in a manner incumbent upon the Court to follow the course actually adopted. These materials showed that the *Amrita Bazar Patrika* was the property of a Company called the *Amrita Bazar Patrika Limited*, incorporated under the Indian Companies Act, 1882, on the 19th November 1908; that one of the objects for which the Company was established was to acquire and take over as a going concern the business of newspaper proprietors, printers and publishers then carried on in connection with the paper; that the registered office of the Company was at No. 2, Ananda Chatterjee's Lane, where the newspaper was published, and where many of the shareholders and Directors who were closely related to each other lived, and that on the 5th March 1917, the Directors and Managers were the persons mentioned in the return filed by the Secretary under the provisions of the Indian Companies Act. In these circumstances, there was a strong *prima facie* case against the defendants that they were connected with and responsible for the publication of the articles in question. But although these materials were sufficient to justify the issue of a Rule, on careful scrutiny and on examination of the allegations in the affidavits filed in answer to the Rule, I see no escape from the conclusion that an order cannot properly be made against any of the defendants other than the printer and publisher.

With reference to the legal objections just enumerated, I am not prepared to accede to the contention that secondary evidence of the returns in the custody of the Registrar of Joint Stock Companies is not admissible. Section 65, clause (*e*), of the Indian Evidence Act provides that secondary evidence may be given of the contents of a document when the original is a public document within the meaning of section 74. Section 74, sub-section 2, provides that public records kept in British India of private documents are public documents. The question consequently reduces to this, whether the returns in the custody of the Registrar of Joint Stock Companies constitute public records of private documents. The observation of Lord Blackburn in *Sturla* v. *Freccia* (27) is of no assistance in the solution of this question and does not show that a public record of a private document is limited to an entry made in a book by a public officer, which reproduces the contents of the document and thus constitutes a written memorial made by the public officer authorised by law to perform that function. The term "record" as appears from the Oxford Dictionary (Vol. VIII, page 266) has a more comprehensive meaning and includes a collection of documents. When, as in the case of the Indian Companies Act, the Legislature has provided that returns are to be lodged with a public officer, these returns, when transmitted to and filed by him, do constitute public records of private documents within the meaning of section 74, sub-section 2, although they are not copied out by the Registrar of Joint Stock Companies into a volume kept for the purpose; they are undoubtedly intended for reference and used by the public. But though this objection is of no avail, the second exception is well-founded; for although secondary evidence may be admissible, the party who produces the evidence is not relieved of his obligation to prove the execution of the document, just as if the original had been produced, unless the case is covered by section 90 of the Indian Evidence Act or the Legislature has expressly provided that the document or endorsement thereon is receivable in evidence without proof of execution, as, for example, in section 60 of the Indian Registration Act. Consequently, as against Moti Lal Ghose and Golap Lal Ghose there is no legal evidence to establish that the former is a Director and the latter a Manager of the Com-

pany. The statements made by Pijush Kanti Ghose and Mrinal Kanti Ghose, in the affidavits filed by them at the hearing, cannot fairly be used to the detriment of other defendants as the proceeding is in the nature of a criminal trial. Besides, as pointed out in the case of *Governor of Bengal* v. *Moti Lal* (4) on the authority of the decision in *Reg.* v. *Stanger* (11), supplementary evidence cannot be given so as to prejudice the position of the accused. To the same effect are the observations made by Wright, J., *Hooley, In re, Hooley, Ex parte* (89) when he was asked to grant leave to amend a notice of motion to commit a company for contempt of Court: "That is not the way in which the Court deals with matter of this kind affecting the liberty of the subject. Applicants must come with their machinery ready." The procedure should be at least equally strict and adherence to the forms of the law at least equally scrupulous, when the Court finds itself in the position of Prosecutor and Judge and an unexpected lacuna in the evidence transpires during the trial. The Court must act with great caution in strict conformity with the requirements of the law and avoid a perhaps not unnatural tendency to supplement the evidence [*Martin* v. *Mackonochie* (25)]. As regards the third legal objection, however, I am not convinced that there is any substance in the argument. Section 87 of the Indian Companies Act requires that notice of changes among the Directors or Managers shall be filed from time to time. The certified copy of the return furnished by the Registrar of Joint Stock Companies must, therefore, be presumed to embody the latest changes. Consequently, if the return had been duly proved, it would have furnished *prima facie* evidence of the names of the directors and managers on the day the copy was supplied. But this point is immaterial, as, in my opinion, there is no legal evidence to connect Moti Lal Ghose and Golap Lal Ghose with the publication of the articles.

There remains for examination the cases of Mrinal Kanti Ghose, and Pijush Kanti Ghose who admit that they are directors. But they assert in their respective affidavits that none of the directors nor the financial manager exercises any control whatever over the contents of the paper. There are no materials at the disposal of the Court sufficient to contradict these statements made on oath; consequently, the denial is, in the circumstances, a sufficient answer to the rule. I cannot but observe, however, that the further assertion in the affidavits of these two persons that the directors perform such duties and exercise such powers only as are mentioned and defined in the Articles of Association detracts to some extent at least from the value of the previous statement. The Articles of Association show that the business of the company is required to be managed by the directors, while the Memorandum of Association shows that the object for which the company was established was to acquire and take over as a going concern the business of newspaper proprietors, printers and publishers then carried on in connection with the "Amrita Bazar Patrika." Consequently, the Memorandum and Articles of Association taken together may imply that it was the duty of the directors to manage the publication of the paper, and from this point of view they might be held responsible for the publication of the articles mentioned. This inference might possibly be strengthened by the circumstance that the existence of an editor is not mentioned, not even so much as suggested, in these proceedings. But although the case may, in these circumstances, be one of strong suspicion, it is impossible to hold that, notwithstanding the categorical denial to the contrary, it has been established beyond doubt that the directors were responsible for, or connected with the actual publication of the two articles. We cannot possibly hold as a matter of law that the directors of a limited company which owns a newspaper are liable to be committed for contempt of Court on account of a libel published in the paper [*Reg.* v. *Judd* (20)]. The decision in *Green, Ex parte, Robbins, In the matter of* (24) cannot be treated as an authority for a general proposition of law that where a limited company disseminates amongst newspapers matter amounting to contempt of Court, their manager, merely because he was the manager, was liable to be

(89) (1899) 6 Manson 44 at p. 46; 79 L. T. 703.

committed. The decision rested, I think, on the facts admitted or established before the Court, which showed that the manager was in fact responsible for all the paragraphs sent out to newspapers. Nor can we apply to the case before us the presumption which at one time was applied in England as to the responsibility of the proprietor of a newspaper for libels published in his paper. The view that the proprietor of a newspaper was answerable, criminally as well as civilly, for the acts of his servants or agents in misconducting a newspaper, enunciated by Lord Kenyon in *R.* v. *Walter* (90), and re-stated by Lord Ellenborough, C. J., in *R.* v. *White* (91), and by Lord Tenterden, C. J., in *R.* v. *Cutch* (92), has long been obsolete in England [*R.* v. *Holbrook* (22)], and should unquestionably not be applied in this country in a case of the description now before us, even though it be held applicable to trials for defamation under the Indian Penal Code: *Ramasami* v. *Lokanada* (93) and *Harisarvothama Rao* v. *Emperor* (94). After anxious consideration of all the materials on the record, I have thus arrived at the conclusion that the Rule must be discharged also as against Mrinal Kanti Ghose and Pijush Kanti Ghose.

I cannot consider the result of this trial satisfactory from the vital point of view indicated by Lord Hardwicke in *St. James Evening Post Case* (35), namely, that there cannot be anything of greater consequence than to keep the streams of justice clear and pure so that parties may proceed with security both to themselves and their characters. The persons responsible for the grave contempt of Court which has been committed have not been brought to justice. This is not a matter for legitimate surprise as the Court has not the machinery at its disposal for the discovery of the offenders and the materials available from the public records have proved insufficient for the purpose. At the same time the offenders have preferred to keep themselves in the dark and have not adopted the eminently honourable course which was pursued in two other instances in this Court and which evoked the just commendation of Sir Barnes Peacock and Sir Richard Garth respectively: *Banks and Fenwick In the matter of* (3) and *Surendranath Banerjee* v. *Chief Justice of Bengal* (32). They have nothad the courage to come forward to avow their responsibility and either to justify their action or to express contrition for their misconduct. Even the directors of the company have contented themselves with a disavowal of their responsibility and have expressed no regret whatever for the articles published in a newspaper owned by the company. In these circumstances it is undoubtedly worthy of consideration whether legislative provision should not be made to compel registration of the name of the editor and proprietor of a newspaper precisely in the same way as that of the printer and publisher. (See 44 & 45 Vict. C. 60.) It may finally be observed that, on recurrence of a case of this character, the Court may find it necessary to proceed against the company, as has been done in some recent instances. No doubt, the view was maintained at one time that a corporation could not be held liable for contempt of Court, as by reason of its impersonal nature it could not be attached: *Guilford* v. *Mills* (95). But the weight of modern authority is apparently against this doctrine, and the view has been maintained that proceedings by way of contempt would lie against corporations as well as individuals: in the case of individuals, the process is by attachment of the person, followed by fine or imprisonment or both; in the case of corporations, the process is by fine followed by sequestration or distraint: *R.* v. *Birmingham Gloucester Ry. Co.*, (96) *London* v. *Lynn* (97), *Spokes* v. *Banbury Local Board* (98). The decision of Wright, J., in *Hooley, In re, Hooley, Ex parte* (89), is seemingly an authority only for the proposition that a limited company cannot be

(90) (1799) 3 Esp. 21; 16 R. R. 808.

(91) (1829) 1 Moo & Malk 271; (1811) Holt on Libel 287.

(92) (1829) 1 Moo. & Malk. 433 at p. 437.

(93) 9 M. 387; 1 Weir 375; 3 Ind. Dec. (N. S.) 665.

(94) 2 Ind. Cas. 193; 32 M. 338; 5 M. L. T. 415; 9 Cr. L. J. 506.

(95) (1866) 2 Keb. 1; T. Raym. 152.

(96) (1842) 3 Q. B. 223; 2 G. & D. 236; 3 Ry. Cas. 148; 11 L. J. M. C. 134; 6 Jur. 804; 114 E. R. 492; 61 R. R. 207.

(97) (1789) 1 H. Bl. 206.

(98) (1865) 11 Jur. (N. S.) 1010; 35 L. J. Ch 105; 13 L. T. 453.

committed to prison for contempt: it does not decide the question whether such a company may not be fined for contempt of Court and the fine recovered by distraint or sequestration. In the Courts of the United States, the liability of a corporation for contempt of Court has been affirmed by a large preponderance of authority: *Bloomington Church* v. *Muscatine* (99), *West Jersey Co.* v. *Board of Public Works* (100), *U. S.* v. *Munplus Ry. Co.* (101), *Re Westminster Realty Corporation* (102), *Union* v. *People* (103), *Stratton* v. *Merswether* (104), *Schreiber* v. *Garden* (105), *State* v. *Baltimore Ry. Co.* (106). One of the most recent cases in which the question is examined as one of principle is that of *Fiedler* v. *Banbrick Bros.* (107), where, upon an elaborate review of earlier decisions, the conclusion was reached that corporations, though not liable to be imprisoned, were liable to be fined by way of punishment for contempt of Court. (See also Rapaljee on Contempts, section 48, and High on Injunctions, section 1460.) It is not necessary for me to decide finally on this occasion the liability of corporations to be punished for contempt of Court in their corporate capacity; but in view of the turn events have taken in the present proceedings it is desirable to point out that when a grave contempt of Court has been committed by a newspaper owned by a company, the immunity from punishment which the offenders may imagine they enjoy by reason of stolid silence is most probably of an illusory character.

My conclusion on the whole is that the Rule must be made absolute against the printer and publisher, but discharged against all the other defendants.

CHITTY, J.—I have had the advantage of reading the judgments just delivered by my Lord the Chief Justice and Mr. Justice Woodroffe, and I entirely agree with what they have said generally about the case, and the orders to be passed with regard to the several respondents. I wish, however, to state, with regard to Babu Moti Lal Ghose that I should have been disposed to hold him responsible for the articles in question, as one who has been proved to be a director of this company and who in that capactiy has been called upon by this Court to show cause, and has shown none. As the majority of the Bench are in favour of giving him the benefit of the doubt, I do not desire to press my opinion further. I, therefore, concur in the order about to be passed.

Mr. Justice Fletcher, who is unavoidably absent to-day, desires me to say that he too was prepared to hold Babu Moti Lal Ghose responsible, but under the circumstances he also concurs in the order to be passed.

ORDER OF THE OCURT.

SANDERSON, C. J.—Tarit Kanti Biswas! The members of the Court are unanimously of opinion that in printing and publishing the two articles in question in the *Amrita Bazar Patrika* newspaper you were guilty of a contempt of Court.

The serious nature of it has been referred to in the judgments which have been delivered, and it is not necessary, therefore, for me to recapitulate what has already been said.

In the earliar part of your affidavit you state that you did not read the articles when they were handed to you for publication and that you inserted them in the usual course of your business as printer and publisher.

Later, however, in your affidavit you proceeded to try and justify the publication of the articles by alleging that they were published by you in good faith and in the public interest, a position which we consider inconsitent with that of a man who puts forward the case that he printed and published the articles in ignorance of their contents.

We are all of opinion there was not the smallest justification for the publication of such untrue statements and unjustifiable imputations as were contained in the articles.

If the person responsible for the publication of these articles had come forward and had taken the responsibility upon himself, or if you had disclosed to the Court the person who was really responsible for the publication, which must have been within your knowledge, although you might not have

(99) (1855) 2 Iowa 69.
(100) (1896) 58 N. J. L. 536; 37 Atl. 578.
(101) (1881) 6 Fed. 237.
(102) (1908) 108 N. Y. Sup. 551.
(103) (1887) 121 Illinois App. 647.
(104) (1913) 154 Ky. 839; 159 S.W. 613.
(105) (1912) 137 N. Y. Sup. 747.
(106) (1913) 73 W. Va. 1; 79 S. E. 834.
(107) (1912) 162 Missouric App. 528; 142 S. W. 1111.

known the actual writer of the article, it might have been possible for us to treat the offence in your case with such leniency as your learned Counsel prayed for.

The person really responsible, however, has not been disclosed but you, being the printer and publisher, whose identity could not be concealed and whose legal liability could not be denied, are left by your employers to bear the brunt of this matter.

We have taken all these matters into consideration. The contempt of Court, however, in our judgment was of such a nature that in the interest of the administration of justice it is impossible for us to pass it over without some penalty.

It is essential to vindicate the authority of the Court and to make it clear that articles such as those in question constituting a grave contempt of Court cannot be published with impunity.

Tarit Kanti Biswas! The judgment of the Court is that you Tarit Kanti Biswas do pay to the Accountant-General of this Court a fine of Rs. 300 before 4-30 P. M. to-day, and that you be detained until such hour, or until such time as the fine is paid; and if the fine is not paid as herein directed, you be lodged on the civil side of the Presidency Jail until the said fine is paid or until the further order of this Court.

Printer convicted;
Others discharged.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 115 OF 1917.

August 30, 1917.

Present:—Mr. Pratt, J. C., and Mr. Hayward, A. J. C.

DHARMIBAI—APPLICANT

versus

EMPEROR—OPPONENT.

Bombay District Police Act (Bom. Act IV of 1890), s. 43—District Magistrate, order by, under s. 43—Revision—High Court, power of interference of.

An order passed by a District Magistrate under section 43 of the Bombay District Police Act is an executive order and not the order of an inferior Criminal Court, and consequently cannot be interfered with by the High Court in revision even though it is *ultra vires*. [p. 397, col. 1.]

The aggrieved party has in such a case a remedy under sections 13 (2) and 50 of the Bombay District Police Act by petition to the Commissioner. [p. 397, col. 1.]

A District Magistrate has no jurisdiction to eject any person from property under section 43 of the Bombay District Police Act without first taking temporary possession himself and his order of ejectment or exclusion can only operate for the period of his temporary possession. [p. 397, col. 1.]

Application for revision against the order of the District Magistrate, Larkana.

Mr. *Lalchand Hassomal*, for the Applicant.

Mr. *E. Raymond*, Public Prosecutor for Sind, for the Crown.

JUDGMENT.—This is an application for revision of an order made by the District Magistrate, Larkana, under section 43 of the Bombay District Police Act IV of 1890.

The applicant Dharmibai is or claims to be the widow of Bawa Jeramdas, the Bawa of a "Tikana" at Larkana. The Bawa died on the 25th March 1917 and the applicant remained in possession of the premises. Her possession was resented by certain persons who claim to represent the Hindu Panchayet of Larkana; and the District Magistrate, apprehending a disturbance, made orders first on the 6th July 1917 prohibiting her from entering the temple and again on the 18th July 1917 directing her to remove from the premises of the temple and the "Tikana".

A preliminary objection is raised to the jurisdiction of this Court to interfere with the order made by the District Magistrate, and this objection we must uphold.

It has been held in the case of *Pandurang Shidrao, In re* (1) that a District Magistrate acting under this chapter of the Bombay District Police Act is acting in his executive capacity and not as an inferior Criminal Court and that, therefore, his order is not subject to the revisional jurisdiction of a High Court. This ruling has been approved in the case of *Imperator* v. *Jaro* (2). That was a case under

(1) 8 Ind. Cas. 747; 12 Bom. L. R. 1029; 11 Cr. L. J. 705.

(2) 12 Ind. Cas. 646; 5 S. L. R. 54; 12 Cr. L. J. 558.

the Sind Frontier Regulation. But there, as here, the orders of the Magistrate are made subject to appeal not to this Court but to the Commissioner. It is, however, urged that the order is in excess of the jurisdiction conferred by the section and this Court has the same power of revision as it has in respect of orders purporting to be made under sections 143 and 144 of the Criminal Procedure Code but in excess of the powers conferred by those sections.

Now it must be admitted that the order made by the District Magistrate is not an order which the section empowers him to make. The procedure enjoined by the section is that he should first take temporary possession of the place which is the subject of the dispute, and then by virtue of that possession make orders excluding certain persons or allowing access to certain other persons. He has no jurisdiction to eject any person without first taking temporary possession himself and his order of ejectment or exclusion would only operate for the period of his temporary possession. Here the Magistrate has not taken possession and is, therefore, not authorized to eject the applicant, and secondly, he has put no term upon his order of ejectment to indicate that it was to operate temporarily. This is a serious prejudice to the applicant, for it casts upon her the onus of resort to the Civil Court. This would not have been the case if the District Magistrate had taken a limited period of possession, say, two months, and excluded her for that period only in order to give the Panchayet an opportunity of recourse to the Civil Court.

This would have been sufficient reason to justify our interference in revision if the order had been made under section 143 or 144, Criminal Procedure Code, for then it would be the order of an inferior Court. But the orders being under section 43 of the Bombay District Police Act are not orders of an inferior Court and we, therefore, are unable to interfere in revision even though we think them to be *ultra vires*.

The applicant has a remedy under section 13 (2) and section 50 by petition to the Commissioner.

Probably the District Magistrate may think it advisable to amend his order and bring it in accord with the terms of section 43 of the Bombay District Police Act and with this remark we can do nothing further but reject the application.

Application rejected.

PATNA HIGH COURT.

CRIMINAL REVISION No. 455 OF 1917.

February 1, 1918.

Present:—Mr. Justice Jwala Prasad and Justice Sir Ali Imam, KT.

Babu BIPIN BIHARI MUKHERJI—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 125, 435, 438—Revision—Concurrent power of High Court with subordinate Courts—Procedure.

In cases where the High Court has concurrent revisional jurisdiction with a subordinate Court, the aggrieved party should in the first instance seek his remedy before the subordinate Court. [p. 398, col. 1.]

There is no ground for holding that the revisional jurisdiction of a Sessions Judge or of a District Magistrate under sections 435 and 438 of the Criminal Procedure Code is in any way trenched upon by the provisions of section 125 of the Code. [p. 398, col. 2.]

The jurisdiction of a Sessions Judge or a District Magistrate under section 435 of the Criminal Procedure Code is concurrent with that of the High Court, even where the Sessions Judge or the District Magistrate cannot pass a formal order but can only refer the matter to the High Court under section 438 of the Code. [p. 398, col. 2.]

Criminal revision from an order of the Deputy Magistrate, Purneah, dated the 3rd October 1917

Mr. *Hasan Imam* (with him Babu *Lal Mohan Ganguly*), for the Peitioner.

The Assistant Government Advocate, for the Crown.

JUDGMENT.—The petitioner, Bipin Bihari Mukherji, has been bound down by Mr. E. A. Guest, Deputy Magistrate of Purnea, under section 107 of the Code of Criminal Procedure to keep the peace for a period of one year and in default to undergo simple imprisonment for that period.

The learned Assistant Government Advocate has raised a preliminary point object-

ing to the hearing of this petition by us. The ground of objection taken by him is that the petitioner had a remedy under section 125 of the Code of Criminal Procedure and should have applied to the District Magistrate of Purnea for cancelling the order passed by Mr. Guest. He relies on two decisions of the Allahabad High Court given by Knox, J. [*Emperor* v. *Abdur Rahim* (1) and the case cited therein No. 114 of 1905.]

The learned Counsel appearing on behalf of the petitioner resists this contention, on the ground that the powers exercisable by a District Magistrate under section 125 of the Code are within his original jurisdiction and although this is the section on which the two Allahabad cases have rested, yet there is a point of principle involved in that the Calcutta rulings as well as other rulings of the Allahabad and Bombay High Courts have allowed such a preliminary objection to prevail only in cases where the jurisdiction of the High Court was concurrent with the revisional jurisdiction of subordinate Courts and that, therefore, the rulings of the High Courts of Calcutta, Bombay and Allahabad, except the two rulings given by Knox, J., do not support the view that section 125 of the Code of Criminal Procedure is a section that can be allowed to stand in the way of the hearing of the petition by this Court. The learned Counsel on behalf of the petitioner also contends that the *dictum* laid down by Knox, J., is by a single Judge and unless there is a decision of a Divisional Bench holding section 125 of the Code as a ground of objection we should not refuse to entertain the application before us.

In *Musan Rai* v. *Birich Roy* (2) a Division Bench of this Court has held that in cases where the High Court has concurrent revisional jurisdiction with a subordinate Court, the aggrieved party should in the first instance seek his remedy before the subordinate Court. In this view it would appear that the High Courts of Patna, Calcutta, Allahabad and Bombay are in full agreement: *vide Bhuyan Abdus Sobhan Khan, In re* (3), *Shafaqatullah* v. *Wali Ahmad Khan* (4), *Emperor* v. *Kali Charan* (5), *Queen-Empress* v. *Chagan Dayaram* (6). Even if it be conceded that the two decisions given by Knox, J., are in excess of the principle laid down in the other decisions, the preliminary objection taken by the learned Assistant Government Advocate must prevail, inasmuch as the revisional jurisdiction of this Court under section 435 of the Code is shared by the subordinate authorities and there is nothing to show that the Sessions Judge and the District Magistrate of Purnea are precluded from dealing with the present case. The jurisdiction of the Sessions Judge and the District Magistrate is concurrent with that of the High Court, even where they could not pass formal orders but only could refer to the High Court under section 438—*Queen-Empress* v. *Revlah* (7) and *Bhuyan Abdus Sobhan Khan, In re* (3).

The learned Counsel on behalf of the petitioner contends that as a matter of practice cases under section 107 of the Code are generally dealt with by the District Magistrate under section 125 of the Code of Criminal Procedure. This may be so, and probably it is due to the fact that acting under section 125 the District Magistrate may himself deal with a case like this without referring it for orders to the High Court under section 438, but this is no ground for holding that the revisional jurisdiction of a Sessions Judge or a District Magistrate under sections 435 and 438 of the Code is in any way trenched upon by the provisions of section 125. It is evident, therefore, that the application before us is one with reference to which the revisional power of the Sessions Judge and the District Magistrate of Purnea is exercisable. There is nothing, therefore, to distinguish the present case from the principles laid down in the decisions of the four High Courts referred to above.

(1) A. W. N. (1905) 143; 2 Cr. L. J. 335.
(2) 41 Ind. Cas. 831; 2 P. L. W. 115; 18 Cr. L. J. 863.
(3) 2 Ind. Cas. 846; 36 C. 643; 13 C. W. N. 753; 10 Cr. L. J. 190.
(4) 30 A. 116; A. W. N. (1908) 25; 3 M. L. T. 124; 7 Cr. L. J. 48.
(5) A. W. N. (1904) 232; 1 Cr. L. J. 914.
(6) 14 B. 331; 7 Ind. Dec. (N. S.) 681.
(7) 14 C. 887; 7 Ind. Dec. (N. S.) 585.

SOBHRAJ DWARKADAS v. EMPEROR.

In the circumstances we must allow the preliminary objection taken by the learned Assistant Government Advocate and decline to entertain the application, but we do so without any prejudice to the right of the petitioner to move this Court in case he fails to receive satisfaction from the Sessions Judge or the District Magistrate of Punrea. With these remarks the petition is rejected.

Petition rejected.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION APPLICATION No. 120 OF 1917.

November 23, 1917.

Present:—Mr. Crouch, A. J. C., and Mr. Hayward, A. J. C.

SOBHRAJ DWARKADAS—APPLICANT

versus

EMPEROR—OPPONENT.

Workman's Breach of Contract Act (XIII of 1859), s. 1—Magistrate of Police, meaning of—Jurisdiction—Interpretation of Statutes.

The term "a Magistrate of Police" in section 1 of the Workman's Breach of Contract Act must be limited to a Magistrate in the territorial limits of whose jurisdiction the employer resides or carries on business. [p. 400, col. 1.]

There is nothing in section 1 of the Workman's Breach of Contract Act which gives special jurisdiction to a Magistrate, within whose jurisdiction the contract was made or the advance received, to try an offence under the Act committed beyond his jurisdiction. [p. 400, col. 1.]

Both under the Common Law of England and under the Criminal Procedure Code no Court, unless expressly authorised by Statute, can try any offences other than those committed within the area of its jurisdiction. [p. 400, cols. 1 & 2.]

It must always be presumed that the Legislature does not intend to make any alteration in the law beyond what it explicitly declares, either in express terms or by implication, or in other words beyond the immediate scope and object of the Statute. In all general matters beyond, the law remains undisturbed. It is in the highest degree improbable that the Legislature would overthrow fundamental principles or depart from the general system of law without expressing its intention with irresistibw clearness. [p. 400, col. 1.]

Revision against the order of the City Magistrate, Sukkur.

Mr. *Srikishendas*, for the Applicant.

Mr. *E. Raymond*, Public Porsecutor for Sind, for the Crown.

JUDGMENT.

CROUCH, A. J. C.—This is an application under section 439, Criminal Procedure Code, to revise an order of the City Magistrate, Sukkur, dismissing a complaint filed under the Workman's Breach of Contract Act.

The contract was made and the advance was received in Sukkur; the parties are British Indian subjects residing in the Sukkur district; the work was to be performed in Khairpur. The Magistrate held that he had no jurisdiction as the work was to be performed outside British India.

Mr. Srikishendas has appeared for the applicant and contends that the Magistrate, having jurisdiction in the place where the complainant resided and carried on his business and where the contract was made, could take cognizance of the case even though the work was to be performed outside British India. He relied on *Ali Mohamed* v. *Emperor* (1) and *Lal Mohan Chowbey* v. *Hari Charan Das Bairagi* (2).

Omitting words that have no importance for our present purpose, section 1 of the Act runs as follows :—

"When any workman shall have received from any employer, resident or carrying on business in any presidency town, an advance of money on account of any work which he shall have contracted to perform, if such workman shall wilfully and without lawful or reasonable excuse neglect or refuse to perform such work, such employer may complain to a Magistrate of Police, and the Magistrate shall thereupon issue a summons or a warrant for bringing before him such workman and shall hear and determine the case."

It is clear that the offence with which the Magistrate is to deal is that of "wilfully neglecting or refusing to perform the work undertaken." This is brought out even more clearly by the preamble to the Act, which recites that "it is just and

(1) 35 Ind. Cas. 484; 10 S. L. R. 56; 17 Cr. L. J. 308.

(2) 25 C. 637; 13 Ind. Dec. (N. S.) 419.

proper that persons guilty of such fraudulent breach of contract should be subject to punishment." The effect of the Act was to make breach of contract in certain cases punishable as a crime.

By section 3 of the Code of Criminal Procedure, 1882, it was declared that in every enactment passed before that Code came into force, the expression "Magistrate of Police" should be deemed to mean "Presidency Magistrate." By section 19 of that Code, and section 20 of Act V of 1898, a Presidency Magistrate exercises jurisdiction in all places within the presidency town for which he is appointed.

Now, it must always be presumed that the Legislature does not intend to make any alteration in the law beyond what it explicitly declares either in express terms or by implication, or in other words, beyond the immediate scope and object of the Statute. In all general matters beyond, the law remains undisturbed. It is in the highest degree improbable that the Legislature would overthrow fundamental principles, or depart from the general system of law, without expressing its intention with irresistible clearness.* Hence we must limit the term "a Magistrate of Police" or "Presidency Magistrate" to a Magistrate in the territorial limits of whose jurisdiction the employer resides or carries on business. For the right of the employer to lodge the complaint is conferred by the fact of his having his residence or place of business in a certain place; and the Magistrate has special jurisdiction because he is appointed for that place. There is nothing in the section which gives special jurisdiction to a Magistrate in the place where the advance was received or the contract was made, and both under the Common Law and under the Criminal Procedure Code, no Court, unless expressly authorised by Statute, can try any crimes other than those committed within the area of its jurisdiction. The offence created by the section could, under the ordinary law, be tried by any Court having jurisdiction in the place where it was committed, that is, where the work had to be carried out.

Under the Common Law of England, the exercise of criminal jurisdiction was limited to crimes committed within the limits of England and its ports and harbours. The punishment of offences is the special province of the Sovereign within whose territory they are committed, and this general principle is recognised in the Indian Penal Code (sections 1—3). It cannot be assumed that the Legislature intended to override this fundamental principle of English criminal procedure in the absence of any indication of such intention. I am of opinion, therefore, that the lower Court acted rightly in acquitting the accused.

The case of *Ali Mohamed* v. *Emperor* (1) merely decides that residence and carrying on business within the area to which the Act has been extended confers a right to lodge a complaint before the nearest Magistrate empowered in that area. The decision followed *Lal Mohan Chowbey* v. *Hari Charan Das Bairagi* (2). In that case, the defendant had entered into a contract with the complainant at Calcutta to do work in the North Western Provinces, and the question for decision was whether a Presidency Magistrate had jurisdiction in view of the fact that the breach had taken place outside his jurisdiction, and the decision was in the affirmative. The judgment reads as if the Court considered that jurisdiction was conferred by the fact that the contract had been made in Calcutta, but it may be inferred from the report that complainant had his place of business in Calcutta. The decision forms no authority whatever for contending that a Magistrate can deal with a breach of contract committed outside British India.

I would reject the application.

HAYWARD, A. J. C.—I concur. The jurisdiction is *prima facie* local. No authority has been advanced for extending the scope of the Workman's Breach of Contract Act beyond British India. Offences thereunder are not offences within the meaning of sections 4 (1) and 40, Indian Penal Code.

Application rejected.

*Maxwell, 3rd Edition, page 113.

VASUDEVA MUDALIAR v. VELAPPA NADAR.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 102 OF 1916.

September 3, 1917.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Phillips.

VASUDEVA MUDALIAR—DEFENDANT—APPELLANT

versus

M. A. VELAPPA NADAR—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), ss. 62, 63, 73—Contract—Novation—Debt, agreement for payment of, at new place—Cause of action—Jurisdiction—Civil Procedure Code (Act V of 1908), s. 21, applicability of—Interest Act (XXXII of 1839)—Money due on accounts—Interest, claim for, as damages, in absence of agreement, legality of.

Plaintiff and 2nd defendant were partners. First defendant received Rs. 2,500 as an advance from 2nd defendant, promising to supply cotton at Palladam within the jurisdiction of the Tirupur Munsif's Court. As the 1st defendant failed to supply the cotton or to return the advance plaintiff and 1st defendant looked into the accounts, and 1st defendant's liability was fixed at Rs. 2,000 and it was agreed that this liability should be discharged by the 1st defendant sending cotton to Virudupatti within the jurisdiction of the Satur Munsif's Court, to be sold by the plaintiff's man who should realize the Rs. 2,000 due by 1st defendant from the sale-proceeds. Plaintiff filed a suit in the Satur District Munsif's Court on 1st defendant's default and also claimed interest by way of damages:

Held, that interest could not be claimed as compensation under section 73 of the Contract Act. [p. 403, col. 2.]

Per *Sadasiva Aiyar, J.*—The new agreement to pay the amount due at Virudupatti was a novation of the original contract within the meaning of section 62 of the Contract Act and the Satur Munsif's Court had jurisdiction to try the suit. [p 402, col 1.]

Per *Phillips, J.*—The agreement was itself a new one and in supersession of the old one and was not a mere agreement to pay a debt at a place other than that mentioned in the original agreement and the cause of action, therefore, arose within the jurisdiction of the Court of the District Munsif of Satur. [p. 403, col. 2.]

Quære—Whether, even where the question is one affecting jurisdiction, failure of justice must be shown to justify the interference of an Appellate Court under section 21, Civil Procedure Code. [p. 403, col. 1.]

Per *Sadasiva Aiyar, J*—A new contract changing the place of performance falls under section 62 of the Contract Act and no independent consideration is necessary to validate the same. [p. 402, col. 2.]

Brassecdhur v. *Government of Bengal*, 14 M. I. A. 86; 9 B. L. R. 364; 2 Suth. P. C. J. 448; 2 Sar. P. C. J. 689; 20 E. R. 718, *Seshagiri Row* v. *Nawab Askar Jung Aftal Doulah Mushraf Mulk*, 30 M. 438; 17 M. L. J. 304, distinguished.

Per *Phillips, J.*—Where no interest is provided for in the agreement of parties and when it is not a case of damages for breach of contract, interest cannot be claimed as compensation under section 73 of the Contract Act. [p. 403, col. 2.]

Hamira Bibi v. *Zubaida Bibi*, 36 Ind. Cas. 87; (1916) 2 M. W. N. 551; 38 A. 581; 14 A. L. J. 1055; 21 C. W. N. 1; 18 Bom. L. R. 999; 31 M. L. J. 799; 20 M. L. T. 505; 4 L. W. 602; 1 P. L. W. 57; 25 C. L. J. 517 (P. C.), distinguished.

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Ramnad at Madura, in Appeal Suit No. 3 of 1915, preferred against the decree of the Court of the District Munsif, Satur, in Original Suit No. 618 of 1912.

Mr. *T. R. Venkatarama Sastry*, for the Appellant.

Mr. *T. M. Krishnasamy Aiyar*, for the Respondent.

JUDGMENT.

SADASIVA AIYAR, J.—The facts are shortly as follows. The 1st defendant obtained Rs. 2,500 at Palladam within the jurisdiction of the District Munsif's Court of Tirupur in the Coimbatore District (1st defendant also residing in that district) promising to supply cotton to the 2nd defendant at Palladam itself. The 2nd defendant had a partner (plaintiff) living at Virudupatti within the jurisdiction of the District Munsif's Court of Satur in the Ramnad District. The 2nd defendant's duty was to advance partnership moneys to customers and receive cotton at Palladam from the customers to whom advances had been made and to send on the cotton to Virudupatti. Towards the Rs. 2,500 advanced, the 1st defendant gave 6 *pothies* of cotton worth Rs. 525 at Palladam, but the 6 *pothies* were returned to him at Palladam itself as he himself promised to send it on direct to Virudupatti instead of 2nd defendant sending it on to Virudupatti.

This was on 10th October 1910. A sum of Rs. 1-15-6 besides this Rs. 2,500 seems also to have been due by 1st defendant to the plaintiff's firm.

The 1st defendant did not send the 6 *pothies* to Virudupatti nor did he supply cotton for the remaining Rs. 1,575. So he owed Rs. 2,501-15-6 on accounts to the partnership firm, out of which he paid to the 2nd defendant Rs. 501-15-6 sometime afterwards and owed a balance of Rs. 2,000 in April 1911.

The plaintiff and the 1st defendant met at Virudupatti on 14th April 1911, looked

into accounts and found Rs. 2,000 due by the 1st defendant to the firm of the plaintiff and the 2nd defendant. The 1st defendant then promised to pay the Rs. 2,000 to the plaintiff at Virudupatti through the 1st defendant's customer P. W. No. 2. The suit was brought in the Satur District Munsif's Court on this promise made on 14th April 1911 by the 1st defendant to pay at Virudupatti the Rs. 2,000. A preliminary question of jurisdiction was raised by Mr. Venkatarama Sastriar arguing for the 1st defendant (appellant). The argument was that, because the contract as first entered into was to supply cotton to the 2nd defendant at Palladam, the cause of action arose at Palladam within the jurisdiction of the District Munsif's Court of Tirupur in October 1910 and that therefore no new cause of action could arise at Viruduppati merely by reason of the subsequent promise made at Virudupatti to pay the sum of Rs. 2,000 due under the contract at Virudupatti and hence the Satur District Munsif's Court had no jurisdiction. Reliance is placed for this contention on *Bunseedhur* v. *Government of Bengal* (1) and *Seshagiri Row* v. *Nawab Askur Jung Aftal Dowlah Mushral Mulk* (2). The case of *Bunseedhur* v. *Government of Bengal* (1) was decided in 1871 before the Indian Contract Act came into force. As regards *Seshagiri Row* v. *Nawab Askur Jung Aftal Dowlah Mushral Mulk* (2), the Indian Government Act, section 62, has not been referred to in that case. The facts there were that according to the original contract payment was to be made by the defendant living in Hyderabad for work done at Hyderabad for the defendant by the plaintiff. The plaintiff alleged that after the work had been done, the defendant agreed to pay in Madras the remuneration due to the plaintiff. A great mass of witnesses whom the Court would have had to examine in that case were residents of Hyderabad and the balance of convenience was in favour of the suit being tried in Hyderabad. Moore, J., dismissed the application under Article 12 of the Letters Patent for leave to institute a suit in the Madras High Court Original Side on account of the above reasons of convenience. The learned Chief Justice and Miller, J., while upholding the order of Moore, J., on that ground also added the *dictum* that there was no consideration for the promise to pay in Madras, that there was, therefore, no new legal contract to pay at Madras in substitution of the original contract and hence no part of the cause of action arose within the jurisdiction. As I said, Contract Act, section 62, is not referred to in the judgment. That section says: "If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed." Of course this section is subject to the provision of the Indian Evidence Act (section 92) forbidding the admission of oral evidence to contradict or vary written agreements but where the original contract and the subsequent contract are both oral, I do not see that section 62 of the Contract Act requires any further consideration for the validity of the substituted contract than the putting an end to the obligation under the original contract. It has been held that under section 63 of the same Contract Act no consideration is necessary for extending the time for performance or for accepting any satisfaction by the promisee, though under the English Law the question of consideration comes in respect of the matters mentioned in section 63 of the Indian Contract Act (see Leake on Contract, pages 623 24). If there is a new oral contract to have the place of performance changed, I think, it falls under section 62 and no independent consideration is necessary to validate the same. I, therefore, respectfully dissent from the *dictum* in *Seshagiri Row* v. *Nawab Askur Jung Aftal Dowlah Mushral Mulk* (2), the decision in which can be supported on the other grounds mentioned in it. The English case of *Baird* v. *Bell* (3) is irrelevant, as we are governed by the Statute Law enacted in the Indian Contract Act. In the above view it is unnecessary for me to consider whether the new section 21 in the Civil Procedure Code of 1908 cures the defect of territorial juris-

(1) 14 M. I. A. 86; 9 B. L. R. 364; 2 Suth. P. C. J 448; 2 Sar. P. C. J. 689; 20 E. R. 718.
(2) 30 M. 438; 17 M. L. J. 304.

(3) (1898) A. C. 420 at p. 424.

diction assuming such a defect to exist. I might, however, shortly state that the argument of Mr. Venkatarama Sastriar that section 21 only applies to cases referred to in section 18, clause 2, is not acceptable to me as at present advised. Section 21 follows sections 16 to 20, of which sections 16, 17, 19 and 20 refer to territorial causes of action generally. There in also an observation in *Sethrucherla Rama Chhaddra* v. *Maharaja of Jeypore* (4) upholding my above view. Section 99 (corresponding to old section 578) uses the negative words, "that no decree shall be reversed on account of irregularities not affecting the jurisdiction of the Court," but this cannot, I think, override the plain language of section 21 that even when the question is one affecting the jurisdiction, failure of justice must be shown to justify the interference of an Appellate Court. However, as I said, it is unnecessary for me to express a final opinion on this point in this case.

The next question argued for the appellant was that the defendant was not afforded sufficient opportunity to adduce all his evidence in respect of the discharge by payment to the 2nd defendant, and though there is an affidavit in support of this contention, it is met by a counter-affidavit on the respondent's side. This contention is, therefore, also rejected. On the question of interest the case of *Hamira Bibi* v. *Zubaida Bibi* (5) quoted for the respondent was a case of dower-debt governed by Muhammadan Law and the equitable principles recognised in the Muhammadan Law were applied by the Privy Council on the question of awarding compensation in the shape of interest. I, therefore, agree with my learned brother that the claim for interest should be disallowed and that in other respects the appeal should be dismissed with costs.

PHILLIPS, J.—The agreement set out in the plaint has been found by the learned Subordinate Judge to be true and is as follows:—It was found that the 1st defendant owed the firm in which plaintiff and 2nd defendant were partners Rs. 1,976-15-6 and had also to supply 6 *pothies* of cotton. It was then agreed that 1st defendant's total liability should be Rs. 2,500. Plaintiff accepted 1st defendant's contention that he had paid Rs. 500 to 2nd defendant and it was then agreed that the 1st defendant should pay the balance of Rs. 2,000 by sending cotton to Virudupatti to be sold by plaintiff's 2nd witness, who should then pay plaintiff Rs. 2,000. It appears to me that this was a new agreement entered into between 1st defendant and plaintiff on behalf of his firm, and was in supersession of the old agreement between the parties, and was not a mere promise to pay a debt at a place other than that mentioned in the original agreement. In this view the decision in *Seshagiri Row* v. *Nawab Askur Jung Aftal Dowlah Mushral Mulk* (2) is inapplicable to this case, nor is it necessary to decide whether section 21, Civil Procedure Code, is applicable as the District Munsif had jurisdiction to try the suit. After considering the affidavits now filed, I do not think that any evidence was shut out by the District Munsif and consequently 1st defendant is not entitled to adduce further evidence.

On the question of interest, I do not think the Subordinate Judge is right. No interest can be claimed under the Interest Act and it was held in *Kamalammal* v. *Peeru Meera Levvai Rowthen* (6) that interest in such cases cannot be claimed by way of damages under section 73 of the Contract Act.

In *Hamira Bibi* v. *Zubaida Bibi* (5) interest was allowed by way of damages on equitable considerations in that case in which the circumstances were peculiar, and I do not think that the Judicial Committee intended to dissent from their prior decision in *Ganesh Bakhsh* v. *Harihar Bakhsh* (7) where it was held that the Interest Act applied, when it was not a case of damages for breach of contract. Following *Kamalammal*

(4) 34 Ind. Cas. 411; (1916) 1 M. W. N. 354; 19 M. L. T. 360.

(5) 36 Ind. Cas. 87; (1916) 2 M. W. N. 551; 38 A. 581; 14 A. L. J. 1055; 21 C. W. N. 1; 18 Bom. L. R. 999; 31 M. L. J. 799; 20 M. L. T. 505; 4 L. W. 602; 1 P. L. W. 57; 25 C. L. J. 517 (P. C.).

(6) 20 M. 481; 7 M. L. J. 263; 7 Ind. Dec. (N. S.) 341.

(7) 26 A. 299; 31 I. A. 116; 8 C. W. N. 521; 14 M. L. J. 190; 8 Sar. P. C. J. 628; 6 Bom. L. R. 505 (P. C.).

v. Peeru Meera Levvai Rowthen (6) I disallow the claim for interest till date of suit, but, in other respects, the appeal is dismissed with costs.

Appeal dismissed;
Decree varied.

M.C.P.

PATNA HIGH COURT.

APPEALS FROM APPELLATE ORDERS NOS. 316 AND 317 OF 1916.

May 22, 1916.

Present:—Mr. Justice Sharfuddin and Mr. Justice Reo.

Maharani JANKI KUER—APPELLANT

versus

Sri BANWAMALLE RAMANAUJEAR—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata in execution proceedings—Objection not taken at one stage, whether can be taken at later stage—Bengal Court of Wards Act (IX B. C. of 1879), s. 54—Notice, service of—Procedure.

An objection that a decree is barred by limitation cannot be taken in an execution proceeding if it was not taken in a previous execution proceeding when it could and should have been raised, provided the judgment-debtor had been properly served with notice of execution in the previous proceeding. The objection, for instance, would not be *res judicata* as against a judgment-debtor who was a Ward of Court and who was not properly served with notice of the previous proceeding as required by section 54 of the Bengal Court of Wards Act.

Section 54 of the Bengal Court of Wards Act requires that notices should be served upon the Manager of a Ward's estate through the Collector and any notice served otherwise is void.

Appeal from an order of the Subordinate Judge, Chapra, dated the 10th April 1915.

JUDGMENT.—In these two cases the Bettiah Raj and certain *ryots* of the Bettiah Raj are aggrieved by an order of the Subordinate Judge of Chapra enforcing against them two decrees, which are alleged to be barred by limitation. The decrees are said by the Court below to be enforceable for the reason that the order passed by the Court on the 30th June 1914 was an adjudication that the decrees were capable of execution. The objections now taken by the appellants were not then taken, and, therefore, the application of the law of limitation is *res judicata* inasmuch as the question should and could have been raised in the prior proceedings. On appeal from this decision a Divisional Bench of this Court remanded the case for findings as to whether certain parties were properly served with notices. It has been found by the lower Court that the notices on the tenants were properly served. It must, therefore, be held that the decision in the previous application for execution is binding upon them and they cannot now raise an objection that the decree is barred by limitation. But with regard to the appellant Maharani, it is clear that the decision of the former application was wrongly made against her. The Maharani is a ward. It must be shown that notice was served upon her in accordance with the provisions of section 54 of Act IX of 1879. The notice was served directly upon Mr. Laurie, the Assistant Manager of the Bettiah Raj, resident in Chapra. We required evidence to be taken as to what authority Mr. Laurie had to receive the notice direct instead of receiving it through the Collector. It has been found by the learned Subordinate Judge that Mr. Laurie had an implied authority to receive notices, the authority apparently being conveyed to him by a careless habit contracted by himself. We cannot substitute for a strict rule of law a careless habit. The law requires that notices be served upon the Manager of the Ward's estate through Collector and any notice served otherwise is void. There was no real service of notice in the previous application against judgment-debtor No. 1. Therefore the decisions in those prior proceedings are not *res judicata* against her. The proceedings are now obviously barred by limitation. The appeal by the appellant Maharani must be decreed and the application for execution of the decree against her refused as barred by limitation. We make no order as to costs in the appeal of the tenant-appellants. The appellant Maharani will receive the costs of this hearing in this Court and the Courts below. Hearing-fee in this Court four gold *mohurs*.

Appeal decreed.

THAKAR DAS *v.* SULTAN BAKHSH.

COURT OF THE FINANCIAL COMMISSIONER, PUNJAB.

REVENUE REIVSION No. 300 OF 1916-17.

February 23, 1918.

Present:—Mr. Maynard, F. C.

Chowdhri THAKAR DAS—

—APPLICANT

versus

SULTAN BAKHSH AND OTHERS—

RESPONDENTS.

Punjab Land Revenue Act (XVII of 1887), s. 111—Partition proceedings—Consent of joint owners—Mortgagee, consent of, necessity of.

A partition effected with the consent of the joint owners of the land is not invalidated by reason of the lack of consent of the mortgagee of an undivided share, and such a mortgagee has no claim to be made a party to the partition proceedings. [p. 406, col. 1.]

A mortgagee with possession of an undivided share in joint property has no right as such to intervene in partition proceedings, or to be a party to them, except when the property to be partitioned is a tenancy of which he is technically the landlord, that is to say, the person under whom the tenants hold land and to whom the tenants are, or would be but for a special contract, liable to pay rent. [p. 405, col. 2.]

A mortgagee of an undivided share in joint property, alleging injury to his interest by the collusive conduct of his mortgagor in partition proceedings, can claim his remedy by regular suit in the Civil Courts. A dispute of this character does not come within the functions of a Revenue Officer dealing with a partition under the Land Revenue Act. [p. 405, col. 2; p. 406 col. 1.]

Revision from the order of the Commissioner, Multan, dated the 19th June 1917.

Mr. *Mukand Lal Puri*, for the Petitioner.

Mr. *Durga Das*, for the Respondents.

JUDGMENT.—I have heard Counsel for both the parties. The partition as effected is admittedly not in accordance with the sanctioned mode of partition. On the other hand, it is admitted before me that the allegation in clause (*b*) of the third ground of revision is not in accordance with fact. The actual mode differs from the sanctioned mode in this, that lots were not cast for the portions assigned to each, but each co-sharer took such land as he agreed to take. The actual partition was in effect a partition authoritatively made in accordance with the consent of the co-sharers. The applicant objects that, as mortgagee, with possession of an undivided share, he was entitled to be treated as a party to the partition proceedings, and that those proceedings are irregular because he did not consent to the departure from the sanctioned mode.

A mortgagee with possession is a landowner within the meaning of the Land Revenue Act, (section 3 (2)). But the Act does not employ the expression "landowner" in determining who are the persons who have a right to apply for partition. The words of section 111 are: "Any joint owner of land, or any joint tenant of a tenancy in which a right of occupancy subsists." In the remainder of the Chapter on partition the expressions "owner," "joint owner", "co-sharer" are in various passages employed, and there is a provision that, on an application for the partition of a tenancy, the objection of the "landlord" (which includes a mortgagee with possession) may be a sufficient reason for absolute disallowance. The word "landowner" only occurs twice in the Chapter; once in section 125, which does not deal with partition but with periodical re-distribution of land in an estate which is subject to that custom; and once in section 110, where it is provided that a partition shall not in ordinary course affect the joint liability for the land revenue. There is every indication of the precise and careful use of language throughout the Chapter, and it does not appear to be the intention of the framers of the Act to recognise the claim of a mortgagee with possession, as such, to intervene in partition proceedings, or to be a party to them, except when the property to be partitioned is a tenancy of which he is technically the "landlord," that is to say, the person under whom the tenants hold land and to whom the tenants are, or would be but for a special contract, liable to pay rent.

In the present case it is alleged by the mortgagee that the mortgagors have colluded with the other co-sharers to injure him, and, with this object, have accepted as their share land having inferior advantages in respect to irrigation. It is not alleged that, by reason of this supposed collusion, the land which has fallen to the share of the mortgagors is of less value than the amount of the mortgage debt. But a mortgagee, alleging injury to his interest by the collusive proceedings of his mortgagor, can claim his remedy by

regular suit in the Civil Courts. A dispute of this character does not come within the functions of a Revenue Officer dealing with a partition under the Land Revenue Act.

The partition effected in this case with the consent of the joint owners of the land is not invalidated by reason of the lack of the mortgagee's consent and the mortgagee had no claim to be made a party to the partition proceedings.

Revision rejected. The applicant to pay the respondent's costs in these proceedings.

Revision rejected.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1788 TO 1799 OF 1916.

August 7, 1917.

Present:—Mr Justice Bakewell and Mr. Justice Phillips.

KARUPPA GOUNDAN AND OTHERS —PLAINTIFFS—APPELLANTS

versus

NARAYANA CHETTIAR—DEFENDANT—RESPONDENT.

Madras Estates Land Act (I of 1908), s. 26—Madras Rent Recovery Act (VIII of 1865), s. 11—Landlord and tenant—Faisal rate, presumption of, as proper rate of rent—Contract to receive lower rate by prior landholder, whether binds successor—Decision in favour of reduced rate in suit by previous landholder, whether res judicata *in suit for* faisal *rate by successor—Civil Procedure Code (Act V of 1908), s. 11.*

Though the provisions of section 11 of the repealed Madras Act VIII of 1865 are not re enacted in the Madras Estates Land Act there is a presumption that the *faisal* rate fixed by Government is the proper rent that can be levied on the land. [p 406, col. 2; p. 408, col. 1.]

A contract between a landholder and a tenant for payment of a favourable rate of rent will not, except in cases specified in section 26 (1) of the Madras Estates Land Act, bind the successor-in-title of the landholder who can enforce the *faisal* rate or the rate in force prior to such contract. [p. 407, col. 1.]

Per *Phillips, J.*—A decision of Court negativing a landholder's right to levy *faisal* rate and upholding a contract between him and his tenant for payment of reduced rent will not be *res judicata* in a suit by the landholder's successors to enforce the original rate, as under section 26 (3) of the Madras Estates Land Act, a special privilege is conferred on the successor to a landholder, not possessed by the original landholder himself, *i. e*, the right to enhance an unduly low rate of rent agreed to by the latter. [p 407, col. 2.]

Per *Bakewell, J.*—The prior decision will not operate as *res judicata*, unless it is shown that the plaintiffs in that suit had an absolute interest in the property, in order that they might be held to be the predecessors-in-title of the landholder seeking to enforce the original rate in the subsequent suit. [p. 408, col. 1.]

Second appeals against the decrees of the Court of the District Judge, Trichinopoly, in Appeal Suits Nos. 431 to 442 of 1915, preferred against decrees of the Court of the Deputy Collector of Namakkal Division, in Original Suits Nos. 5 to 16 of 1915.

Messrs. *A. Krishnaswami Aiyar* and *C. Narasimhachariar*, for the Appellants.

The Hon'ble *S. Srinivasa Aiyangar* (Advocate-General) and Mr. *Desikachariar*, for the Respondent.

JUDGMENT.

PHILLIPS, J.—This is a rent suit and the point for determination is the amount of rent payable by plaintiff to defendant. Prior to 1859 a *faisal* rate was fixed on the land by Government, but admittedly plaintiff has for many years, certainly for more than 35 and possibly for 40 years, been paying a lower rate called in the *muchilika* the *jamabandi* rate. In the *muchilika* the *faisal* rate is also mentioned and the road cess payable is calculated on it. It has not been proved that the *jamabandi* rate was in force prior to 1859 and consequently under section 11 of Act VIII of 1865 the proper rate payable on the land would be the *faisal* rate. This provision of the Rent Recovery Act (1865) is not reproduced in the Estates Land Act, 1908, and it is contended for the appellant-plaintiff that there is now no presumption that the *faisal* rate is the proper rate. Although there is no such presumption raised by the Statute, yet I think that the existence of a *faisal* rate is a very strong piece of evidence as to what the proper rate should be The *faisal* rate is fixed by Government as the fair rental of the land, and upon the *faisal* rates the *peshkush* and cesses are calculated and consequently the *faisal* rate should ordinarily be taken as the proper rent that can be levied on the land, and we see that in *Palani* v.

Paramasiva (1) it was held that a purchaser at a revenue sale was *prima facie* entitled to demand the *faisal* rate, although the tenants pleaded a contract with the former landholder at a lower rate. In the present case we find the *faisal* rate specifically mentioned in the *pattas* and *muchilikas*, and the road cess payable by the tenant is calculated upon it. Notwithstanding the omission from the Estates Land Act of the provision in section 11 of Act VIII of 1865, I would hold that the *faisal* rate is the proper rate of rent for the land. This being so, is defendant entitled to charge that rate in spite of the contract between plaintiff and defendant's predecessor to charge lower rate? Under section 26 (3) of the Estates Land Act "Except as provided by sub-section (1) no rate of rent at which land may have been granted by a landholder shall be binding upon the person entitled to the rent after the lifetime of the landholder if such rate is lower than the lawful rate payable by the *ryot* before the date of the grant upon the land or upon land of similar description and with similar advantages in the neighbourhood." Unless therefore the lower rate has been granted to the tenant for some reason specified in clause (1) of the section, the lower rate is not binding on defendant. Plaintiff has failed to show that the lower rate was granted for any of the reasons specified in clause (1) and even if any presumption could be drawn that such reasons existed when the rent was originally reduced, plaintiff has failed to show that such reasons still exist. I, therefore, hold that the lower rate is not binding on defendant.

In some of the appeals connected with this one, a question of *res judicata* arises. There were formerly two *mittadars* of the suit estate, one of whom died. The surviving *mittadar* and the heir of the deceased *mittadar* filed suits in 1889 claiming rent at the *faisal* rate and in Second Appeal No. 400 of 1891 this Court made the following order:—"The plaint does not allege that the *cowle* rates were terminated and that plaintiffs are now entitled under the original agreement to levy the *faisal* rates. The suit is not framed nor have issues been taken on any such cause of action. The plaintiffs simply claimed the *faisal* rates. The defendants answered that by contract presumable from uniform payment for 50 years they were entitled to pay other rates.

Both Courts have found that there is an implied contract to that effect.

The appeal fails and we dismiss it with costs."

From this it would appear that the then plaintiffs were not allowed to charge *faisal* rates, because a contract to pay lower rates had been found to exist by both the lower Courts. The question whether the then plaintiffs were entitled to enhance the existing favourable rate was not considered, because no such claim had been put forward in the plaint. The question is whether this decision as to the rate leviable is binding on the present defendant, and the answer depends upon whether the then plaintiffs were the predecessors in interest of the defendant. Undoubtedly, as *mittadars*, they were predecessors in interest of the present *mittadar*, but under section 26 (3) of the Estates Land Act, a special privilege is conferred on the successor to a landholder, not possessed by the original landholder himself, *i. e.*, the right to enhance an unduly low rate of rent agreed to by the latter. In respect of this right of enhancement, defendant's claim is peculiar to himself and it cannot be said that the prior *mittadars* are persons 'under whom defendant claims, litigating under the same title.'

It is further contended that the plaintiffs in the suit of 1889 were the successors-in-interest of the landholders who granted the lower rate, and consequently defendant is in the same position as they were. The answer to this is that one of the former plaintiffs was himself a party to the favourable grant, and consequently could not claim the benefit of any privilege conferred by section 26 (3). I would, therefore, hold that the question is not *res judicata*.

In view of the above I would dismiss the appeal with costs.

Second Appeals Nos. 1789 to 1799 follow.

(1) 13 M. 479; 4 Ind Dec. (N. S.) 1046.

MANINDRA CHANDRA NANDI v. SARABINDU RAY.

BAKEWELL, J.—I agree that the *faisal* rate must be presumed to be the proper rent and that the appellants have failed to rebut this presumption.

With regard to the question of *res judicata* I think that the appellant should have shown that the plaintiffs in the previous suit had an absolute interest in the property in order that they might be held to be the predecessors-in-title of the present defendant.

It is quite possible that those persons, the then landholders, had only a limited interest and that under section 26 (3) of the Madras Estates Land Act, a grant by them would not be binding upon the persons entitled to the rents after the lifetime of the landholder. In that case the present defendant would derive title from the successor of the landholders and would not be bound by the grant made by the latter. The appeal is, therefore, dismissed with costs.

Appeal dismissed.

M.C.P.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 701 OF 1916.

March 19, 1918.

Present:—Mr. Justice Richardson and Mr. Justice Walmsley.

HON'BLE SIR MAHARAJA MANINDRA CHANDRA NANDI BAHADUR—PLAINTIFF—APPELLANT

versus

Kumar SARABINDU RAY AND OTHERS—DEFENDANTS—RESPONDENTS.

Possession, suit for—Boundary dispute—Burden of proof—Appeal—Appellate Court dissatisfied with local enquiry—Procedure.

Where the defendant in a suit for recovery of possession of land, even where the question is a question of boundaries clearly shown, is found to have been in actual possession of the disputed area, the burden will be on the plaintiff to establish his title. [p. 409, col. 2.]

An Appellate Court is not bound in law to direct a fresh local investigation even where it is dissatisfied with the map and report of the Commissioner, appointed by the trial Court for a local enquiry. In such a case though it is open to the Appellate Court to send back the case for further enquiry, it does not commit any error of law if it decides the case on the evidence before it whether the decision thus arrived at is right or wrong (on questions of fact) is a question into which the High Court cannot enter in second appeal. [p. 409, col. 2.]

Appeal against the decree of the District Judge, Rajshahye, dated the 16th August 1915, reversing that of the Additional Subordinate Judge, Rajshahye, dated the 28th February 1914.

Sir *Rash Behary Ghose*, Babus *Ram Charan Mitter*, *Joges Chandra Dey* and *Hemendra Nath Sen*, for the Appellant.

Babus *Dwarka Nath Chackrabarty*, *Surendra Nath Das Gupta* and *Jatindra Mohan Chowdhury*, for the Respondents.

JUDGMENT.

RICHARDSON, J.—The plaintiff in [illegible] and C. is the appellant in this appeal. The [illegible]r (Advo- between the parties relates to the b[illegible]riar, for between two estates, that on th[illegible] belonging to the plaintiff and tha[illegible] the east belonging to the defendants. In the trial Court, the learned Subordinate Judge on a consideration of the evidence came to the conclusion that the bulk of the lands belonged to the plaintiff's estate. The Subordinate Judge made a decree in accordance with that finding. On appeal the learned District Judge took a different view and dismissed the suit.

The principal contention urged before us by Sir Rash Behary Ghose on behalf of the plaintiff, and the only contention with which we are called upon to deal, is that the learned District Judge erred in respect of the mode in which he dealt with the burden of proof. It appears that on behalf of the plaintiff the District Judge was referred to the principle laid down by the Privy Council in the case of *Lukhi Narain Jagadeb* v. *Jodu Nath Deo* (1). The principle, as it is stated by their Lordships, appears to be that in those cases where scientific accuracy in regard to boundaries cannot be attained and especially in cases where the disputed line of division runs between waste lands which have not been the subject of definite possession, the ordinary rule in a suit regarding the onus coming on the plaintiff has no applica-

(1) 21 C. 504; 21 I. A. 39; 6 Sar. P. C. J. 408; 10 Ind. Dec. (N. S.) 966 (P. C.).

tion. The parties to the suit are in the position of counter-claimants and it is the duty of the defendant, as much as of the plaintiff, to aid the Court in ascertaining the true boundary. Referring to that case the learned District Judge says that the principle is only laid down in respect of boundaries in large areas of waste lands, and that in the present case the plaintiff has to shoulder the ordinary burden of proving his case. It is not, in my opinion, necessary to consider for the present purpose what, if any, limitation should be placed upon the principle as their Lordships stated it, a principle which when the evidence as to possession is equally balanced or unreliable is of great utility in those parts of the country where expert surveyors are not easily obtainable, and where boundaries may depend on the identification by evidence of trijunction points and so forth. Even if the learned District Judge be wrong in supposing that the principle applies only in regard to large areas of waste lands, his conclusion, though it may rest on a wrong ground, nevertheless seems to be right. It is clear that he had before him on the record the fact that the defendants against whom the suit was brought had been in possession for some years under an order of the Criminal Court made in accordance with the provisions of section 145, Criminal Procedure Code. The learned Pleader for the defendants has gone so far as to argue, though the point was not apparently taken before the learned District Judge, that the present suit was brought beyond the period of limitation prescribed by Article 47 of the Schedule of the Limitation Act. Whether that is so or not may perhaps be doubtful and may depend on further questions of fact as to who were the parties who appeard or were represented in the proceedings before the Magistrate. That question not having been considered by the District Judge it would not be argued for us in second appeal to deal with it. It still remains, however, that the defendants were in possession under this order which was made in the year 1904, and they remained in possession till the date when the suit was brought in January 1910. Regard being had to the decision of the Privy Council in *Dinomoni Chowdhurani* v. *Brojo Mohini Chowdhurani* (2) it seems clear that the principle stated in *Lukhi Narain Jagadeb* v. *Jodu Nath Deo* (1) must yield to the circumstances of the present case and that the burden of proof was on the plaintiff to show that the person in possession under the order of the Magistrate had no right to possession. Dinomoni Chowdhurani's case suggests that when the defendant in a suit for recovery of possession of land, even where the question is a question of boundaries clearly shown, is found to have been in actual possession of the disputed area, the burden will in that case come on the plaintiff to establish his title. Though, therefore, the learned District Judge may have given a wrong reason for his view that the burden of proof was on the plaintiff, that view seems to be correct in the circumstances of the present case. If the burden of proof is on the plaintiff, no ground exists in second appeal for disturbing the findings of fact at which the learned District Judge has arrived. He was entitled to deal with the report of the Amin appointed to make a local investigation. He was entitled to come to a conclusion on the evidence that the map prepared by the Amin did not represent the true boundary.

A complaint is made that if the District Judge was dissatisfied with the map and report of the Amin, he did not, as it is said he should have done, direct a fresh investigation. As to that, in the first place, it was not compulsory on the learned Judge to direct a fresh investigation and in the words used by the Privy Council in *Jagadindra Nath Roy* v. *Secretary of State* (3), while it was no doubt open to the District Judge to take that course of sending back the case for further enquiry, he committed no error of law in deciding, as he did, on the evidence before him Whether he was right or wrong in the decision to which he came is not a question into which we can enter in second appeal. Moreover, from an observation to be found in the District Judge's judgment it appears that the plaintiff had an opportunity for further

(2) 29 C. 187; 29 I. A. 24; 6 C. W. N. 386; 12 M. L. J. 83; 4 Bom. L. R. 167; 8 Sar. P. C. J. 224 (P. C.).

(3) 30 I. A. 44 at p. 54; 30 C. 291; 7 C. W. N. 193; 5 Bom. L. R. 1; 8 Sar. P. C. J. 412 (P. C.).

enquiry but he did not take advantage of it. The learned Judge says that the appellants before him, *i. e.*, the defendants, were perfectly willing to abide by the revenue survey line if it were relaid by a competent surveyor but the respondent, that is, the plaintiff, would not accept this offer.

In the circumstances, in my opinion, this appeal fails and should be dismissed with costs.

WALMSLEY, J.—I agree.

Appeal dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION APPLICATION No. 38 OF 1915.

November 22, 1917.

Present:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

MESSRS. MOOSAJI AHMED & CO.—APPLICANTS

versus

THE KARACHI PORT TRUST—OPPONENTS.

Karachi Port Trust Act (Bom. Act VI of 1886), ss. 87, 88—Board of Trustees for Karachi Port, suits against—Limitation.

The word 'person' in section 87 of the Karachi Port Trust Act technically includes and was intended to include the Board. [p. 410, col. 2.]

Sections 87 and 88 of the Karachi Port Trust Act do not distinguish suits against private individuals from suits against the Board, but section 87 deals with the limitation of suits against the Board or any servant or officer of the Board, while section 88 defines the responsibility of the Board for acts of their officers and servants. [p. 410, col. 2.]

Mr. *C. M. Lobo*, for the Applicants.

Mr. *T. G. Elphinston*, for the Opponents.

JUDGMENT.—This is an application under section 25 of the Provincial Small Causes Court Acts.

In December 1912, a large consignment of molasses arrived in Karachi for the applicant, and, on being landed, were deposited in the Import Yard. He commenced to take delivery on the 7th January, but a very large number of the 10,000 odd baskets continued to remain in the Port Trust sheds for a considerable time after the expiration of the five free days allowed. Demurrage, at the ordinary rate, was demanded by the officers of the Trust and on the 13th January applicant paid Rs. 500 on protest. In response to his application for a return of the money the Secretary replied on the 8th March 1913 that he was not prepared to recommend a return of the money, and suggested an appeal to the Chairman. On the 9th May the Chairman wrote refusing to interfere, and mentioned that applicant might refer his grievance to the Board. On the 20th June 1913, the Board affirmed the decision of the Secretary and Chairman. On the 10th September 1913, applicant filed a suit in the Court of Small Causes claiming Rs. 500 and interest.

The only question dealt with in the judgment was, whether the suit was not time-barred under section 87 of the Karachi Port Trust Act. The Court held for reasons orally given that it was time-barred, and dismissed the suit.

Mr. Lobo contends that the word "person" in section 87 does not include the Board, and that the suit is not one for anything done or purporting to have been done in pursuance of the Karachi Port Trust Act, 1886. He suggests that section 88 deals with suits against the Board, and section 87 with those against individuals acting within the scope of the Act, and that the brief period of limitation prescribed by section 87 confers no special privilege on the Board.

Sections 87 and 88 were taken from section 87 of the Bombay Port Trust Act, 1879, the second paragraph of section 87 and the last one of section 88 being new. By section 3(3) of Bombay Act, III of 1886, which was in force when the Karachi Port Trust Act, VI of 1886, was passed, "person" is declared to include "a company or association or body of individuals whether incorporated or not," and there can be no doubt that "person" in section 87 technically includes, and was intended to include, the Board. Sections 87 and 88 do not distinguish suits against private individuals from suits against the Board, but section 87 deals with the limitation of suits against the Board or any servant or officer of the Board, and section 88 defines the responsibility of the Board for acts of their officers and servants. The same

question was dealt with in the case of *Prag Narain* v. *Karachi Port Trust* (1) by Leggatt, A. J. C., and again by myself in *Ralli Bros.* v. *The Asiatic Steam Navigation Company* (2), and in each case it was held that section 87 had application to suits against the Board. No instance has been brought to our notice of the contrary view having been expressed.

The cause of action, if any, arose when the applicant paid the Rs. 500 under threat of having his goods detained. If the officers of the Board refused to deliver the goods without payment of the demurrage incurred, with the *bona fide* intention of acting in the performance of duties imposed by the Act, they would be entitled to the protection of section 87. It has not been suggested that they acted under improper motives or outside the scope of their duties.

Mr. Lobo has argued that the cause of action should be taken to have arisen in June 1913 when the Board refused to return the Rs. 500, but the refusal to return the money constituted no cause of action unless there was an agreement, express or implied, to return it, and such agreement is not alleged.

I would hold that the six months' limit applies and dismiss the application with costs.

Application dismissed with costs.

Application dismissed.

(1) 10 Ind. Cas. 972; 4 S. L. R. 236.
(2) Suit No. 412 of 1916.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

February 7, 1918.

Present:—Lord Buckmaster, Mr. Ameer Ali and Sir Walter Phillimore, Bart.

DEBENDRA NATH DAS—DEFENDANT—APPELLANT

versus

BIBUDHENDRA MANSINGH BHRAMARBAR ROY (MINOR)—PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), s. 5—Tenure-holder or raiyat, test of—Area exceeding 100 bighas—Presumption that tenant is tenure-holder—Purpose for which lease is granted—Cultivation by sub-lessee.

Fixity of rent is no criterion for determination of the question whether a person is a tenure-holder or a *raiyat*, for a tenure may be held at a fixed rent equally with a *raiyati* holding. [p. 413, col 1.]

In determining the status of a tenant, *viz.* whether he is a tenure-holder or a *raiyat*, two elements have to be borne in mind, *first*, the purpose for which the land was acquired, and, *secondly*, the extent of the tenure or holding [p 413, col. 1.]

Defendant was assignee of a lease of over 100 *bighas* of land granted by plaintiff's predecessor for cultivation, without any restriction as to the agency to be employed in such cultivation:

Held, that under the circumstances of the case the presumption arising under sub-section (5) of section 5 of the Bengal Tenancy Act that the tenant was a tenure-holder and not a *raiyat*, since the area exceeded 100 *bighas*, was not rebutted by proof of the purpose for which the right of tenancy was originally acquired [p 413, col. 2.]

Appeal from a decree of the Calcutta High Court (Sir Lawrence Jenkins, C. J., and Asutosh Mookerjee, J.), dated July 11, 1913, reported as 27 Ind. Cas. 432, reversing a decree of Richardson, J.

FACTS are sufficiently stated in their Lordships' judgment. The sole question involved was whether the defendant-appellant was a "tenureholder" or a "raiyat" within the terms of the Bengal Tenancy Act (VIII of 1885). Richardson, J., held he was a Raiyat: the Letters Patent Bench of the High Court, that he was a tenure holder. Hence this appeal.

Mr. *De Gruyther*, *K. C.* (with him Sir *W. Garth*), for the Appellant.—Act VIII of 1885 has a classification into tenure-holders, under-tenure-holders and Raiyats. The purpose for which the land was originally granted is the most important of all tests in determining whether a person is a Raiyat.

Durga Prosunno Ghose v. *Kalidas Dut* (1).

That case was before Act VIII of 1885, but it was followed in *Laidley* v. *Gour Gobind Sarkar* (2).

The primary purpose here was cultivation by hired labour. It is unlikely the tenant meant to become a tenure-holder, because if he were that, any person he put in would be a Raiyat and would have the rights of a Raiyat.

The presumption under section 5, sub-section 5, that a tenant of over 100 standard

(1) 9 C. L. R. 449.
(2) 11 C. 501; 5 Ind. Dec. (N. S.) 1093.

bighas is a tenure-holder prevailed in *Gokul Mandar* v. *Pudmanund Singh* (3), only because there was no evidence in that case that the purpose was to acquire Raiyat tenure.

This suit purports to be brought under section 106 of the Act. The Record of Rights was prepared under sections 101, 102 and 105 and it was decided after due notice to respondent that appellant was a settled Raiyat at a fixed rent. In the draft record he was shown as a tenure-holder, but he lodged an objection, which was decided in his favour. This suit has been brought only after final publication of the Record: it was then no longer maintainable. Section 106 only provides for disputes arising before final publication.

[LORD BUCKMASTER.—That point was not taken in the Court below. It is undesirable the Board should entertain it.]

It does not follow that because a point has not been taken below it cannot be raised here.

[Their Lordships intimated that the present contention not being raised by appellant's case was not open.]

Sir *Erle Richards*, *K. C.*, and Mr. *O'Gorman*, for the Respondents, were not called on.

JUDGMENT.

MR. AMEER ALI.—The sole question involved in this appeal is whether the defendant-appellant is a "tenure-holder" or *raiyat* as defined in the Bengal Tenancy Act (VIII of 1885).

The defendant holds over 250 acres of land in the village of Goyalbank, forming part of the plaintiff's Zemindari in the district of Cuttack, under a lease granted by the predecessor of the plaintiff in 1901 to one Gokulananda Chowdhury. In 1907 Gokulananda assigned the lease to the defendant.

The land covered by the lease became about the same time the subject of "Record of Rights" proceedings instituted by Government under Chapter X of the Act.

These proceedings are taken by the Revenue Authorities before special officers for the ascertainment and record of all rights connected with the land within the ambit of the enquiry. At the initial stage of the proceedings the defendant was entered as a "tenure-holder," but subsequently on his objection the Assistant Settlement Officer recorded him as "a settled *raiyat* at a fixed rent."

The present suit has been brought under the provisions of section 106 on behalf of the Zemindar for rectification of the entry by recording the defendant as a "tenure-holder." The suit was first heard by the Settlement Officer, who upheld the plaintiff's contention as to the status of the defendant, and his decision was confirmed on appeal by the Special Judge of Cuttack. The defendant then preferred a second appeal to the High Court of Calcutta, which came for hearing before Richardson, J. The defendant renewed before that learned Judge his contention that under the terms of his lease he was entitled to be classed as a *raiyat*. Richardson, J., accepted his contention and reversed the order of the Special Judge, the effect of which was that the entry in the Record of Rights remained as made by the Assistant Settlement Officer.

An appeal was thereupon preferred by the respondent under section 15 of the Letters Patent, which came on for hearing before two Judges of the High Court, Jenkins, C. J., and Mookerjee, J., who, differeing from Richardson, J., held, in concurrence with the Settlement Officer and the Special Judge, that the defendant was a tenure-holder. They accordingly reversed the order of that learned Judge, and restored the decree of the lower Courts for the rectification of the entry in the Record of Rights.

The present appeal to His Majesty in Council, which forms the sixth stage of this litigation, is an indication not merely of the persistency of the defendant, but also of the valuable rights that are attached to his claim, for, if he be a tenure-holder, persons holding under him would have the status of *raiyats* and would be entitled to acquire, after a certain eflux of time, the right of occupancy under the Act. Whereas, if he be a *raiyat*, those persons would only be *under-raiyats*, without the privileges or security afforded by the Act to *raiyats*.

For the purposes of the Tenancy Act, tenants are classed under three heads, *viz.*,

(3) 29 I. A. 196; 29 C. 707; 6 C. W. N. 825; 4 Bom. L. R. 793; 8 Sar. P. C. J. 323 (P. C.).

tenure-holders, *raiyats* and *under-raiyats*, that is to say, tenants holding, whether mediately or immediately, under *raiyats*. *Raiyats*, again, are divided into three sub-classes, *i. e.*, (*a*) *raiyats* holding at fixed rates, (*b*) occupancy *raiyats*, and (*c*) non-occupancy *raiyats*. The defendant has been entered as a settled *raiyat* at a fixed rent, evidently on the ground that under the lease the rent payable by him is permanently fixed. But it is to be observed that fixity of rent is no criterion for the determination of the point at issue, for a tenure may be held at a fixed rent equally with a *raiyati* holding. The question must, therefore, be decided on other considerations.

Sub-section (1) of section 5 defines a tenure-holder to mean:—

"Primarily a person who has acquired from a proprietor or from another tenure-holder a right to hold land for the purpose of collecting rents or bringing it under cultivation by establishing tenants on it, and includes also the successors-in-interest of persons who have acquired such a right."

And a *raiyat* is defined to mean:—

"Primarily a person who has acquired a right to hold land for the purpose of cultivating it by himself, or by members of his family or by hired servants, or with the aid of partners, and includes also the successors-in-interest of persons who have acquired such a right."

Sub-section (4) provides certain rules for determining whether a tenant is a "tenure-holder" or "*raiyat*." Clause (*b*) is important: it says: "The Court shall have regard to the purpose for which the right of tenancy was originally acquired." Sub-section (5) is equally important. It provides that where the area held by a tenant exceeds 100 standard *bighas* (a little over 33 acres) "the tenant shall be presumed to be a tenure-holder until the contrary is proved." In determining the status, therefore, of a tenant, *viz.*, whether he is a tenure-holder or a *raiyat*, two elements have to be borne in mind, *firstly*, the purpose for which the land was acquired, and, *secondly*, the extent of the tenure or holding. A close examination of the definition clauses makes it quite obvious that both these elements are closely interrelated. The law assumes the *raiyat* to be the actual cultivator of the soil, either by his own labour or the labour of members of his family or by hired labourers and it assumes also that ordinarily a larger area than 100 *bighas* would make cultivation by the personal agency of the tenant improbable. The presumption provided in sub-section (5) of section 5 is founded on that hypothesis.

In the present case, the land held by the defendant amounts to more than 250 acres; the statutory presumption certainly applies to him. He seeks to rebut it by referring to the purpose for which the lease was granted. The terms of the document have been carefully examined by the Settlement Officer, the Special Judge, and the High Court. Their Lordships will, therefore, confine their remarks to its general features. It is an ordinary reclamation lease; it leases the land permanently to the lessee at a fixed rent to cultivate the same, after making it fit for cultivation at his own expense and by his own efforts. In other words, he is to reclaim the land at his own expense and bring it under cultivation. The sixth clause makes this quite clear. It says:—

"You shall, by reserving water and raising *bandhs* (on the land leased), make it fit for cultivation according to your will, and shall hold the same by cultivating it or having it cultivated, and you shall be competent to make such other arrangement or adopt such other convenient steps as you consider necessary for cultivating the same."

The employment of the agency for the cultivation is left entirely to the option of the lessee; the land was leased for cultivation, that is, for agricultural purposes, but the agency to be employed is to be determined by the lessee; he has the power to establish *raiyats* or under-lease it to others or cultivate it himself, if he can. It cannot be said that the purpose is, primarily or otherwise, that the demised land should be cultivated by his personal agency. At the best, the lease may be said to be equivocal. In their Lordships' opinion, the High Court and the lower Courts were perfectly right to look to the attendant circumstances to judge of the purpose for which the lease

was acquired and to determine the status of the defendant. Apart from the facts appearing in the lease to which the learned Judges of the High Court have referred as indicating that the land was being taken for purposes other than that of personal and direct cultivation as a *raiyat*, there is the outstanding circumstance that the land was leased to a man of means, who appears to be a resident of another place, for the purpose of reclamation and rendering fit for cultivation, the agency to be employed for carrying on the cultivation being left to his discretion.

Their Lordships think that the presumption under section 103B, on which the defendant relies, that an entry in a Record of Rights finally published "shall be presumed to be correct until it is proved by evidence to be incorrect," is fully rebutted by the circumstances to which the Courts in India have referred in arriving at the conclusion that the defendant was a tenure-holder and not a *raiyat*.

Their Lordships are of opinion that this appeal should be dismissed with costs and that they will humbly advise His Majesty accordingly.

Appeal dismissed.

Solicitor for the Appellant Mr. *E. Delgado.*

Solicitor for the Respondent: The Solicitor, India Office.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 113 OF 1917.

November 15, 1917.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Bakewell.

A. BHARADWAJA MUDALIAR—DEFENDANT No. 1—APPELLANT

versus

ARUNACHALLA GURUKKAL AND OTHERS—PLAINTIFFS AND DEFENDANTS Nos. 2 TO 4—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 36, 62 102—'*Wages*', *meaning of*—Archaka *of temple, claim by, for salary and perquisites*—*Limitation*—*Jurisdiction of Small Cause Court*—*Provincial Small Causes Courts Act (IX of* 1887), *Art.* 13.

A suit to recover an amount alleged to be due to a hereditary *archaka* of a temple as the dues of his office falls under Article 13 of the Schedule to the Provincial Small Causes Courts Act [p. 415, col. 2.]

Subraya Acharya v. *Kesava Upadhya*, 31 Ind. Cas. 266; (1915) M. W. N. 845, followed.

If any portion of a claim is not cognizable by a Small Cause Court, the whole claim should be brought in the regular Court [p. 415, col. 2.]

Mulambath Kunhammad v. *Acharath Parakal*, 38 Ind. Cas. 373; 31 M. L. J. 827 at p. 829; 5 L. W. 472, followed.

The term 'wages' in Article 102 of the Limitation Act is a very general term: although it is usually used in connection with daily wages, it also includes the wages paid as monthly salary [p. 415, col. 2.]

A claim, therefore, for the salary and perquisites of office by the *archaka* of a temple, whose position is essentially that of a servant under the temple trustee, is governed by Article 102 of the Limitation Act. [p. 416, col. 1.]

If the perquisites are received from third persons, they are not wages and if the claim is for their recovery from the trustee as in tort, Article 36 and not Article 102 will apply. [p. 416, col. 1.]

Appeal against the order of the Court of the Subordinate Judge, North Arcot, in Appeal Suit No. 100 of 1916, preferred against the decree of the Court of the District Munsif, Tiruvannamalai, in Original Suit No. 616 of 1915.

Messrs. *T. Narasimha Aiyangar* and *N. S. Rangaswami Aiyangar*, for the Appellant.

Mr. *K. Bashyan Iyengar*, for the Respondents.

JUDGMENT.

SADASIVA AIYAR, J.—The 1st defendant is the appellant. The appeal is against the order of remand passed by the Appellate Court which held that the plaintiff's suit was not wholly barred by limitation, the Court of first instance having held otherwise and dismissed the suit.

The material allegations in the plaint are as follows:—

(*a*) The two plaintiffs (father and son) are the hereditary Archakas of the famous temple at Tiruvannamalai. The 1st defendant-appellant before us is the trustee of the temple. The 3rd defendant is the temple Peishkar. The 1st defendant in June 1912 suspended the plaintiffs from office. The 3rd defendant intimated this fact to the plaintiffs on 19th June 1912 and the suspension of the plaintiffs lasted till 3rd July 1912.

(*b*) The plaintiffs contend that the suspension order was illegal and unjust and that the 3rd defendant maliciously made misrepresentations to the 1st defendant and made the 1st defendant pass such an unjust order.

(*c*) The 4th defendant discharged the duties of the office during the 14 days during which the plaintiffs remained under suspension.

The plaint concluded for the following reliefs:—

(1) Pay for the days of suspension, Rs. 4-14 4. (2) The value of perquisites from other sources during such period, Rs. 25. (3) Damages for mental distress, loss of dignity, etc., Rs. 50. Total Rs. 79-14-4.

The District Munsif dismissed the suit, applying Article 36 of the Limitation Act which allows two years for a suit for compensation for any malfeasence, misfeasance or non-feasance independent of contract and not specially provided for. The suit was brought on 28th June 1915, the cause of action having risen on 19th June 1912, more than 2 years before the suit was brought. The plaint was filed on the day on which the Tiruvannamalai District Munsif's Court opened after the summer vacation and if the limitation period of three years under Article 62 or Article 102 applied, the claim for at least Rs. 4-14-4 (the pay) was not barred. If Article 120 applied (which provides 6 years) to the claim for pay, then also the Distsict Munsif was not justified in dismissing the whole claim as barred.

The Subordinate Judge, in appeal, held that Article 120 applied so far as the claim for the pay (Rs. 4-14-4) and the perquisites (Rs. 25) against the defendants Nos. 1 to 3 was concerned. As regards the claim against the 4th defendant (the *locum tenens* during the plaintiffs' suspension) the Subordinate Judge was inclined to apply Article 62 (and only in the alternative Article 120), the 4th defendant having "constructively received" the 'money' made up of the pay and the perquisites "for the plaintiff's use." So far as the claim for Rs. 50 was concerned, that is, the compensation for mental distress, loss of dignity, etc., he held that Article 36 applied and concurred with the District Munsif in dismissing that portion of the claim as barred. He then remanded the suit for disposal in respect of the claim for Rs. 29-14-4. The contention for the defendant, the only appellant before us, on appeal is that the whole claim including the claim for salary and perquisities is a claim for damages for tort and not for a breach of contract, and hence Article 36 alone applied and a suit even for this portion of the claim was barred by limitation.

A preliminary objection was taken by the respondents to the appeal on the ground that the suit was of a Small Cause nature and of the value of less than Rs. 500. We overruled it, following the decision of Srinivasa Aiyangar, J., in *Subraya Acharya* v. *Kesava Upadhya* (1), where the learned Judge held that a suit to recover an amount alleged to be due to a hereditary Archaka as the dues of his office falls under Article 13 of the Schedule to the Provincial Small Causes Courts Act. If any portion of a claim is not cognizable by a Small Cause Court, the whole claim ought to be brought in the regular Court. See *Mulambath Kunhammad* v. *Acharath Parakat* (2).

I shall now consider the question of limitation. The suit in the case reported as *Subbier* v. *Ranga Aiyangar* (3) was brought by a hereditary Stanikam office-holder against the Dharmakartha for the recovery of emoluments wrongly withheld between the date when the plaintiff brought a former suit for the recovery of the office against the trustee and the date when he recovered possession of the office in execution of the decree in that suit. The relevant portion of the judgment is very short and is as follows:—

"We are unable to agree with the contention that Article 36 of the Limitation Act applies. The case is not specifically provided for, and in our opinion comes under Article 102."

I think that neither Article 36 nor Article 102, which are very generally worded Articles, should be applied if any other more specifically worded Article applies to a case. Article 102 applies to suits for "wages not otherwise expressly provided for in this Schedule." 'Wages' is a very general term; though it is usually used in connection with daily wages, it also includes the wages paid as monthly salary. [See *Kalichurn Mitter* v. *Mahomad Soleem* (4)]. Article 4 which prescribes a

(1) 31 Ind. Cas. 206; (1915) M. W. N. 846.
(2) 28 Ind. Cas. 373; 31 M. L. J. 827 at p. 829; 5 L. W. 472.
(3) 9 M. L. J. 163.
(4) 6 W. R. 33 (Civ. Ref.)

period of limitation of 6 months applies to wages accruing due under the Employers and Workmen Act; Article 7 prescribing one year applies to wages of household servants, artisans or labourers not provided for by Article 4; Article 101 for a seaman's wages and prescribes a limitation period of three years. The plaintiff's claim in this case does not fall under any of the three Articles. It, therefore, clearly falls under Article 102. The plaintiff is the servant of the temple paid in monthly wages, though a hereditary servant. In *Seshadri Aiyangar* v. *Ranga Bhattar* (5) Benson and Sundara Aiyar, JJ., say at page 633 *: "The position of an Archaka, though he may have a hereditary tenure in the office, is, in our opinion, essentially that of a servant. The trustee is the representative of the temple and the Archaka must be subject to his disciplinary authority." So far, therefore, as the claim for the pay Rs. 4 14-4 due to plaintiff is concerned, I think that Article 102 applies and the suit is, therefore, not barred by limitation. As regards the perquisites (Rs. 25), if they are payable by the temple they are part of the wages (that is, remuneration for work done and payable by a master to his servant) and the claim for them as against the defendants Nos. 1 and 2, trustees, also falls under Article 102. If the perquisites are received from third persons, they are not wages, Article 102 will, therefore, not apply and the plaintiff's claim *as against the defendants Nos.* 1 *and* 2 will be in tort and Article 36 might apply.

As regards the 3rd defendant (the temple *peishkar*) there is either no cause of action against him or the claim against him falls under Article 36 and it is, therefore, barred.

As regards the 4th defendant if Article 62 applies, that is, if it could be held that he received the plaintiff's salary and perquisites for the plaintiff's use [see *Sankunni Menon* v. *Govinda Menon* (6)], the claim against him for such salary and perquisites is not barred. I shall not finally decide just now whether, in law, it could be so held.

(5) 10 Ind. Cas. 548; 35 M. 631; 21 M. L. J. 580; 10 M. L. T. 14.

(6) 14 Ind. Cas. 254; 11 M. L. T. 325; (1912) M. W. N. 516; 22 M. L. J. 485; 37 M. 381.

* Page of 35 M.—*Ed.*

In the result, I would modify the order of remand by confining it to the plaintiff's claims against the defendants Nos. 1, 2 and 3 alone. The appeal has substantially failed against the contesting respondents. The 1st defendant (appellant) will, therefore, pay the plaintiffs (contesting respondents) costs in this appeal.

BAKEWELL, J.—I agree.

Order modified.

M. C. P.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1175 OF 1917.

April 3, 1918.

Present:—Mr. Justice Teunon and Mr. Justice Newbould.

BRAJENDRA KUMAR ROY CHOWDHURY AND OTHERS—APPELLANTS

versus

SARAJENDRA NATH SAHA AND OTHERS—RESPONDENTS.

Res judicata—*Landlord and tenant*—Ex parte *decree as to rate of rent, whether* res judicata *on question of rate of rent annually payable.*

An *ex parte* decree in a rent suit, allowing the plaintiff's claim at the rate of rent alleged in the plaint, does not operate so as to render the question of the rate of rent annually payable *res judicata* unless there was a prayer in the plaint for a declaration as to the rate of rent as part of the substantive relief claimed. [p. 417, col. 1.]

Appeal against the decree of the Subordinate Judge, Dacca, dated the 23rd of February 1917, modifying that of the Munsif, Dacca dated the 31st July 1916.

Babu *D. N. Chakerbutty*, and Babu *Suresh Chandra Tulukdar* for Babu *Rajendra Chandar Guha*, for the Appellants

Babu *Sib Chander Palit*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for arrears of rent of a certain Sikmi Taluk. The plaintiffs who are the respondents before us claimed rent at the rate of Rs. 13-14-11½ *gandas*, while the defendants-appellants contended that the rent annually payable is Rs. 4-0-3¾ *gandas*.

Both Courts have found that the true rent is Rs. 4-0-3¾ *gandas*, but differing from the Court of first instance the learned Subordinate Judge has held that the decision in a previous rent suit between the

parties operate as *res judicata* and has, therefore, decreed the claim of the plaintiffs-landlords in full.

The previous rent suit was for the arrears of the years 1312—1314 and of the first 3 *kists* of the year 1315. In the plaint and also in the account annexed to the plaint the rate of rent was alleged to be Rs. 13-14-11½ *gandas* and on this footing a sum of Rs. 52-2-13-2-2 was claimed as the rent due. The defendants, who were recent purchasers of the Sikmi, filed a written statement but subsequently failed to appear, with the result that the claim was decreed in full *ex parte*. In the written statement filed the defendants denied liability but did not take any explicit objection to the rate of rent alleged. It further appears that after decree the decretal amount was realised in execution proceedings from the judgment-debtors.

The question for our determination in this appeal then is, whether in the circumstances we have set out the previous decree operates so as to render the question of the rate of rent annually payable *res judicata* between the parties.

On this question many decisions of this Court have been cited, and we are not prepared to say that they can all readily be reconciled. But for the purposes of our decision it is sufficient to say that we are unable to draw any distinction of substance between the present case and the case of *Madhusuden Shaha Mundul* v. *Brae* (1), decided by the Full Court on the 27th of February 1889 and reported as *Madhusudan Shaha Mundul* v. *Brae* (1). There, as here, there was in the plaint a statement of the alleged rate of rent, but there, as here, there was no prayer for a declaration as to the rate of rent as part of the substantive relief claimed.

We, therefore, hold that the prior *ex parte* decree does not operate as *res judicata*, and on this view we set aside the decree of the Subordinate Judge and restore the decree of the Munsif. This appeal is accordingly decreed with costs both in this Court and in the Court of first appeal.

Appeal decreed.

(1) 16 C. 300 (F. B.); 8 Ind. Dec. (N. S.) 197.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1274 OF 1916.

November 23, 1917.

Present:—Justice Sir William Ayling, KT., and Mr. Justice Phillips.

N. VENKATACHARI—PLAINTIFF—APPELLANT

versus

RAMALINGA TEVAN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 74—Lease—Deposit—Forfeiture of deposit in event of breach—Interest, claim for, at 24 per cent. per annum from date of suit—Penalty.

Under a rental agreement executed by the defendant to the plaintiff the latter deposited 6 months' rent as advance, stipulating for its forfeiture in case of breach by him of the terms of the lease. In a suit for rent due and for a declaration that the deposit had been forfeited in accordance with the defendant's undertaking under the lease and for interest at 24 per cent. per annum from date of suit:

Held (1) that section 74 of the Contract Act was not applicable to the forfeiture of deposit and that the clause for forfeiture was not a penalty; [p. 418, col. 1.]

(2) that the claim for interest at 24 per cent. per annum from date of suit was penal and should be disallowed. [p. 418, col. 1.]

In determining whether the amount stipulated to be forfeited is in the nature of a penalty, the Court must be guided by the reasonableness or unreasonableness of the amount. [p. 418, col. 1.]

Second appeal against the decree of the Court of the Subordinate Judge, Coimbatore, in Appeal Suit No. 29 of 1916 (Appeal Suit No. 8 of 1916, on the file of the District Court, Coimbatore), preferred against the decree of the Court of the Additional District Munsif, Coimbatore, in Original Suit No. 287 of 1915 (Original Suit No. 31 of 1915, on the file of the Court of the District Munsif, Coimbatore).

Messrs. *T. Narasimha Aiyangar* and *K. S. Krishnaswami Aiyangar*, for the Appellant.

Mr. *T. Ramachandra Row*, for the Respondents.

JUDGMENT.—Plaintiff's suit is for arrears of rent and for a declaration that the amount deposited by defendants under the rental agreement has been forfeited. It is in effect a suit for rent coupled with a claim for the damages provided in the contract, if a forfeiture of a deposit can be styled damages. Both the lower Courts appear to have treated the suit as one for damages alone and have allowed the defendants to set off the

amount deposited by them under the rental agreement against the rent due, although no set-off was pleaded in the written statement and not only has the lower Appellate Court awarded nothing by way of damages for breach of contract, but has mulcted the plaintiff in the costs of the suit.

We think they were wrong in the view that they took and in applying the ruling in *Vellore Taluq Board* v. *Gopalasami Naidu* (1) in support of it. It was clearly held by a Full Bench in *Natesa Aiyar* v. *Appavu Padayachi* (2) that in the case of a sale, section 74 of the Contract Act was not applicable and that a stipulation for forfeiture in case of breach is not a penalty. The same view was held by Seshagiri Aiyar, J., in the case of a lease, *Orr* v. *Chitha Chinna Yegappa Chetty* (3), and it is not contended before us that any distinction can be drawn between the case of a sale and that of a lease.

In determining whether the sum of Rs. 150 agreed to be forfeited was a deposit or not, we must be guided by the reasonableness or unreasonableness of the amount. The point has not been considered by the lower Courts, but, taking all the circumstances into consideration, we must certainly hold the amount to be reasonable, being, as it is, one-half year's rent in a rental agreement for 5 years. Following the Full Bench ruling in *Natesa Aiyar* v. *Appavu Padayachi* (2), we think plaintiff is entitled to retain the deposit.

Plaintiff is also entitled to his rent, and that is not disputed.

Plaintiff has made a further claim, *i. e.*, for interest at 24 per cent. from date of suit until realisation. This is clearly in the nature of a penalty and as his Vakil says he does not press the claim, we disallow it, and reduce the rate to 6 per cent. The second appeal is accordingly allowed and plaintiff will have a decree as prayed for, except in regard to the penal interest claimed with costs throughout.

Appeal allowed; *Decree varied.*

M. C. P.

(1) 26 Ind. Cas. 226; 38 M. 801; 17 M. L. T. 84.
(2) 19 Ind. Cas. 462; 38 M. 178; 13 M. L. T. 391; (1913) M. W. N. 341; 24 M. L. J. 488.
(3) 28 Ind. Cas. 318; (1915) M. W. N. 249; 17 M. L. T. 229.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 446 OF 1917.

March 6, 1918.

Present:—Mr. Justice Jwala Prasad.

DEONATH MISRA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

AMAR SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), ss. 116, 181—Khudkasht, *whether* zerait—Jagir, *whether service tenure*.

Khudkasht does not necessarily mean *zerait* or private lands of the proprietor within the meaning of section 116 of the Bengal Tenancy Act. [p. 419, col. 1.]

The words "*jagir khudkasht* land" do not necessarily mean a service tenure within the meaning of section 181 of the Bengal Tenancy Act. [p. 419, col. 1.]

Appeal from a decision of the Additional District Judge, Gaya, dated the 30th January 1917.

Mr. *Kailaspati*, for the Appellants.

Mr. *Siva Nandan Roy*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiffs to recover possession of the land in dispute from the defendants, on the ground that the said land is the plaintiffs' private or *zerait* land and that the lease on the basis of which the defendants held the land has expired. The defendants-respondents on the other hand claim to hold the land as occupancy tenants thereof. It is not disputed that the defendants were inducted on the land by virtue of two leases, first, dated the 15th August 1904, which expired in 1314 and the second, dated 2nd September 1912, which expired in 1322. Both the leases were for three years. The plaintiffs' case is that the land was held *khas* in the interval, *i. e.*, between 1315 to 1319. The present suit was instituted after the expiry of the second lease. The Courts below have held and it is not disputed in this Court that the defendants are settled *raiyats* in the village and their status has also been so recorded in the survey papers. The Courts below have also held that the lands in dispute are not the *zerait* land of the plaintiffs and that hence the defendants have acquired occupancy rights in the said lands, although they were brought on the land by means of a temporary lease. The finding of the Court below regarding the character of the land as being not *zerat*

has been disputed by the appellants in this Court. The contention rests upon the description of the land in the *kabuliyat* as *khudkasht* land. The oral evidence of the plaintiffs as to the *khudkasht* and the *zerait* being synonymous has been disbelieved. No authority has been shown as to *khudkasht* necessarily meaning *zerait* or private lands of the proprietor. Such a description, namely, *khudkasht* in the lease referred to in *Ajodhya Prosad Singh* v. *Ram Golam Singh* (1) was not accepted as sufficient to mean that the land was the *zerait* land. The word '*khudkasht*' does not occur in section 116 of the Bengal Tenancy Act, where the words expressly mentioned are *khamar*, *nij*, *nij-jote zerait*, *sir* or *khamat*, as denoting the proprietor's private lands. It cannot, therefore, be accepted without any express authority that the word *khudkasht* necessarily means '*zerait*'. This contention of the learned Vakil for the appellants, therefore, fails.

The survey record of right has entered the land as the *kayemi* or occupancy holding of the defendants and the Courts below have concurred in the finding that the entry is correct. The only ground upon which the decree of the Court below is assailed is that the land in dispute forms part of the *jagir* lands of the plaintiffs and as such it was a service tenure and hence under section 181 the defendants could not acquire an occupancy right in this land. It is true that the land in the *kabuliyat* has been described as the "*jagir khudkasht* land." The plaintiffs have also described it at one place as their exclusive *jagirdari* land and at another place as *khudkasht jagir* land. It must, therefore, be accepted that the land was known as *jagir khudkasht* land of the plaintiffs, but there is nothing to show on the record that this was a service tenure as mentioned in section 181. Hence the section has no application.

It is not asserted that the land was a *ghatwali* tenure. A *jagir* tenure may be a service tenure or may be an ordinary tenure or holding. Appendix IV, which contains a list of tenures or holdings, attached to Finucane and Amir Ali's Bengal Tenancy Act, page 568. Apart from what has been said in that appendix, personally I am of opinion that the *jagir* tenure is not necessarily a service tenure. This was not the point taken in the Courts below and as a matter of fact this is not the basis of the claim of the plaintiffs. Although the land is described as *jagir* in paragraph 1 of the plaint it was meant nothing more than a mere description of the land. This was not the ground upon which the claim was based. Having failed upon the principal grounds taken in the grounds of appeal, the learned Vakil with admirable ingenuity has tried to apply section 181 on account of the mention of the word '*jagir*' in the lease and in the pleadings. He certainly would have been entitled to win the case, provided the word '*jagir*' was mentioned in section 181 of the Bengal Tenancy Act or there was a clear authority showing that the general acceptance of the word '*jagir*' was that it was a service tenure.

For the reasons given above the appeal must fail. The appeal is, therefore, dismised with costs.

Appeal dismissed.

(1) 4 Ind. Cas. 529; 13 C. W. N. 661.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1949 OF 1916.

December 14, 1917.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

ANKALAMMA—PLAINTIFF—APPELLANT

versus

BELLAM CHENCHAYYA AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Bond executed to manager—Payment to one of several heirs, whether discharges promisor—Payment to one of co-heirs of promisee, effect of—Contract Act (IX of 1872), s. 2—'Promisee', meaning of.

Payment to one of the co-heirs of a promisee under a bond would not discharge the promisor from his liability. The same considerations govern payments made to a junior member of a Hindu family during the lifetime of its manager in whose favour the bond was executed. [p 422, col. 2.]

A payment made to one of the sons of a promisee under a bond, while the latter is undergoing a sentence of transportation and there are other sons of

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the promisee alive at the time, does not discharge the bond. [p. 421, col. 2.]

Sheikh Ibrahim v. *Rama Aiyar*, 10 Ind. Cas. 874; 35 M. 685; 21 M. L. J. 508; (1911) 1 M. W. N. 442 and *Manavea Annapurnamma* v. *Uppala Akkayya*, 19 Ind. Cas. 12; 36 M. 544; 13 M. L. T. 268; (1913) M. W. N. 328; 24 M. L. J. 334, distinguished.

Prima facie the word 'promisee' in section 2 of the Contract Act means, in reference to bonds, a person in whose favour the document is executed. [p. 420, col. 2; p. 421, col. 1.]

Where money has been advanced by the manager of a joint family the other members do not become co-promisees with him. [p. 421, col. 1.]

A person who has an interest in bonds or securities standing in the name of another is not a co-promisee with him [p. 421, col. 1.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Cuddappa, in Appeal Suit No. 87 of 1916, preferred against the decree of the Court of the District Munsif at Prodattur, in Original Suit No. 647 of 1910.

Messrs. *M. O. Parthasarathy Aiyangar* and *M. O. Tirumalachariar*, for the Appellant.

Mr. *A. Narasimhachariar* for Mr. *V. V. Srinivasa Aiyangar* and Messrs. *Venkatasubba Row* and *Radhakrishnayya*, for the Respondents.

JUDGMENT.—The bond sued on was executed to the father of the 1st plaintiff. The 1st plaintiff's case was that it was assigned to him by the father. After filing the suit he died and the 2nd plaintiff is his legal representative. The 1st defendant is the son of the mortgagor. Defendants Nos. 2 to 11 are the alienees of some of the properties mortgaged. The 12th defendant is the eldest son of the mortgagee. The defendants pleaded that the mortgage bond was discharged by the payment made to one Chinna Narayana Reddi. This Chinna Narayana Reddi was another son of Byreddi Venkata Reddi, the original mortgagee. In the written statement, the case for the defence was that, in a partition between the father and sons, this bond fell to the share of Chinna Narayana Reddi and that after it came to him, there was a complete discharge of the obligation under the bond.

The District Munsif gave a decree to the plaintiff. In appeal, after remand in which the District Judge asked for certain findings upon some subsidiary issues, the Subordinate Judge, who heard the appeal, finally has come to the conclusion that the payment to Chinna Narayana Reddi discharged the 1st defendant from liability and that the plaintiff is not entitled to claim anything under the bond. The facts found are (*a*) that Venkata Reddi was alive at the time that the alleged payment was made to Chinna Narayana Reddi. Venkata Reddi and his son, the 12th defendant, were sentenced to transportation for life somewhere near 1880 and the discharge is alleged to have been in the year 1883. At that time the father is alleged to have given a power-of-attorney to a person called Narayana Reddi. (*b*) It is further found that there was no partition as alleged by the defendants. The District Munsif has stated that there was no allegation that Chinna Narayana Reddi was the manager of the family and that it was not sought to establish it before him. In this Court an attempt was made both by Messrs. Narasimha Chariar and Radhakrishnayya to show that Chinna Narayana Reddi was actually managing the family affairs. But the circumstances mentioned by the Subordinate Judge negative any such presumption. After the father and the eldest son were convicted and sentenced to transportation for life, apparently every member of the family was endeavouring to get as much family property as possible into his own hands. In these circumstances, it is unlikely that any one of the members was looked up to as the managing member of an undivided family.

On these facts, the question of law for decision is whether the payment to Chinna Narayana Reddi could discharge the 1st defendant from liability. Chinna Narayana Reddi was undoubtedly not a promisee. The learned Vakils for the respondents argued that, as the money was advanced by the father while the family was still undivided, every member of the family must be taken to be a co-promisee with the father. In the first place, there is no evidence as to the source of the money which was lent. For all we know, it might have been the self-acquisition of the father. Even granting that it was from the family funds that the father advanced the money, it does not follow that the other members of the family were co-promisees with him. The definition of 'promisor' and 'promisee' contained in the Contract Act negatives any such presumption. *Prima facie* the word

'promisee' means a person in whose name the document has been executed. No authority has been cited before us for the broad proposition that where money had been advanced by the manager of joint Hindu family the other members of the family would become co-promisees with him. The fact that the other members of the family have an interest in the debt is not enough to constitute them promisees. That is a technical expression carrying with it certain rights: we are not prepared to hold that every person who has an interest in bonds or securities standing in the name of another is a *co-promisee*, even though that other may be the manager of the Hindu family of which he is a member. Therefore, we must proceed on the footing that Chinna Narayana Reddi was not a promisee under the bond. He was one of the heirs of Venkata Reddi to whom the bond was executed. There were also other heirs including the plaintiff who were entitled to the money under this bond. The question, therefore, is whether payment to one of the co-heirs would discharge the obligor from liability. The principle regarding co-heirs would be equally applicable to co-parceners. In *Ahinsa Bibi* v. *Abdul Kader Saheb* (1) Bhashyam Aiyangar, J., accepts the proposition laid down by Mahmood, J., in the case in *Surju Prasad Singh* v. *Khwahish Ali* (2) and says that the co-heir of a single promisee is not entitled to give a discharge in respect of a bond executed to his ancestor. The Subordinate Judge has relied, for his conclusion that payment to one of the co-heirs would discharge the obligor, upon *Sheikh Ibrahim* v. *Rama Aiyar* (3). That case only decided that where payment is made in fraud of the other co-heirs, to one of the co-heirs the obligor is not discharged. Further there are some observations in the judgment which are against the view taken by the Subordinate Judge. There is nothing in that judgment to support his position. Mr. Parthasarathy Aiyangar has drawn our attention to the Full Bench decision in *Mannava Annapurnamma* v. *Uppala Akkayya* (4), where two learned Judges of this Court held that payment to one of the co promisees would be a good discharge. The Chief Justice was against that view. Even the two learned Judges who held that payment to one of the co-promisees would amount to a discharge, guard themselves by saying that the case of a co-heir would stand upon a different footing. Sankaran Nair, J., at page 549* says that the proposition which he enunciated would not cover the case of co-heirs. Sadasiva Aiyar, J., uses similar language in his judgment. In a later case reported as *Muniandi Servai* v. *Ramasami* (5), Sadasiva Aiyar, J., sitting with Hannay, J., held that payment to one of the co-heirs of the promisee would not amount to a discharge of the liability incurred under the bond. Coutts Trotter, J., in *Ponnusamy Pillai* v. *Thyagaraja Pillai* (6) seems to doubt the correctness of the Full Bench decision in *Mannava Annapurnamma* v. *Uppala Akkayya* (4). If the question for decision were whether the payment made to one of the co-promisees would amount to a discharge of the bond, it might become necessary to refer the matter to a Full Bench, having regard to the fact that two cases in Calcutta in which the question was fully argued and elaborately considered, took a different view and to the fact that Coutts Trotter, J., is of opinion that the decision is opposed to the current of authorities in England. We refer to *Hasainara Begum* v. *Rahmannessa Begum* (7) and *Umes Chandra Banerjee* v. *Dinabandhu Mahanti* (8). But that question need not be considered in this case. The principle seems to be clear that payment to one of the co-heirs of the promisee would not discharge the promisor from his liability to pay under the bond. The same considerations govern payments made to a junior member of a Hindu family during the lifetime of its manager in whose favour the bond was executed. In the view we have taken the decision

(1) 25 M. 26 at p. 39.
(2) 4 A. 512; A. W. N. (1882) 114; 2 Ind. Dec (N. S.) 1089.
(3) 10 Ind. Cas. 874; 35 M. 685; 21 M L. J. 508; (1911) 1 M. W. N. 442.
(4) 19 Ind. Cas. 12; 36 M. 544; 13 M. L T. 268; (1913) M. W. N. 328; 24 M. L. J. 333
(5) 29 Ind. Cas. 586.
(6) 32 Ind. Cas. 173; 3 L. W. 22.
(7) 8 Ind. Cas 837; 38 C. 342; 13 C. L. J. 3.
(8) 29 Ind. Cas. 956; 21 C. L. J. 570.

*Page of 36 M.—*Ed.*

of the Subordinate Judge must be reversed and that of the District Munsif restored with costs here and in the lower Appellate Court. Time for payment is extended to 9th April 1918.

Appeal allowed.

M. G. P.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 51 OF 1917.

January 28, 1918.

Present:—Mr. Justice Beaman and Mr. Justice Heaton.

HIMATLAL MAGANLAL SHAH —DEFENDANT—APPELLANT

versus

BHIKABHAI AMRITLAL SHAH— PLAINTIFF—RESPONDENT.

Easements Act (V of 1882), s. 24—Accessory rights—Right to discharge rain water from eaves—Right to go over servient tenement to repair wall supporting eaves, whether accessory to easement.

Plaintiff, who was entitled to an easement of discharging water upon the defendant's land from projecting eaves, sued for an injunction restraining the defendant from making any use of his land which would prevent the plaintiff from going upon it for all the purposes of repairing the wall of his house abutting thereon and which supported the eaves:

Held, that inasmuch as it was not absolutely impossible to repair the wall from the inside it would be an altogether illegitimate extension of the doctrine of accessory easements to grant the plaintiff the injunction sued for. [p. 423, cols. 1 & 2.]

Per *Heaton, J.*—The accessory rights mentioned in section 24 of the Easements Act are not intended to be of such a nature as to deprive the owner of the servient tenement of his rights of property, unless such a result is absolutely essential. [p. 423, col. 1.]

Second appeal from the decision of the Joint Judge, Ahmedabad, in Appeal No. 139 of 1915, modifying the decree passed by the Subordinate Judge at Nadiad, in Civil Suit No. 58 of 1914.

Mr. *M. H. Vakil*, for the Appellant.

Mr. *G. N. Thakor*, for the Respondent.

JUDGMENT.

BEAMAN, J.—The only substantial point with which we are called upon to deal is whether the lower Appellate Court was right in granting the plaintiff an accessory easement the extent of which is unfortunately not defined in the decretal portion of his judgment. The plaintiff is admittedly entitled to an easement of discharging water upon the defendant's land from eaves which project, as we are told here, although we do not discover this on the record, from three to five inches in length. This probably is about the fact, if not absolutely accurate. On the strength of this easement the plaintiff asked the Court below to give him an injunction, restraining the defendant from making any use of his land which would prevent the plaintiff from going upon it for all the purposes of repairing the wall of his house abutting thereon. The first Court refused this injunction, and in my opinion very rightly refused it. I entirely agree with the reasons given and the characterisation of the plaintiff's case by the trial Judge. In appeal the learned Judge below found that the case fell under section 24 of the Indian Easements Act and that the repair of the wall was an accessory easement to the admitted easement of discharging water through the eaves. It appears to me that this is an altogether illegitimate extension of the doctrine of accessory easement. The wall is just as necessary to the support of the roof as a whole as to the support of these slightly projecting eaves beyond it, and yet it is contended that because of this so-called easement the plaintiff is to have a vague and undefined easement which might preclude the defendant from making any use of his land within five or six feet of the plaintiff's wall. It does not appear to me that this is such an easement as any person is entitled to or was contemplated by section 24 of the Indian Easements Act. It is true that we have been referred to a very similar case in Madras [*Hayagreeva* v. *Sami* (1)] in which the learned Judges took a different view, a view to which the learned Judge below intended to give effect. The result, however, is manifestly most unjust, and in principle it would come to this, that whoever built a house to the very limit of his own land might, if his neighbour did not build upon his land within twenty years, compel him to forego making any use of it for any profitable purpose within

(1) 15 M. 286; 5 Ind. Dec. (N. s.) 551.

an altogether indefinite distance of the plaintiff's wall. The actual easement is for no more than discharge of water over three to five inches of defendant's land and that easement can very easily be secured and continued without extending it in the manner in which it has been extended by the learned Judge below. Such eaves, for example, in so far as they are separable from the roof as a whole and entitled to special treatment on the ground of constituting an easement, could very easily be supported from the central roof beam or in any other way entirely independent of the wall. It is only by saying that the wall is necessary to support the roof as a whole and that the eaves are dependent upon the maintenance of the roof that we arrive at the position that the maintenance of the wall is in itself a ground for granting an extended easement over the defendant's land. I do not think that that is a reasonable view in principle.

But after all it is not necessary to generalize and, looking to the facts of the particular case and the view taken of it by the learned trial Judge, I should have no hesitation in saying that this at any rate was not a proper case for granting an injunction of the kind prayed for by the plaintiff.

In the lower Appellate Court we find the learned Judge saying that it was not suggested that the plaintiff could repair his wall in any other way than by having the use of the defendant's land which he asks for. It may not have been suggested, but it is pretty clear, that there must be ways in which the plaintiff could do any necessary repairs to his wall from within, and without further encroaching upon the defendant's land. For example, to take an extreme case, we might say that if the plaintiff really was so anxious about the repair of this wall and the maintenance of the easement, he might build his wall two feet further back upon his own land, the eaves then projecting two feet five inches instead of five inches beyond the wall and so preserving the old easement. There would be no difficulty whatever in arranging the matter so, though it would no doubt be very inconvenient to the plaintiff. But the course proposed by the plaintiff and sanctioned by the learned Judge below is certainly as inconvenient and in my opinion far more unjust to the defendant.

In this view of the case, I think that the learned Judge below was wrong in granting the plaintiff the relief he has done, and that the proper order is that the plaintiff's suit should be dismissed, and in my opinion it ought to be dismissed with all costs at any rate of the two appeals.

HEATON, J.—I agree. I think that the meaning of section 24 of the Indian Easements Act as illustrated by the examples given has been misunderstood by the lower Appellate Court. The accessory rights mentioned in that section are not intended to be of such a nature as to deprive the owner of the servient tenement of his rights of property, unless such a result is absolutely essential. We can in this case only say that it is absolutely essential that the plaintiff should reach his wall from the outside in order to repair it, by assuming that it is impossible for him to do it from the inside. Clearly, it seems to me, it is not impossible for him to do it from the inside, although it may be very inconvenient. The plaintiff, if he wishes to repair his wall and if the defendant is unwilling that the plaintiff should go on to his land for the purpose, must do so from the inside.

I think it quite right that this claim should be dismissed and the appeal allowed. I agree as to the order proposed as to costs.

Appeal allowed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 481 OF 1917.

January 28, 1918.

Present:—Mr. Justice Oldfield AND Mr. Justice Sadasiva Aiyar.

KATHA PILLAI AND OTHERS—DEFENDANTS Nos. 2, 7, 8, 11, 12, 17, 21, 22, 23, 27 AND 32 —PETITIONERS

versus

KANAKASUNDARAM PILLAI AND OTHERS—PLAINTIFFS AND DEFENDANTS Nos. 3 TO 6, 10, 13 TO 16, 18 TO 20, 24 TO 26, 28 TO 31 AND 33 —RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. I, r. 8—

KATHA PILLAI KANAKASUNDARAM PILLAI.

Representative suit, leave for—Damages, claim for, maintainability of, in representative suit—Form of order—Objectors, position of—Leave, grant of, without reference to objectors—Scheme of management of trust prayer for, validity of.

Leave to file a representative suit under Order I, rule 8, Civil Procedure Code, may be granted as on behalf of a community or body of persons even though some persons object to it. The order need not be restricted to the grant of leave on behalf of the persons not opposing. [p. 425, col. 1.]

Though leave cannot be granted to file a representative suit for damages, the prayer may be allowed in combination with other reliefs sought. The plaintiffs may be allowed to claim damages, not in their representative capacity but on account of the acts by which they were individually aggrieved. [p. 424, col. 2.]

A scheme of management of trust property may be prayed for in a representative suit, subject to objections when the scheme is actually framed. [p. 425, col 1.]

Leave was granted under Order I, rule 8, Civil Procedure Code, to the plaintiff, a leading Mirasidar, to file a suit on behalf of 200 co-Mirasidars as trustees of a forest land for a declaration that the property belonged in common to them on trust, for an injunction restraining the defendants from trespassing on it, for damages and, if necessary, for a scheme of management. [p. 424, col. 2; p. 425, col. 1.]

Petition, under section 115 of Act V of 1908, praying the High Court to revise the order of the Court of the Subordinate Judge, Negapatam, in Interlocutory Petition No. 1068 of 1916, in Original Suit No. 109 of 1916.

FACTS appear for the judgment.

Mr. *T. N. Krishnaswami Aiyar*, for the Appellants, contended that the appropriate suit was under Order I, rule 1, in which all the alleged owners should be made parties. A representative suit cannot be maintained for damages. *Vide Markt* v. *Knight Steamships Co.* (1).

The scheme asked for should not have been sanctioned as that relief virtually would result in a partition among the Mirasidars.

Mr. *T. R. Venkatrama Sastri*, for the Respondents, argued *contra*.

JUDGMENT.—The order before us is one granting leave to plaintiff to sue as representing those of his fellow Mirasidars, who have not opposed his application, and it was passed under Order I, rule 8 of the Code of Civil Procedure.

The proposed suit is brought by plaintiff as a leading Mirasidar and as trustee in management of certain forest land on behalf of the other Mirasidars, alleging that defendants, some of the Mirasidars, have trespassed on it and removed a quantity of forest produce. The reliefs claimed are declarations, an injunction, damages measured by the value of the produce removed and, if necessary, a scheme for future management.

The main objections to the lower Court's order are that Order I, rule 8, deals only with representative suits, and that (1) as the plaint refers to the forest as the common property of the Mirasidars, their interest in it should be protected by a suit framed in accordance with Order I, rule 1, with all the individuals concerned as parties, not by a representative suit under Order I, rule 8, and (2) that a representative suit cannot be brought for damages. Both these contentions have been supported by reference to *Markt* v. *Knight Steamships Co.* (1), in which one of several shippers sued, as representing all, for compensation for the losses, which each of the shippers had incurred by the loss of the ship. But the main relief claimed in the present case resembles rather that in question in *Duke of Bedford* v. *Ellis* (2), a declaration regarding the rights of the six plaintiffs and other interested persons, whom they were allowed to represent under the English Order XVI, rule 9, corresponding with Order I, rule 8 in the Indian Code; and following the latter case we hold that as regards the reliefs claimed other than damages, the suit is properly constituted.

As regards damages there is no doubt the dictum of Moulton, L. J., in *Markt* v. *Knight Steamships Co.* (1) that a representative suit cannot be brought for damages. But it is clear that the objection is only to the representative suit, as such, being for that relief. In fact in *Duke of Bedford* v. *Ellis* (2) the plaintiffs were allowed to claim damages, not in their representative capacity but on account of the acts by which they were individually aggrieved, the Court sanctioning the combination in one plaint of the claim by them as representatives under Order XVI, rule 9, and of their individual claims raising common

(1) (1910) 2 K. B. 1021; 79 L. J. K. B. 939; 103 L. T. 369.

(2) (1901) A. C. 1; 70 L. J. Ch. 102; 83 L. T. 666; 17 T. L. R. 139.

questions of fact and law under Order XVI, rule 1, corresponding with the Indian Order I, rule 1. Similarly in the present case two claims are made in the plaint. But the combination is no more open to objection than that which the House of Lords permitted, since it is of the claim already referred to as made by plaintiff under Order I, rule 8, and of that which he makes alone as trustee or manager of the forest for damages for the loss of its produce and in respect of which there is no question of combination at all. These objections to the lower Court's order, therefore, fail.

It is said next that the lower Court's discretion was wrongly exercised. But only nineteen persons actually objected to its order and they merely referred generally to some others not specified as showing their objection. The total number of Mirasidars is, we are told, about two hundred. The lower Court's discretion was, therefore, exercised properly. Then it is argued that under Order I, rule 8, plaintiff must sue as representative of all the persons interested, and that he should not have been allowed to sue if any of them, even only one, repudiated his representation. This does not, in our opinion, follow from the wording of the Order and it takes no account of the provision in it, enabling any person desiring to be a party to be made one. But in this connection, we observe that the lower Court ought not to have limited plaintiff's representation to those who did not oppose the grant of leave to him before it. It should have permitted him to sue as representing all, who have not been made or do not apply to be made parties to the suit.

Lastly it is said that the prayer for a scheme of management involves or will probably result in a partition of the property among the Mirasidars, and that permission for a representative suit with that object should not have been given. It is not clear that the suit has that object; in fact the scheme asked for is merely one for the management of the property. But in any case it will be for defendants to object to the scheme, when one is proposed, on the ground that it is not of a kind which can be sanctioned in the suit as brought. It is not for them to object to the frame of the suit, because an inadmissible scheme may be proposed at a later stage.

The lower Court's order is modified to the extent stated above, but is confirmed in other respects. Petitioners will pay 1st respondent's costs in this Court.

Order modified.

M. C. P.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 326 OF 1916.

February 19, 1918.

Present:—Mr. Batten, Offg. J. C.

GOVINDRAO AND OTHERS—DEFENDANTS APPELLANTS

versus

GANPATHI AND OTHERS—PLAINTIFFS RESPONDENTS.

Bengal Regulation XI of 1825, *s.* 4 (1)—*Alluvion—Accretion, when can be claimed by owner of adjoining land - Boundary line, original, ascertainable, effect of—Decree, improper, whether should be passed.*

Plaintiff sued for possession of some land, on the ground that it had formed contiguous to his fields by alluvial deposits in the bed of the river which adjoined his occupancy holding. The accretions took place in successive steps in four years. It was contended for the defendants that the land could not be claimed by the plaintiff inasmuch as the Bengal Regulation XI of 1825, section 4, did not apply to the case, the accession not having accrued by gradual, slow and imperceptible means:

Held, that the plaintiff must succeed, as the only requirement in section 4 of the Bengal Regulation is that the accretion should be gradual, not that it should be slow and imperceptible. All accessions by gradual alluvion are treated alike irrespective of the rate of formation. [p. 426, col. 2; p. 427, col 1.]

The fact that the original boundary was known or ascertainable does not render the law of accretion inapplicable. [p. 427, col. 1.]

Secretary of State v. *Rajah of Vizayanagaram*, 40 Ind Cas. 896: 40 M 1083; 22 M. L. T. 57, followed.

No decree should be given by the Courts which on the face of it is improper. [p. 427, col. 2]

Appeal against the decision of the Divisional Judge, Nagpur, dated the 23rd February 1916, in Appeal No. 96 of 1915.

The Hon'ble Sir *B. K. Bose*, for the Appellants.

Messrs. *G. R. Deo* and *M. R. Bobde*, for the Respondents.

JUDGMENT.—The plaintiffs-respondents are occupancy tenants of two fields Nos. 3 and 4, which adjoined the bed of the river Kanhan. From 1896 onwards land contiguous to these fields was formed in the bed of the river by alluvial deposit. The accretion amounted to 5·08 acres in 1896, an additional 10·07 acres in 1898, and an additional 3·30 acres in 1907. In 1908 the defendants, Malguzars of the village, took possession of this land, and in 1909 there was a further accretion of ·85 acre. The defendants appellants are Malguzars of the villages on both sides of the river and at the last Settlement they were recorded as proprietors of the bed of the river.

The plaintiffs sued for possession alleging that the accretions became part of their occupancy holding. The Additional Judge to the Court of the Sub-Judge gave the plaintiffs a decree for possession but did not in his judgment refer to Bengal Regulation XI of 1825. The appeal of the defendants was dismissed by the District Judge, who applied the provisions of the above Regulation to the case.

The grounds of appeal are general, but the learned Advocate for the appellants has argued the appeal under four heads. In the lower Appellate Court it was argued that the Bengal Regulation did not apply to the case, because the accession did not accrue by gradual, slow and imperceptible means. The same contention forms the first ground of appeal argued in this Court. The learned District Judge after consideration of the authorities summarised his conclusions as follows:—

"I am doubtful whether the Roman Law, in laying down that alluvion must be gradual and by imperceptible increments, meant to insist on its being slow. The English Law, as it appears in the *resume* given by their Lordships in *Lopez* v. *Muddun Mohun Tha oor* (1), insists on slowness. But their Lordships in speaking of the Regulation in *Nogender Chunder Ghose* v. *Mahomed Esaff* (2) omit the word 'slow'. In the recent Privy Council case of *Srinath Roy* v. *Dinabandhu Sen* (3) their Lordships have gone further and stated that where under English conditions the rule applies to imperceptible alterations, Regulation XI of 1825, Articles 1 and 4, speak of gradual accession. The analogy of the English rule can hardly be prayed in aid when Indian Legislation has thus an established and different rule on the same subject. Certainly the word 'considerable' in the second clause of section 4 suggests that accession may be by small jumps and still come under clause 1 of section 4. This supports their Lordships' view in the recent case that the Indian Regulation is not confined to accretions gradual and imperceptible much less to gradual, slow and imperceptible."

These conclusions of the learned District Judge are called in question in view of the fact that accretion took place by successive steps in four years. In every year when the flood subsided a considerable accretion was apparent, and it is contended that in these circumstances the land cannot be said to have been gained by gradual accession within the meaning of the first clause of section 4 of the Regulation. My task in deciding this question is much lightened by a recent decision of Ayling and Srinivasa Aiyangar, JJ., in *Secretary of State* v. *Rajah of Vizayanagaram* (4), in which the authorities on the subject have been exhaustively discussed by Srinivasa Aiyangar, J., whose conclusions are thus summed up by Ayling, J.:—

"It seems to me the recognition of title by alluvial accretion is largely governed by the fact that the latter is due to the normal action of physical forces: and the different condition of Indian and English rivers is such that what would be abnormal and almost miraculous in the latter is normal and commonplace in the former, as pointed out by their Lordships of the Privy Council in *Srinath Roy* v. *Dinabandhu Sen* (3). Such a difference cannot be ignored in the application of the legal principles of alluvial accretion: and it seems to have been given effect to in Bengal Regulation XI of 1825. The only requirement in section 4 of

(1) 13 M. I. A. 467; 14 W. R. P. C. 11; 5 B. L. R. P. C. 521; 2 Suth. P. C. J. 336; 2 Sar. P. C. J. 594; 20 E. R. 525

(2) 18 W. R. 113; 10 B. L. R. 406; 3 Sar. P. C. J. 151 (P. C.).

(3) 25 Ind. Cas 467; 42 C. 489 at p. 531; 18 C. W. N. 1217; (1914) M. W. N. 654; 1 L. W. 733; 16 M. L. T. 319; 12 A. L. J. 119; 20 C. L. J. 385; 16 Bom. L. R. 901; 41 I. A. 221 (P. C.)

(4) 40 Ind. Cas. 896; 40 M. 1083; 22 M. L. T. 57.

that enactment is that this accession should be gradual, not that it should be slow or imperceptible. Abnormal changes due to sudden alterations of course and violent avulsions are separately provided for, but all accessions by gradual alluvion are treated alike, irrespective of the rate of formation."

Speaking with due respect I am in entire accordance with the view expressed by the Madras High Court and the first ground of appeal, therefore, fails.

It is next suggested that as the boundaries of the plaintiffs' fields Nos. 3 and 4 were already known and had been recorded by the Survey Department, the claim of uncertainty on which the principle of the Bengal Regulations is said to be based is absent. This question also has been dealt with in the judgment of the Madras High Court already cited. It is sufficient to quote the following passage from the judgment of Srinivasa Aiyangar, J.:—

"He (the Government Pleader) contended that as the extent and boundaries of the plaintiff's *lankas* in the river were accurately ascertainable from the map ...any lands subsequently formed, even by gradual, slow and imperceptible alluvion in what was the bed of the river in 1870, belonged to the Crown; and relied chiefly on the observations of the Lord Chancellor in *Attorney-General* v. *Chambers* (5). This question was elaborately considered in *Attorney-General* v. *M'Carthy* (6) already referred to and the conclusion reached that there was no such principle and the fact that the original boundary was known or ascertainable did not render the law of accretion inapplicable, and the observations of the Privy Council at page 612 in *Attorney General for Nigeria* v. *Holt & Co.* (7) are to the same effect. The surveys in this case were not within the category of the *agri limitati* of the Civil Law. *St. Clair Co.*, v. *Lovingston* (8), Dr. Hunter's Roman Law, page 276, and Law Quartely Review, Volume 12, at page 353. This contention must, therefore, be disallowed." This ground of appeal also fails.

The next contention is that it is possible that what happened was that there was an exposure of the pre-existing bed of the river and not a fresh deposit of silt as alleged by the plaintiffs. On looking at the record of the case, however, I find there is no foundation for this contention. The appellants themselves pleaded that the new land had been thrown up by the river.

It is finally argued that the map filed in the case shows that not all the land claimed by the plaintiffs can be correctly described as an accretion to their fields Nos. 3 and 4. A glance at the map (Exhibit P.-2.) indicates that only a portion of the land in suit is contiguous to other fields further down the course of the river. The learned District Judge in paragraph 3 of his judgment has noticed this; but he has not thought it necessary to adjudicate on the subject since there were no pleadings on these lines. I am, however, of opinion that no decree should be given by the Courts which is on the face of it improper. It is argued for the respondents that the new land adjoining fields which do not belong to the plaintiffs should nevertheless be considered as an accretion to the plaintiffs' fields because the bank of the plaintiffs' fields is low, while the bank lower down is percipitous. There is no force in this argument, for the accretion must be considered to be an accretion to the land at the foot of the percipitous portion of the bank. I must remand the case to the lower Appellate Court for a decision as to what portion of the land claimed is an accretion to the fields of the plaintiffs. Judging by the map, some of the land claimed is an accretion to land not the property of the plaintiffs. The District Judge will use his discretion as to whether further proceedings should take place in his Court or in the Court of first instance.

Costs will be the costs in the suit.

There will be no refund certificate.

Case remanded.

(5) (1859) 4 DeG. & J. 55; 5 Jur. (N. S.) 745; 7 W. R. 404; 45 E. R. 22; 124 R. R. 149.

(6) (1911) 2 Ir. Rep. 260; 12 Ir. L. R. 339.

(7) (1915) A. C. 599 at p. 612; 84 L. J. P. C. 98.

(8) (1874) 23 Wall. 46 at p. 69; 23 Law. Ed. 59.

SADASIVA CHETTY v. RANGAPPA RAJOO.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1994 OF 1916.

January 25, 1918.

Present:—Sir John Wallis, Kt., Chief Justice, and Mr. Justice Sadasiva Aiyar.

SADASIVA CHETTY—DEFENDANT—APPELLANT

versus

RANGAPPA RAJOO—PLAINTIFF—RESPONDENT.

Nuisance—Oil mill, erection of, close to dwelling house—Discharge of foul smell and garbage—Noise—Abatement—Stoppage of work, right of neighbour to.

It is an actionable nuisance to erect an oil mill close to a dwelling house from which foul-smelling water is always discharged and unbearable noise is produced which can be heard even at some distance. [p. 428, col. 2.]

The owner of the house adjoining the mill is entitled to ask for prohibition of the working of the mill altogether where the nuisance cannot be abated [p. 429, col. 1.]

The locality, the question whether the nuisance has been long in existence, whether the trade which causes it is commonly carried on in that locality and other questions of a like nature have to be considered in deciding whether a particular business carried on by a neighbour is an actionable nuisance. [p. 428, col. 2; p. 429, col. 1.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Salem, in Appeal Suit No. 250 of 1915, (Appeal Suit No. 162 of 1914, on the file of the Court of the District Munsif, Krishnagiri, in Original Suit No. 421 of 1913).

FACTS appear from the judgment.

Mr. *V. L. Ethiraj*, for the Appellant, argued that the opening of a factory close to a dwelling house and in a non-commercial locality was an actionable nuisance. The noise from the mill and the foul-smelling water that flowed on to defendant's premises caused inconvenience, even judging of the matter by the ordinary standards of comfort. The test is, whether it is built in a place where such business is carried on.

Mr. *B Somaya*, for the Respondent, argued *contra*.

JUDGMENT.

SADASIVA AIYAR, J.—The defendant is the appellant He purchased a schoolmaster's house about a year before suit, the plaintiff's house being next door to the house so purchased by the defendant. The defendant is an oil monger by caste and he set up an oil mill of the country pattern in the yard of his house. The noise of the mill caused by the turning of the machine drawn by the bullocks, the state of the ground trodden by the bullocks and the droppings of the bullocks created much nuisance. The District Munsif found (1) that the machine occupied the entire vacant space in the defendant's compound and that it has been put up very near the occupied portion of the plaintiff's house; (2) that the machine was worked by the defendant both day and night, that the noise caused by the working of the machine was unbearable and prevented the defendant from attending to his photographic work; (3) that the noise proceeding from the mill machine could be heard at a distance of two furlongs; and (4) that black, dirty, foul-smelling water containing mosquitoes and worms was found in the defendant's compound on account of the washing of the nuts and of the cowdung stored in it, especially during the rainy season. In Pollock on Torts at page 429, it is stated: "A nuisance is not justified by showing that the trade or occupation causing the annoyance is, apart from the annoyance, an innocent or laudable one. 'The building of a lime-kiln is good and profitable; but if it be built so near a house that when it burns, the smoke thereof enters into the house, so that none can dwell there, an action lies for it.' 'A tan house is necessary, for all men wear shoes; and nevertheless it may be pulled down if it be erected to the nuisance of another. In like manner of a glass house; and they ought to be erected in places convenient for them.'" So of a fried fish shop. "So it is an actionable nuisance to keep a pig-stye so near any neighbour's house as to make it unwholesome and unfit for habitation, though the keeping of swine may be needful for the sustenance of man." Then at page 426 the learned author says: "What amount of annoyance or inconvenience will amount to a nuisance in point of law, cannot, by the nature of the question, be defined in precise terms. There should be a material interference with the ordinary comfort and convenience of life.....the physical comfort of human existence.....by an ordinary and reasonable standard." The locality, the

question whether the nuisance had been long in existence, whether the trade which causes it is commonly carried on in that locality and other questions of a like nature have, no doubt, to be considered in deciding whether a particular business carried on by a neighbour is an actionable nuisance. All these things have been kept in mind on, by the learned District Munsif in arriving at his conclusion that the business of the defendant is an actionable nuisance for the abatement of which the plaintiff could sue. The District Munsif says: "It is not shown that the plaintiff is living in the midst of oil mills." The portion of the suburb where other oil mills are situated seems to be far removed from the locality where the plaintiff lives. The lower Appellate Court has substantially concurred in the findings of the District Munsif on the points already referred to. The lower Courts have also found that the nuisance cannot be abated otherwise than by prohibiting the working of the oil mill. I would, therefore, dismiss the second appeal with costs.

WALLIS, C. J.—I do not think that there are sufficient grounds for interfering with the findings of the lower Courts that what has been done in the circumstances of the case amounts to a nuisance. I would dismiss the appeal with costs.

Appeal dismissed.

M. C. P.

SIND JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 2 OF 1915.

September 14, 1917.

Present:—Mr. Pratt, J. C., and Mr. Hayward, A. J. C.

UMERMAL JANIMAL—APPELLANT

versus

FIRM OF BHOJRAJ-HASSOMAL AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXVIII, r. 5, Appendix F, Form 6, Sch. II, para. 16—Surety bond for property sought to be attached before judgment—Suit referred to arbitration—Decree in terms of award—Surety, liability of—Contract Act (IX of 1872), s. 133.

When a suit is referred to arbitration and the Court pronounces judgment for the amount of the award, the amount is "adjudged" by the Court. [p. 429, col. 2.]

A surety gave security under Order XXXVIII, rule 5 of the Civil Procedure Code for the value of the property sought to be attached before judgment. The suit was referred to arbitration and a decree having been made in the terms of the award, it was sought to be executed against the surety:

Held, that the reference to arbitration was an ordinary incident in the suit and the amount awarded was in a judgment against the defendant and was one for which the surety was liable. [p. 430, col. 1.]

Appeal against the decision of Mr. H. N. Crouch, A. J. C. of Sind.

Mr. *Kalumal Pahloomal*, for the Appellant.

Mr. *Isardas Odharam*, for Respondent No. 1.

JUDGMENT.

PRATT, J. C.—This is an appeal from an order passed by this Court in its District Court Jurisdiction allowing execution to proceed against the surety.

The appellant Umer had given security under Order XXXVIII, rule 5, for Rs. 1,800, the value of the property sought to be attached before judgment. The suit between the parties was referred to arbitration and a decree was made in the terms of the award, and it is this decree of which execution is sought against the appellant surety.

The surety contends that he is not liable to satisfy the amount of that decree, *firstly*, because that amount has not been "adjudged" by the Court as provided by the terms of his bond, see Form No. 6 of Appendix F of the Civil Procedure Code; and *secondly*, because the reference to arbitration was not contemplated by him when he executed the bond.

There is no force in either of these objections.

When a suit is referred to arbitration, the Court pronounces judgment for the amount of the award; see paragraph 16 of the arbitration schedule. The amount is, therefore, adjudged by the Court.

The second objection proceeds on the assumption that the liability of the surety is affected by section 133 of the Contract Act. But that section has no application, for, as pointed out by the lower Court, the relation of the debtor and creditor did not exist between plaintiff and defendant at

the time the bond was executed. The utmost that the appellant can contend is that he bound himself to pay what the Court adjudged, and not what the parties settled between themselves as the result of a compromise which might be collusive and in fraud of him. But that is not the case here. The reference to arbitration is a proceeding incidental to the conduct of the suit and this has been decided in the case of *Srikishen Rochumal* v. *Relumal Pariomal* (1), following the case reported as *Faviell* v. *Eastern Counties Railway Co.* (2).

Whether an amount arrived at by a compromise between the parties is an amount which the surety is liable to pay under the terms of this bond is not a question which arises in this appeal. Mr. Kalumal refers to the case of *Tatum* v. *Evans* (3). But that was a very special case, for the compromise decree was a consolidated decree in two suits; the surety had given a bond in one suit only; the decree made an order affecting the sureties' liability and it was, therefore, held that looking at the substance of the thing there was not an awarding of such sum as the Court should think fit. Further, the Judge took care to say that he would not go to the length of laying down that in no case, where a person gives security as a surety, is he liable when the judgment is obtained by consent.

On the whole I am of opinion that the reference to arbitration in this case was an ordinary incident in the suit and the amount awarded was in a judgment passed against the defendant and is one for which the surety is bound.

I would confirm the decree of the lower Court and dismiss this appeal with costs.

HAYWARD, A. J. C.—I concur. I think no sufficient ground has been shown in this case to justify our holding that the surety was released by the award decree between the parties. But I desire to guard myself against holding that in no case would a surety be entitled to claim the application of the equitable principles underlying section 133 of the Contract Act in respect of a bond given under the Civil Procedure Code.

Appeal dismissed.

(1) 34 Ind. Cas. 845; 9 S. L. R. 183.
(2) (1848) 17 L. J. Ex. 297; 2 Ex. 344; 6 D. & L. 54; 76 R. R. 615; 154 E. R. 525.
(3) (1886) 54 L. T. 336.

MADRAS HIGH COURT.

CIVIL APPEALS NOS. 192 AND 193 OF 1915.

January 29, 1917.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Seshagiri Aiyar.

P. M. A. MUTHIAH CHETTY AND OTHERS —PLAINTIFFS NOS. 2 TO 5—APPELLANTS

versus

P. R. ALAGAPPA CHETTY AND ANOTHER—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 89, 90—Principal and agent—Accounts, suit for, of moneys entrusted to agent—Misapplication of moneys—Limitation, commencement of—Agency, termination of.

A suit by a principal for accounts of moneys entrusted to his agent is governed by Article 89 of the Limitation Act, even though there are averments in the plaint that the agent either through negligence or misconduct has misapplied the moneys in an unauthorised manner. [p. 431, col. 1.]

The words "other suits" in Article 90 of the Limitation Act show that that article does not include suits which properly come within Article 89. [p. 431, col. 1.]

Great Western Insurance Co., of New York v. *Cunliffe*, (1874) 9 Ch Ap. 525; 43 L. J. Ch. 741; 30 L. T. 661, distinguished.

Such matters as the liability of the agent for wilful default and to account for moneys that should have come to his hands come within the scope of an ordinary money account and are governed by Article 89. [p. 431, cols. 1 & 2.]

The termination of an agency is a question of fact for the purposes of Article 89 of the Limitation Act and the agency must be considered as having terminated when the authority of the agent is revoked, or the agent renounces the agency or the business of the agency is completed, which is practically another case of revocation or determination of authority. [p. 431, col. 2.]

Appeal against the decree of the Temporary Subordinate Judge, Sivaganga, in Original Suit No. 9 of 1914.

Mr. *A. Krishnasami Ayyar*, for the Appellants.

The Hon'ble Mr. *S. Srinivasa Aiyangar*, (Advocate General) (with him Messrs. *K. Bashyam Ayyangar* and *N. M. Malim Sahib*), for the Respondents.

MUTHIAH CHETTY *v.* ALAGAPPA CHETTY.

JUDGMENT.

WALLIS, C. J.—In the first of these cases—Appeal No. 192 of 1915, the Subordinate Judge has dismissed a suit brought by the principals against an agent and his son to recover a specified sum of money particulars of which are set out at length in the plaint, and those particulars show that what they are really seeking to do is to make the first defendant account for the moneys which they entrusted to the first defendant.

The main ground of complaint taken by the plaintiffs in their plaint is that the first defendant lent moneys of the principals to persons to whom he was not authorised to lend them, and Mr. Krishnasami Ayyar for the appellants has taken the point that this case is governed by Article 90 of the Limitation Act, which provides for

"other suits by principals against agents for neglect or misconduct,"

and not by Article 89 which deals with suits

"by a principal against his agent for moveable property received by the latter and not accounted for."

Now the use of the word 'other' in Article 90 shows that that Article does not include suits which properly come within Article 89, and we think that this is really a suit for a mere money account which comes within Article 89.

Mr. Krishnasami Ayyar has relied upon *Great Western Insurance Co. of New York* v. *Cunliffe* (1). In that case it was sought, in taking an account by a principal against his agent, to hold the agent responsible for the loss which had occurred to the principal by the agent's failure to insure certain goods, that is to say, for failing to carry out the instructions of the principal by spending moneys of the principal in a particular manner, and Lord Justice James held that that did not come within an ordinary money account. In an ordinary money account the accounting party is asked to account for the moneys which have come to his hands and to pay over the balance, and where the account is on the footing of wilful default, he may be held liable, not only for the moneys which have come to his hands, but also for moneys which ought to have come to his hands; and if he is shown, in taking such an account, to have applied moneys in a way in which he was not authorised to apply them, the result is that he is not allowed credit for that sum in taking account. That is the ordinary practice in taking accounts and it seems to us that there is no reason for holding that the matters pleaded in this case should not come into an ordinary money account. As I have said, *Great Western Insurance Co. of New York* v. *Cunliffe* (1) itself and also the illustration put there of an attempt to make a solicitor liable for his negligence in the conduct of an action when taking an account in respect of his client's moneys—those are cases of a different nature from the present.

Therefore, in our opinion, in this case, Article 89 was rightly applied.

Then the question arises as to whether this case was properly disposed of with regard to that Article. Now the Judge has simply held the suit to be barred on the authority of a decision of my learned brother and myself in *Venkatachalam Chetty* v. *Narayanan Chetty* (2). All we decided in that case was that termination of agency is a question of fact for purposes of Article 89 of the Limitation Act and the agency must be considered as having terminated when the authority to the agent is revoked, or the agent renounces the agency or the business of the agency is completed, which is practically another case of revocation or determination of authority. Now that must be a question of fact in each case to be decided upon the evidence.

We do not think the case is sufficiently clear upon the pleadings to enable us to dispose of the case without taking evidence, and we have, therefore, decided to call for a finding upon fresh evidence as to whether the suit is barred under Article 89. We think it necessary, however, to say that we consider this question depends upon the question when the authority of the agent to represent the principal ceased, and that it does not depend upon the question as to the agent's obligation to take back a salary chit and pass his accounts with the principal. Fresh evidence may be taken. The finding will be submitted in two months

(1) (1874) 9 Ch. Ap. 525: 43 L. J. Ch. 741; 30 L. T. 661.

(2) 26 Ind. Cas. 740; 39 M. 376; 28 M. L. J. 140.

from this date and seven days will be allowed for filing objections.

[The connected appeal was then taken up, but the decision in that appeal does not contain any law point.—*Ed.*]

SESHAGIRI AIYAR, J.—I agree.

M. C. P.

Appeal allowed;
Case remanded.

PATNA HIGH COURT.

LETTERS PATENT APPEAL No. 92 OF 1917.

March 4, 1918.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Mullick.

Sheikh LATAFAT HUSSAIN—APPELLANT

versus

Kumar KALIKER NAND SINGH—RESPONDENT.

Record of Rights, entry in—Declaratory suit for correction of entry—Entries in two consecutive records—Suit for correction of entry in second record, maintainability of—Limitation Act (IX of 1908), s. 120—Limitation—Fresh cause of action.

Where there are two consecutive finally published Records of Rights, it is competent to a party aggrieved by the second to ask for a declaration in respect of the second record without first displacing any prejudicial entries in the first record. [p. 433, col. 2.]

Where there was an entry in the Record of Rights prepared in 1888-89 against the plaintiff and then again there was a similar entry in the record prepared in 1906:

Held, that the entry in 1906 was a fresh invasion of the plaintiff's right, so that the plaintiff was entitled to sue for the correction of the record within six years of the second entry. [p. 433, col. 2.]

Appeal from a decision of Mr. Justice Atkison, reversing the decre of the District Judge, Purneah.

Messrs. *Muhammad Mustafa Khan* and *Amir Hossain*, for the Appellant.

Syed *Muhammad Tahir*, for the Respondent.

JUDGMENT.

MULLICK, J.—On the 10th June 1905 the 1st and 3rd party defendants made an objection before a Settlement Officer conducting a settlement under Chapter X of Act VIII of 1885, to the effect that the lands in suit, measuring an area of 18 *bighas*, 3 *cottahs* 16 *dhurs* had been wrongly recorded as the *lakhiraj* estate of the plaintiffs. The objectors succeeded before the Settlement Officer, and on the 12th January 1906 a final record was published containing entries in accordance with the Settlement Officer's decision. On the 11th January 1907 the suit out of which the present appeal arises was instituted before the Munsif of Purnea, for a declaration that the entries in the finally published record with regard to the lands in suit were incorrect. The suit was decreed by the Munsif, but was dismissed on appeal by the District Judge on the 30th November 1908. There was then a second appeal to the High Court of Calcutta, with the result that the case was remanded to the District Judge for a decision upon the merits. I have to explain here that the District Judge who disposed of the case on the 30th November 1908 was of opinion that no civil suit for a declaration, such as had been given to the plaintiffs by the Munsif, would lie and that the proper remedy of the plaintiffs was by way of an application under section 106 of the Bengal Tenancy Act for the settlement of a dispute to the Revenue Officer. The High Court of Calcutta held that this position of the law had been misconceived by the learned Judge and that a suit in the Civil Court would lie to declare that the entries in the finally published record were incorrect. When the case went back to the District Judge on remand, the decree of the Munsif was confirmed. The learned District Judge found that in regard to 9 *bighas* 10 *cottahs* 16 *dhurs* of the land in suit the plaintiffs had established a title by purchase made in 1885, shewing that this area was part of the *lakhiraj* estate of one Mr. Beaufort. As regards the remainder of the land the learned Judge found that the plaintiffs had been in adverse possession for more than 12 years and that they had, at the time that the finally published record of 1906 was published, acquired a complete title as against the defendants. Against this decree of the learned District Judge a second appeal was again preferred to the High Court. That appeal came before a learned Judge of this Court sitting alone for the hearing of second appeals and the learned Judge of this Court, disagreeing with the learned District Judge

dismissed the whole suit on the ground that it was barred by limitation. It appears that an issue on the question of limitation was raised in the Court of the Munsif but there was no distinct finding upon it. In the Court of the District Judge who last heard the case it was raised somewhat faintly, and the learned Judge came to the conclusion that as the suit had been brought within 12 years of the disposal of the objection case before the Settlement Officer in 1905 the suit was within time. The learned Judge of this Court, however, has gone upon a different ground and in order to consider his objection to the plaintiffs' suit it is necessary to take it in two parts. With regard to that portion in respect of which the plaintiffs have established their title by purchase from the 4th party defendants, the learned Judge finds that in 1888 or 1889 a survey and settlement under Chapter X of the Bengal Tenancy Act as it then stood was made by a Revenue Officer and that in the course of that settlement the land in dispute was recorded as belonging to the Patni tenure of the first party defendants in Mouza Chandi Katwa and that it was in the actual possession of the 2nd party defendants as occupancy *raiyats*. In the opinion of the learned Judge of this Court the plaintiffs having failed to bring a suit to correct the entry in the finally published settlement record of 1888-89 within six years of publication, it is no longer competent to them to bring a suit for a declaration that the record of 1906 is wrong.

The contention is that as the prayer in the present suit substantially involves a correction of the record of 1888-89, the plaintiffs cannot be indirectly allowed to obtain a declaration which is barred by the law of six years' limitation. Now this raises the question as to what is the precise scope of the present suit. The present suit does not in any way concern itself with the entry in the Record of Rights published in 1888-89. It in terms only seeks for a declaration that the record of 1905-6 is incorrect. Section 111 A of the present Bengal Tenancy Act clearly confers the right to the plaintiffs to obtain a declaration in the terms of section 42 of the Specific Relief Act. Is there anything in the law which compels the plaintiffs to ask for a declaration in respect of the previous record before they can obtain the reliefs they now seek? The learned Vakil for the respondents before us has been unable to show any direct authority in support of his contention, but he has suggested that the case of *Akbar Khan* v. *Turaban* (1) is authority for the proposition that in the present case time began to run against the plaintiffs upon the publication of the first record. I have carefully examined this case and I can find nothing in it which supports the general proposition that where there are two consecutive finally published Records of Rights, it is incompetent to a party aggrieved by the second to ask for a declaration in respect of that second record without first displacing any prejudicial entries in the first record. On the contrary this case is authority for the proposition that a plaintiff seeking a declaration is entitled to sue upon each successive invasion of his right, and the learned Judges of the Allahabad Court cite with approval two other judgments o their Court recognising this principle, namely, *Ilahi Bakhsh* v. *Harnam Singh* (2) and *Robert Skinner* v. *Shankar Lal* (3). The same principle has been recognised in this Court in *Brij Bihari Singh* v. *Sheo Shankar Jha* (4) and *Ramji Ram* v. *Sadhu Saran Lal* (5). In each case it must be seen whether the invasion upon which the plaintiffs seek to base their cause of action was in fact an invasion or not. In *Akbar Khan's case* (1) above cited their Lordships of the Allahabad High Court dismissed the suit on the ground that where an adverse entry was made in 1895 in a settlement record and the plaintiff in 1903 failed to get that entry corrected by the Revenue Officer, such subsequent failure did not constitute a fresh invasion of his right. But that is not the case here. Here it is clear that in 1906 a fresh invasion of the plaintiffs' right occurred. They may have had a number of reasons for not pursuing their remedies in respect of the previous entry.

(1) 1 Ind. Cas. 557; 31 A. 9; 5 A. L. J. 637; A. W. N. (1908) 252; 4 M. L. T. 444.
(2) A. W. N. (1898) 215.
(3) 1 Ind. Cas. 556; 31 A. 10 *note*; 5 A. L. J. 638 *note*.
(4) 39 Ind. Cas. 85; 2 P. L. J. 124; 1 P. L. W. 434; (1917) Pat. 108.
(5) 41 Ind. Cas. 11; 2 P. L. J. 493.

The entry did not create or extinguish any rights. It did not affect their title. It is found that they were in possession and there was no reason whatsoever why they should put the law in motion, for an owner in possession is not bound to sue upon every challenge to his rights. On the other hand in 1906 if they were of opinion that it was to their advantage to rebut the presumption created by the entry adverse to them, then although that entry in terms repeated the contents of a previous entry, there does not seem to be anything in the law which debars them from counting time from the date of the second entry. It is admitted that the suit is within the period of limitation under Article 120 if time began to run from the 12th January 1906. The case is not similar to *Amir-ud-Din* v. *Saidur Rahman* (6), where it was held that a plaintiff cannot by changing the form of his suit count a fresh period of limitation if in fact the real object of his suit is to obtain a declaration such as is contemplated by section 111A of the Bengal Tenancy Act. That case has no bearing on the facts of the present case. Therefore, if the plaintiffs' title is not extinguished and if being in possession they were not called upon to bring a suit to declare their possession, then I see no reason why they should not be allowed to get a declaration that the Record of Rights of 1906 was incorrect. The learned Judge of this Court has relied upon the case of *Reeves* v. *Butcher* (7). That case followed *Hemp* v. *Garland* (8). Both those cases were based upon an English Statute of Limitation in regard to the recovery of debts the payment of which had been contracted for in instalments. It was held that if the contract was that upon the failure to pay any instalment the whole debt would become due, then if the creditor omitted to sue within the six years allowed by Statute from the date of the first default his remedy to recover not only the instalment but also the whole debt would be barred. Article 75 of the present Indian Limitation Act has made a slight change, but it also recognises the principle that omission to sue for the first default within the statutory period would ordinarily render the creditor incompetent to recover the whole debt. That principle has no bearing upon the case before us. Here time began to run against the plaintiffs upon the publication of each record, that is to say, upon each invasion of their right, and they do not seek to violate the principle that time must run from the earliest moment. So far, therefore, as that half of the land in suit which has been found to be situated within the plaintiffs' purchased *lakhiraj* estate is concerned, the suit is within time and the decision of Mr. Justice Atkinson is, in my opinion, wrong.

There remains the other half of the property. The position in regard to this is that the District Judge finds that the plaintiffs obtained possession in 1885 and that although the land is situated within the revenue-paying Mauza of the 1st party defendants, the plaintiffs have by adverse possession acquired a complete title. It is contended by the defendants that as that title matured not later than 1897, the plaintiffs were bound to bring a suit within six years of 1897 in order to obtain a declaration that they had acquired a prescriptive title by adverse possession. It is, therefore, urged that as the present suit was brought in 1907 it is out of time. Now it is quite clear that the plaintiffs were not bound to bring any suit at all for a declaration that they had acquried a prescriptive title. Their suit in 1907 was for the purpose of dispelling the cloud which threatened their title in the shape of the entry in the Record of Rights of 1906. I see no reason why they should not be entitled to a declaration under section 42 of the Specific Relief Act; for being in possession all that they could demand was a mere declaration. The learned Vakil for the respondents is unable to cite any authority which requires every person who has acquired a title by adverse possession to bring a suit for a declaration that he has acquired such title. So far as the entry of 1888-1889 is concerned, the plaintiffs had not at that time perfected their title and consequently the entry, so far as it shewed the title of the 1st party defendants, was correct and the

(6) 35 Ind. Cas. 433; 1 P. L. J. 73.

(7) (1891) 2 Q. B. 509; 60 L. J. Q. B. 619; 65 L. T. 329; 39 W. R. 626.

(8) (1843) 4 Q. B. 519; 3 G. & D. 402; 12 L. J. Q. B. 134; 7 Jur. 302; 114 E. R. 194; 62 R. R. 423.

plaintiffs were not competent at that time to bring any suit for a declaration regarding the correctness of that entry. Here the cause of action in respect of the entry in the Record of Rights clearly arose when the record was finally published in 1906. The result, therefore, is that with regard also to this second half of the land in suit the bar of limitation does not apply and the plaintiffs, having brought their suit within six years of the publication of the Record of Rights of 1906, are well within time. The result is that the judgment of the learned Judge of this Court will be set aside and the appeal decreed with costs in all Courts.

MILLER, C. J.—I agree.

Appeal allowed.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 50 OF 1915.

March 13, 1916.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Phillips.

RANGA ROW AND ANOTHER—DEFENDANTS—APPELLANTS

versus

RAMATHILAKAMMA—PLAINTIFF—RESPONDENT.

Easements Act (V of 1882), s. 4—Windows, right to open and shut into another's land, acquisition of, as easement—Injunction to lower level of roof to enable free movement of window.

The right to open and shut windows and shutters into adjoining land can be acquired as an easement within the meaning of section 4 of the Easements Act [p. 436, col. 1.]

Where defendant built his house opposite to the window of the plaintiff's house which had been in existence for 30 years, with the result that the eaves of the defendant's roof rose above the level of the plaintiff's window and the shutters of the latter could not be shut and opened as usual:

Held, (1) that the plaintiff had an easement to swing on the shutters of his window into the defendant's land; [p. 436, col. 1.]

(2) that it was competent for the Court to issue an injunction to the defendant to lower the roof of his house so as to enable the plaintiff to shut and open the window freely. [p. 436, col. 1.]

Appeal from the judgment of Mr. Justice Kumaraswami Sastriar, dated the 1st March 1915, in the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 252 of 1914.

Messrs. *V. C. Seshachariar*, *C. Venkatasubbaramiah* and *M. Raghavachari*, for the Appellants.

Mr. *K. Ramnath Shenai*, instructed by Mr. *C. Vijaraghavulu Naidu*, for the Respondent.

JUDGMENT.—This is a suit for a declaration that the plaintiff is entitled to an easement of light and air and for an injunction restraining the defendants from interfering, in certain respects, with the enjoyment by the plaintiff of her house and window. The facts as found by the learned Judge (and we see no reason to differ from his conclusions) are as follows:—The plaintiff's house adjoins the defendants' house to the north and in the plaintiff's southern wall there is a window, which has been in existence for nearly 30 years. The defendants have recently re-built the portion of their house opposite to this window, with the result that the eaves of the roof are now above the level of the plaintiff's window sill and the shutters of the plaintiff's window which open outwards cannot now be shut and opened as usual, because the defendants' roof obstructs their movement. The defendants have also constructed a channel to catch the rain water from their roof, which runs on the same level as the plaintiff's window sill and encroaches on plaintiff's wall and finally discharges into the plaintiff's courtyard. The water from this channel also overflows at times through the window into the plaintiff's bed room. In the room opposite the plaintiff's window the defendants have constructed two chimneys, one $1\frac{1}{2}$ feet and one 5 or 6 feet from the window and the smoke from them goes into the plaintiff's room. The learned Judge has accordingly granted the declaration prayed for and an injunction ordering the defendants

(*a*) to remove the two chimneys opposite to the said window and adjacent to it;

(*b*) to lower the roof of the house and ground No. 8, Ramanuja Iyer Street, George Town, Madras, opposite to the said window so as to enable the plaintiff to open and close the window doors freely

to the width of the said window by one foot ;

(*c*) to re-align the channel in such a manner as to prevent the rain water from flowing into the plaintiff's room or into any portion of the plaintiff's house; and

(*d*) to remove two inches along the whole drain which encroaches on the wall of the plaintiff's said house.

There is no appeal as regards (*d*), and as regards (*c*) we need only say that defendants have failed to prove that they have any right to discharge water on to plaintiff's premises and consequently the plaintiff is entitled to an injunction restraining them from doing so.

The two orders to which objection is chiefly taken are (*a*) and (*b*). It has been found that defendants have not caused any serious diminution of light and air, but the smoke from the two chimneys pollutes the air passing into the plaintiff's house. As one of the chimneys discharges directly into the plaintiff's window from a distance of $1\frac{1}{2}$ feet, it is clear that a substantial nuisance must be caused, and of this we have evidence on the plaintiff's side. The chimneys have been newly constructed and the appropriate relief is to order their removal as being a nuisance to the plaintiff. Objection is taken to order (*b*) on the ground that the plaintiff, having only an easement of light and air, can have no right to open the shutters of her windows outwards and that such a right cannot be acquired as an easement. It is not suggested that the outer shutters have not been in existence ever since the window was made and consequently if any right can be acquired, plaintiff has acquired such right by prescription. It is contended on behalf of defendants that a right to open and shut windows cannot be held to be an easement, but Mr. Seshachariar is unable to quote any authority in support of his contention. The right appears to be an easement within the meaning of section 4 of the Easements Act, for it is a right which the plaintiff, as owner of her house and site, has, as such, for the beneficial enjoyment of that land to do something, *i. e.*, to swing the shutters upon certain other land not her own. A similar right, *i. e.*, the right to hang clothes on a line above another person's yard was regarded as an easement in *Drewell* v. *Towler* (1) and in America the same right of swinging shutters over a passage way was also regarded as an easement (Jones on Easements, section 10). This being so, we agree with the learned Judge that the plaintiff has acquired such an easement. It would be impossible to make an accurate estimate of the pecuniary damage sustained by the plaintiff in respect of the several injuries caused by the defendants and consequently an injunction is the only appropriate remedy. Defendants cannot complain of any hardship, for they disregarded the plaintiff's notice in writing given before the erection of their roof and even denied all the plaintiff's rights. The appeal is accordingly dismissed with costs.

Appeal dismissed.

M. C. P.

(1) (1832) 3 B. & Ad. 735; 1 L. J. K. B. 228; 110 E. R. 268.

PRIVY COUNCIL.

APPEAL FROM CALCUTTA HIGH COURT.

June 21, 1917.

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

KHULNA LOAN COMPANY, LIMITED —APPELLANTS

versus

JNANENDRA NATH BOSE AND OTHERS— RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 48—Limitation Act (IX of 1908), Sch I, Art. 182 (7) – Execution – Mortgage decree directing mortgaged properties to be sold and in case of deficiency balance to be realised from other properties and persons of judgment-debtors—Limitation, commencement of.

A mortgage decree directed that the mortgaged properties should be sold and that if the sale-proceeds proved insufficient, the balance should be realised from the other properties and the persons of the judgment-debtors. An application for execution of the latter part of the decree was made more than twelve years after the date of the decree:

Held, (1) that under section 48 of the Civil Procedure Code time began to run from the date of the decree, and not from the date when the mortgaged properties

were sold and that the application was, therefore, barred by time;

(2) that the direction in the decree was not a direction to pay money at a certain date within the meaning of clause (7) of Article 182 of Schedule I of the Limitation Act, as the date of the sale of the mortgaged properties was not certain.

Appeal from the judgment and decree of Mr. Justice Coxe and Mr. Justice Ray, dated the 4th June 1913, reported as 24 Ind. Cas. 35.

FACTS.—This appeal arose out of the execution of a mortgage decree. It was directed in that decree that the mortgaged property should be sold, and if the proceeds of the sale were insufficient the balance should be realized from the other properties and the persons of the judgment-debtors. The application was presented more than 12 years after the date of that decree. The learned Subordinate Judge held that there were virtually two decrees at that time and that the period of 12 years did not run until what he regarded as the second decree under section 90 of the Transfer of Property Act, 1882, became operative and capable of execution. Accordingly, he held that the application was not barred.

The judgment-debtor appealed to the High Court, which held that limitation began to run from the date of the decree as fixed under Order XX, rule 6, Civil Procedure Code, and the application was consequently barred by time See 24 Ind. Cas. 35. The decree-holder appealed to His Majesty in Council.

Mr. *A. M. Dunne*, for the Appellants.

JUDGMENT.

LORD DUNEDIN.—Their Lordships do not see any reason to differ from the judgment of the High Court in this case. They will, therefore, humbly advise His Majesty to dismiss the appeal. As the respondents have not appeared, there will be no order as to costs.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL No. 209 OF 1916.

November 21, 1917.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Oldfield.

CHALIKANI VENKATARAYANIM GARU AND OTHERS—DEFENDANTS NOS. 3, 8 AND 12—APPELLANTS

versus

Sri RAJA VATSAVYA VENKATA SUBHADRAYAMMA JAGAPATHI BAHADUR GARU AND OTHERS—PLAINTIFFS NOS. 1 AND 2 AND DEFENDANTS NOS. 2 AND 25—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 84—Tender, what is—Usufructuary mortgage—Requisition by mortgagor for statement of accounts and expression of readiness to pay, whether constitutes tender—Assertion by mortgagee of title in himself, whether causes cessation of interest—Legal Practitioners Act (XVIII of 1879), rules under, r. 41—Case involving large pecuniary value—Two sets of fees, award of.

The mere expression of willingness on the part of a mortgagor to pay the amount due on the mortgage cannot amount to a tender within the meaning of section 84 of the Transfer of Property Act. [p. 438, cols. 1 & 2.]

The assertion of a title by the mortgagee in himself, coupled with a statement of the amount due by the mortgagor on the mortgage in reply to a requisition by the latter for accounts, will not amount to a dispensation of tender, nor cause a cessation of interest as from that date. [p. 438, col. 2.]

Dayabhai Dipchand v. *Dullabhram Dayaram*, 8 B. H. C. R. 133, *Owners of the "Norway"* v. *Ashburner*, (1865) 3 Moore P. C. (N. S.) 245; Br. & L. 404; 11 Jur. (N. S.) 892; 13 L. T. (N. S.) 50; 13 W. R. 1065; 16 E. R. 92; 146 R. R. 62; *Harendra Lal Rai Chowdhri* v. *Maharani Dasi*, 28 C. 557; 28 I. A. 89; 5 C. W. N. 536; 11 M. L. J. 171; 8 Sar. P. C. J. 48 (P. C.) and *Gopeswar Saha* v. *Jadab Chandra*, 32 Ind. Cas. 537; 22 C. L. J. 352; 20 C. W. N. 689; 43 C. 632, distinguished.

Under rule 41 of the rules framed under the Legal Practitioners Act, it is competent to a Court to award two sets of fees to a party where more than one Vakil has been engaged by him owing to the large pecuniary value of the case, even though it does not involve questions of special difficulty. [p. 440, col. 2.]

Per *Abdur Rahim, J.*—The Transfer of Property Act lays down the conditions relating to a valid tender and a valid deposit. It nowhere says that, even if a valid tender has not been made, interest will cease to run if the mortgagee happens to set up a right to the property in himself. [p. 438, col. 2.]

Per *Oldfield, J.*—The foundation of section 84 of the Transfer of Property Act is that the liability for interest on the amount due on the mortgage shall cease from the date of the tender, inasmuch as the person who has made the tender not merely has to produce money in order to make it but must also keep it ready for payment in Court or otherwise. There is a distinction between the proposal to make a tender and an actual tender, and there is no reason

why a person who makes the former should be treated any better than a person who makes the latter. [p. 440, cols. 1 & 2.]

Appeal against the decree of the Court of the Temporary Subordinate Judge, Vizagapatam, in Original Suit No. 30 of 1910 dated the 25th December 1915.

Messrs. *P. Narayanamurthi* and *Patanjali Sastri*, for the Appellants.

Messrs. *T. Prakasam*, *D. Appa Row*, *K. Srinivasa Aiyangar*, *V. Ramesam*, *T. Ramachandra Row*, *B. Somaya*, and *D. V. Krishnama Razu*, for the Respondents.

JUDGMENT.

ABDUR RAHIM, J.—This appeal is in a suit to enforce a usufructuary mortgage, and the question that is argued before us is as to whether there was a valid tender of the amount due on the mortgage on the 17th January 1899 or whether the respondents dispensed with the necessity for such a tender. On either ground the claim is that interest ceased to run from the date mentioned. Mr. Narayanamurthi who has argued the case for the appellants before us conceded, and we think rightly, that what happened could not be stated to amount to a valid tender within the meaning of section 84 of the Transfer of Property Act. The so-called tender really depends on what the 2nd appellant wrote to the respondent on the date in question. That letter is Exhibit Va, and there he asked the mortgagee to give him an account of what was due to him and expressed his willingness to pay what was due to the mortgagee. In his reply the mortgagee stated that under the terms of Exhibit A, the deed of mortgage, he had acquired an absolute right to the property and, therefore, he was not bound to render any account to the appellants and refused to do so. He did, however, mention what was the amount that had become due on his mortgage. That amount was Rs. 3,19,946. It is argued that that would be the correct amount upon the terms of the mortgage, that is, calculating interest at the rates specified therein. This or any amount was never actually tendered by the appellants, nor was it sought to be deposited in Court. In fact, before the institution of the suit, no deposit or tender was made, and even now after decree, no portion of the amount due to the respondents has been paid. The mere expression of willingness on the part of a debtor to pay a debt cannot possibly amount to a tender within the meaning of the law. In fact, as we have said, Mr. Narayanamurthi did not contend so far. But he has strongly urged upon us that inasmuch as the respondent put forward the allegation that he had acquired an absolute right to the property and, therefore, the appellants were not entitled to redeem him, it must be taken in law to amount to a dispensation of tender.

On this point we have been referred to a number of Indian and English cases dealing with contracts for sale or other cases of reciprocal contracts; for instance, *Dayabhai Dipchand* v. *Dullabhram Dayaram* (1), *Owners of the "Norway"* v. *Ashburner* (2). But the principle laid down in those cases is that where there are reciprocal promises and one of the promisees waives or dispenses with the performance of the promise made to him, he cannot afterwards put forward the non-performance of that promise as an answer to a suit for damages. But as regards the question whether the interest on a debt ceases from the date of tender or deposit, that class of cases depends upon the provisions of the Transfer of Property Act and upon a different principle. That Act lays down the conditions relating to a valid tender and valid deposit. It nowhere says that even if a valid tender has not been made, interest will cease to run if the mortgagee happens to set up a right to the property in himself. If the argument of the appellants were well founded, the position would be this: In every case where the mortgagee in good faith, as in this case, asserts that he has acquired an absolute right to the property, the mortgagor or the person who has purchased the equity of redemption, by reason of that fact alone, would be exempted from payment of interest, provided he has expressed his willingness to pay the debt. No authority whatever has been cited in support of such a proposition which, in our opinion, is altogether untenable. We have been referred to a Privy Council decision in *Harendara Lal*

(1) 8 B. H. C. R. 133.

(2) (1865) 3 Moore. P. C. (N. S.) 245; Br. & L. 404; 11 Jur. (N. S.) 892; 13 L. T. (N. S.) 50; 13 W. R. 1085; 146 R. R. 62; 16 E. R. 92.

Rai Chowdhri v. *Maharani Dasi* (3). There what happened was that under the contract between the parties the mortgagee engaged to appraise the mortgaged property if there was any proper negotiation for the sale of that property and it was brought to his notice. There was in fact a *bona fide* offer to purchase the property which was brought to the notice of the mortgagee in that case and he was asked to say whether he would appraise the property and fix the value. He refused to do so and in consequence the mortgagor was unable to find a purchaser for the property and re-pay the mortgage amount. Their Lordships held that the mortgagee having rendered impossible the sale of the property by the mortgagor by which the latter would have been in the position to re-pay the debt, the matter stood 'as if it was a case of tender.' Mr. Narayanamurthi has attempted to build an argument upon this phrase to the effect that their Lordships treated the case as one of a tender. But we do not think that there is any warrent for such an interpretation. There was no case of tender there and the Judicial Committee merely cited the case of a tender only by way of analogy. The other case referred to, *Gopeswar Saha* v. *Jadub Chandra* (4), stood apparently on the same footing and none of those cases support the broad proposition which has been contended for before us on behalf of the appellants. We, therefore, hold that what happened between the appellants and the respondents in 1899 did not have in law the effect of making interest cease to run from that date. The Subordinate Judge also finds upon the evidence that, in fact, the 1st appellant had not the necessary amount at his disposal on the date of Exhibit Va. He is no doubt a large landlord with an income of about Rs. 40,000 a year. But the evidence does not show that he had, on the date in question, the amount which would be required to discharge the mortgage debt at his disposal. He was obliged to borrow even small sums of money and sometime after 1899 he got considerably involved in debt. He swore in the witness box that he had Rs. 1,50,000 in his chest. The Subordinate Judge has disbelieved that evidence and we think rightly. If he had anything like that amount with him at the time, his account books would have been the best evidence to show it. He must have kept accounts which he has withheld from Court, and it was not the case of the 8th defendant, the principal appellant before us, that he had been negotiating to raise money, still less that he had actually raised money in that way. We, therefore, accept the conclusion of the Subordinate Judge that if Exhibit Va would be construed as an offer to pay, it was not a *bona fide* offer in the sense that the appellants had the means of making the payment at the time. It may be pointed out that the 8th defendant bought the bulk of the mortgaged properties for Rs. 2,40,000, while on 17th January 1899 the amount payable to the mortgagees was over Rs. 3,00,000. That also supports the finding of the Subordinate Judge that the so-called offer in Exhibit Va, if offer it can be called at all, was really not *bona fide*, for we are not prepared to hold that the 8th defendant was able and willing to pay that amount on the date in question.

The 3rd point which has been raised before us relates to costs. The Subordinate Judge has given a personal decree against defendants Nos. 3, 8 and 12 for the entire costs. As regards the conduct of the suit we think that the Subordinate Judge was right in saying that the way in which the defence was conducted was vexatious. Defendants Nos. 3, 8 and 12 have been rightly made liable to pay the costs finally. But we do not think that they ought to be made personally liable for the costs relating to the stamp duty. So that amount must be deducted from the amount of costs for which defendants Nos. 3, 8 and 12 have been made personally liable. In other respects, the decree of the Subordinate Judge is confirmed.

The 1st respondent's memorandum of objections relates to the expenses of the establishment charges, repairs to canals, etc., expenses for the village headman, service Inams to village headman, and village duties and other similar expenses. The Subordinate Judge has allowed Rs. 3,000 a year for all

(3) 28 C. 557; 28 I. A. 89; 5 C. W. N. 536; 11 M. L. J. 171; 8 Sar. P. C. J. 48 (P. C.).

(4) 32 Ind. Cas 537; 22 C. L. J. 352; 20 C. W. N. 689; 43 C. 632.

these charges, which are amounts actually spent by the mortgagee. But the contention is that Rs. 4,000 is provided for in a lump sum in the deed of mortgage, that being the amount which was settled with the mortgagee as payable on account of these charges. The clause in question says that it is agreed that after deducting for Government taxes so much and Rs. 4,000 on account of establishment charges, etc., and other payments mentioned therein, the mortgagors should take an account of the balance of the net income from the mortgagee's officials on the 1st February of each year. The agreement is only to account for the balance and not with regard to any of the items mentioned in that clause. This view is suggested also by the clause at page 7 of the document which says that, if in addition to the usual earthwork which may have to be executed, any extensive repairs have to be done in respect of river Bunds, etc., in respect of these unusual expenses, the mortgagee is entitled to charge the actual amount paid in excess of the Rs. 4,000. There is no mention here as to the other items comprised in the Rs. 4,000, that is to say, it is not provided that, if for establishment charges, the mortgagee has actually spent more than what was taken into account, he would be entitled to the excess. Nor is it anywhere provided that if anything less than Rs. 4,000 is spent the mortgagee must account for the rest. It seems to us that with respect to these petty and recurring items of expenditure, which were of a variable character, both the parties agreed that they should be fixed at a certain figure. If all that they intended was that the actual expenses incurred under these heads should alone be allowed to the mortgagee, there would have been no necessity to fix this figure at all. We must allow the memorandum of objections with costs to come out of the estate.

The 3rd respondent's memorandum of objections is not pressed and is dismissed.

OLDFIELD, J.—I agree with my learned brother's judgment; but I prefer not to base my conclusion on any implication from the particular reason which the 1st plaintiff gave in his letter, Exhibit V, for refusing to receive money from the defendants. The foundation of section 84 of the Transfer of Property Act is that liability for interest on the amount due on the mortgage shall cease from the date of the tender, inasmuch as the person who has made the tender not merely has to produce money in order to make it, but must also keep it ready for payment in Court or otherwise. It is clear that no money could have been produced in this case and that none was kept ready for payment. There is, no doubt, a distinction to be drawn between the proposal to make a tender, such as we have in this case, and an actual tender ; but there is no reason why a person who makes the former should be treated any better than a person who makes the latter. In these circumstances, it seems to me that the appellants, who made no *bona fide* proposals and who, it is admitted, made no tender of any sort, cannot benefit by the principle of section 84. On the other points, I entirely agree with my learned brother's judgment.

This case coming on for hearing for orders this day, the Court made the following

ORDER.—In this appeal Mr. K. Srinivasa Ayyangar for the respondent has applied to us for fees for two Vakils under the new rule 41 framed under the Legal Practitioners Act. This Rule empowers the Court in cases of special difficulty or importance to allow two sets of fees to a party who has engaged more than one Vakil. This case involved about seven lacs of rupees, but it did not strike us that there was any specially difficult question involved in the appeal and in fact we did not call upon the learned Vakil for the respondent to reply. It is, however, urged that the case is of special importance having regard to the amount involved. We are inclined to agree with that contention ; for the respondent, in view of the fact that no less than seven lacs were concerned in the litigation, was justified in engaging two Vakils. We, therefore, allow fees for two Vakils, which will be taxed according to the rules.

Appeal dismissed.

M. C. P.

CALCUTTA HIGH COURT.

APPEALS FROM ORIGINAL DECREES NOS. 86, 268 AND 269 OF 1911

AND

APPEAL FROM APPELLATE DECREE No. 2918 OF 1913.

July 7, 1916.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Richardson.

IN No. 86 OF 1911

AFTABUDDIN CHOWDHURY, ADMINISTRATOR TO THE ESTATE OF LATE DURGA CHURN MUKHERJI—PLAINTIFF—APPELLANT

versus

BASANTA KUMAR MUKOPADHYAYA AND ANOTHER—DEFENDANTS—RESPONDENTS.

IN No. 268 OF 1911

AFTABUDDIN CHOWDHURY, ADMINISTRATOR TO THE ESTATE OF LATE DURGA CHURN MUKHERJEE—DEFENDANT—APPELLANT

versus

SAMSER ALI MIAN AND ANOTHER—PLAINTIFFS—RESPONDENTS.

IN No. 269 OF 1911

AFTABUDDIN CHOWDHURY, ADMINISTRATOR TO THE ESTATE OF LATE DURGA CHURN MUKHERJI—PLAINTIFF—APPELLANT

versus

DEWAN DAS SAUDAGAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

IN No. 2918 OF 1913

DEWAN DAS SAUDAGAR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

AFTABUDDIN CHOWDHURY, ADMINISTRATOR TO THE ESTATE OF LATE DURGA CHURN MUKHERJEE, AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 53—Fraudulent transfer—Transferee's right under it—Bona fides *—Payment of full value, effect of.*

The purchaser of a property, with full knowledge of the intention of the seller to defraud or defeat his creditor, is not a *bona fide* transferee and his purchase is invalid as against the creditors, even though full consideration was paid for the purchase and a portion of the purchase-money was paid in discharge of a debt which the seller owed to third persons. [p. 445, cols. 1 & 2.]

No. 86 OF 1911

Appeal against the decree of the Subordinate Judge, Noakhali, dated the 23rd of December 1910.

NOS. 268 AND 269 OF 1911

Title Appeals Nos. 58-59 of 1911 in the Court of the District Judge, Noakhali, against the decree of the Subordinate Judge, Noakhali, dated the 23rd of December 1910, and transferred to the file of this Court by an order of Chitty and N. R. Chatterjea, JJ., made on the 27th April 1911.

No. 2918 of 1913

Appeal against the decree of the District Judge, Noakhali, dated the 3rd of February 1913, affirming that of the Officiating Subordinate Judge at that place, dated the 22nd of January 1912.

Babus *Dwarka Nath Chakraburty*, *Hari Bhushan Mukherjee* and *Manmotho Nath Ray*, for the Appellants in Nos. 86, 268 and 269 of 1911 and for the Respondents in No. 2918 of 1913.

Babus *Jogesh Chandra Ray* and *Gunada Charan Sen*, for the Respondents in No. 86 of 1911.

Babus *Basanta Kumar Bosu* and *Khirode Narain Bhuiya*, for the Respondent in No. 268 of 1911.

Babu *Dhirendra Lal Kastgir*, for the Respondents in No. 269 of 1911 and for the Appellant in No. 2918 of 1913.

APPEAL No. 86 OF 1911.

JUDGMENT.—The facts of the cases which gave rise to these appeals may be stated shortly as follows:—

One Durga Charan Mookherjee died in 1898, leaving his son Madhu Sudhan an infant. Bistoo Charan brother of Durga Charan was appointed guardian under Act VIII of 1890 in respect of the properties of the minor on the 20th February 1900, and one Sarat Chandra Ray and three others executed a security bond on the 13th June 1900 as sureties for Bistoo Charan. The order appointing Bistoo Charan as guardian was, however, set aside on appeal by the High Court on the 23th January 1902, and on the 23rd August 1904, one Rajani Kanta was appointed administrator of the estate. On the 27th January 1905, he brought a suit for accounts for the period of Bistoo Charan's management claiming Rs. 12,000 and odd, and the sureties Sarat Chandra Ray and others were made defendants along with Bistoo Charan. After filing the suit application was made for attachment before judgment of the properties of Sarat Chandra, and on the 28th April 1905 a conditional order for attachment was passed

and the order was served on the 9th May 1905. On the 19th May 1905, objection to attachment was made by Bistoo Charan and on the same day Sarat Chandra filed an affidavit stating that he was not going to alienate any property. On the 22nd May 1905, the conditional order for attachment was withdrawn. On the 12th January 1906, a fresh order for attachment before judgment was issued and served between the 19th and the 25th February 1906. A preliminary decree for accounts was passed on the 9th February 1906, and a final decree was passed on the 16th March 1909 for Rs. 10,867-8-4 in favour of Aftabuddin who had succeeded Rajani Kanta as administrator of the estate against Bistoo Charan and Sarat Chandra and the other sureties. While the said suit was pending Sarat Chandra executed six conveyances in favour of certain persons in respect of some of his properties. Two of these were executed in favour of Basanta Kumar Mukerjee, one dated the 29th September 1905 and the other dated the 25th December 1905. Two others were executed in favour of one Dewan Das, one of which dated the 31st December 1905 was in his own name and the other dated the 25th February 1906 in the name of his son Gour Das. Another Kobala dated the 14th February 1906 was executed in favour of one Shamsere Ally, and lastly there was a Kobala in favour of one Nanda Kumar on the 25th February 1906. After the final decree was passed in the account suit, the decree-holder applied for execution of the decree against Sarat Chandra and attached his properties. Thereupon Basanta Kumar Mookherjee and the other purchasers preferred claims to the properties attached on the strength of the Kobalas executed in their favour. The claims of Shamsere Ally, Gour Das and Nanda Kumar were disallowed, but the claims of Basanta Kumar and Dewan Das were allowed on the 31st January 1910.

The decree-holder thereupon brought a suit No. 160 of 1910 for a declaration that the purchase by Basanta Kumar was fraudulent, collusive and *benami*, and that no title passed to him under the Kobalas. The suit was dismissed by the Court below and appeal No. 86 of 1911 has been preferred in that suit. A similar suit brought against Dewan Das (Suit No. 161 of 1910) was also dismissed and Appeal No. 269 of 1911 is against the decision in that suit. The suit (No. 53 of 1910) brought by Shamsere Ally was decreed, and Appeal No. 268 of 1911 arises out of that suit. The suit brought by Nanda Kumar was dismissed and no appeal has been preferred by him. The suit by Dewan Das upon the Kobala in the name of Gour Das (Suit No. 53 of 1911) was also dismissed by the Court below and Second Appeal No. 2918 arises from that suit. We will first deal with Appeal No. 86 of 1911 which arises out of Suit No. 160 of 1910, in which Basanta Kumar Mookherjee is the contesting defendant. It appears that the most valuable of the properties belonging to Sarat Chandra was a share in a big estate called Jugdia Estate, which was in the hands of one Hem Chandra Das as Sadar Malguzar, the proprietors getting their respective Malikanas from him. Sarat Chandra had 13-*gundas* 1-*cowri* 2-*kags* share at the time of the transactions we are dealing with in that estate. Hem Chandra Das had a Katchari at Char Parbati in that estate and Sarat Chandra served as Naib (principal officer) in the Katchary under Hem Chandra. Basanta Kumar as already stated purchased by two Kobalas dated the 29th September 1905 and 25th December 1905 respectively some shares of the Jugdia Estate from Sarat Chandra. By the first Kobala he purchased a 1-*gunda* 2 *karas* 1-*krant*, 1$\frac{1}{5}$-*dantis* share, and by the second a 5-*gunda* share. Basanta Kumar is a Pleader practising at Feni. He acted as a Pleader for Durga Charan Mukherjee so long as he was alive and afterwards for the administrator of his infant son's estate, *i. e.*, the decree-holder. His lodging and that of Durga Charan were in the same compound with only a fencing between them. He was cited as a witness in the suit for accounts against Bistoo, Sarat and others, and the summons was served personally upon him on the 3rd July 1905 and he was examined as a witness in that case. In his deposition in the present case he at first stated that he could not say whether he knew about the account suit before the date of his conveyances. But when the bills of his travelling and other expenses which

he had submitted to the Court in the account suit were shown to him, he had to admit that he knew of the suit before the execution of the Kobalas. It appears from the evidence of Hem Chandra that he, Sarat Chandra and Basanta Kumar gave evidence in the account suit at the same time and Rajani Mohan Ray, who was formerly the administrator of the estate of Durga Charan, swears that he told Basanta Kumar about the attachment before and after the first attachment and before and after the second attachment. The Kobalas in favour of Basanta Kumar and the other purchasers were all executed at the Parbati Char Katchari of Hem Chandra, the Sadar Malguzar of the Jugdia Estate. The first attachment was served at Char Parbati on the 18th May 1905, and the second on the 19th January 1906. There can be no doubt that Hem Chandra was fully aware of the attachment. He denied knowledge of the attachment in his deposition in the present case, but in his deposition in the claim case on the 11th December 1909 he stated that he heard of the first attachment and that it had been subsequently withdrawn on the objection of Sarat Chandra. Sarat Chandra was then serving under him as a Naib in the Jugdia Estate in the Char Parbatia Kutchari. The Court below observes:—"It is quite clear from the deposition of Hem Chandra Das that he knew about the attachment and Basanta Kumar made enquiries from him. Hem Chandra and Basanta Kumar are friendly. It is highly improbable that he would conceal the fact of attachment from him. Moreover he is a Pleader and was a witness in the suit on behalf of the administrator and appeared in Court on many dates. It is very probable that he should know it. Rajani Roy, the previous administrator, affirms that Basanta Kumar was told everything. He is no administrator now and has no concern with the estate or the present administrator or the owners and so I see no reason to disbelieve him. I, therefore, find that Basanta Kumar was aware of the attachment, and the attempt of Sarat to sell properties to avoid the liability." We entirely agree with this finding of the Court below, and we have no doubt that Basanta Kumar was perfectly aware of the attachment and of Sarat's intention to dispose of his properties, to avoid liability under the decree which might be passed in the account suit, before he took the conveyances from Sarat. The next question is whether any consideration was paid by Basanta Kumar for the Kobalas. The first Kobala was for Rs. 1,365, and the second for Rs. 4,520. Hem Chandra and the attesting witnesses have deposed to the passing of the consideration and Basanta Kumar also deposes to the payment of consideration of the second Kobala. The attesting witnesses, however, are all the servants or relations of Hem Chandra. Basanta Kumar is a Pleader, he has money-lending business and landed properties He has accounts, but he says that he has no account books to show the payment of the consideration of the Kobalas. Hem Chandra says that out of the consideration for the first Kobala in favour of Basanta Kumar certain debts which Sarat Chandra owed to certain ladies of his (Hem Chandra's) family were paid off. These loans are said to have been advanced to Sarat Chandra on behalf of the ladies by Hem Chandra on bonds, but he cannot say whether the bonds were registered or were unregistered or whether they were mortgage bonds. Hem Chandra has produced certain accounts to show the re-payment of the debts by Sarat Chandra. They are loose sheets of paper stitched together, and having regard to the evidence we do not think that it has been satisfactorily proved that Sarat Chandra really owed any debts to the ladies of Hem Chandra's family or that they were paid off out of the consideration money of the first Kobala. At the same time we are unable to hold that the Kobalas were *benami*. Hem Chandra, under whom Sarat Chandra was serving as a Naib, was helping him as much as he could and Basanta Kumar was the friend and Pleader of Hem Chandra, but we do not think it likely that he would act as the *benamdar* of Sarat Chandra or hold the property for him when he obtained no benefit from such a transaction. He had already purchased a share in the Jugdia Estate, which appears to be a very valuable one, and he would naturally be desirous of acquiring further shares in that estate. He had undoubtedly the means to purchase the share. There is evidence

that since his purchase from Sarat Chandra he got his name registered in respect of the shares and received the Malikana of the shares purchased from Hem Chandra, the Sadar Malguzar. We do not think having regard to all the circumstances that Basanta Kumar purchased the property from Sarat Chandra *benami* or held it for his benefit. Basanta Kumar, however, is a Pleader and a man of business, and it is not likely that with full knowledge of the suit which was pending at the time, the attachments before judgments and the sure prospect of litigation which a purchaser from Sarat Chandra, would have to enter into in the event of a decree being passed against Sarat Chandra, should have paid the full value of the property which the consideration stated in the Kobalas represents. But if the Kobala were not *benami* and if Basanta Kumar paid some consideration it is idle to speculate how much he actually paid, and we must hold that the Kobalas were not without consideration. The transfers by Sarat Chandra, however, were made with intent to defeat or delay his creditor, the plaintiff, and the Court below has also come to the same conclusion. The only question, therefore, is whether Basanta Kumar was a transferee in good faith. The learned Subordinate Judge observes:—"It cannot, however, be conceived for a moment that Basanta Kumar intended to help Sarat in his fraudulent conduct. It appears from the evidence on the side of the administrator that Basanta Kumar was a well wisher of the estate of Durga Charan and had intimacy with him and his widow. Under such circumstances, it is highly improbable that he should help Sarat. It seems that he purchased for his own benefit without any thought of helping or injuring any one. The question is whether under these circumstance he is to be held as acting *mala fide*. The law has been elaborately discussed in the decisions reported as *Hakim Lal* v. *Mooshahar Sahu* (1) and *Ishan Chunder Das Sarkar* v. *Bishu Sirdar* (2). Going carefully through these decisions I think the purchase of Basanta Kumar cannot be said to be *mala fide* merely because the result has been to defeat the creditor. We are unable to agree with the Court below on the point. There is no doubt that the transfers made by Sarat were fraudulent. They were made with intent to defeat or delay the plaintiff in the event of his obtaining a decree against him. When the first order for attachment before judgment of his properties was served, Sarat Chandra on the 19th May 1905 stated in his affidavit that he was not attempting to transfer any properties and the Court in rejecting the application for attachment on the 22nd May 1905 to a certain extent relied upon the said affidavit. The transfer made by Sarat Chandra in favour of Basanta Kumar on the 22nd September 1905 was certainly fraudulent and if the latter, with full knowledge of the fraudulent intention, obtained the conveyance, we fail to see how he can be said to have acted *bona fide*. The mere fact that the transfer was not a cloak for the benefit of the debtor or that it was for adequate consideration does not necessarily show that it was made in good faith. A mere knowledge of an impending decree or execution against the transferor is not sufficient to make the transferee a transferee otherwise then in good faith, when he does not share the intention of the transferor to defeat or delay his creditors. But as observed in the case of *Ishan Chunder Das Sarkar* v. *Bishu Sirdar* (2), "Indeed it would almost be a contradiction in terms to say that a transferee for value, who takes the transfer with the intention of helping the transferor to convert his immoveable property into money which can easily be concealed, and thus to defeat or delay his creditors, should nevertheless be treated as transferee in good faith, and the transfer to him should be upheld, though section 53 says that a transfer made with such intention is voidable at the option of the creditors. Where the tranferee is a creditor of the transferor and accepts the transfer in satisfaction of the debt due to him, though with the knowledge that his so doing has the effect of defeating other creditors of the transferor, the transfer may come within the last paragraph of section 53 of the Transfer of Property Act." In *Cadogan*

(1) 34 C. 999; 11 C. W. N. 889; 6 C. L. J. 410.
(2) 24 C. 825; 1 C. W. N. 665; 12 Ind. Dec. (N. S.) 1217.

v. *Kennett* (3) Lord Mansfield said: "If the transaction be not *bona fide*, the circumstance of its being done for a valuable consideration, will not alone take it out of the Statute. I have known several cases where persons have given a fair and full price for goods, and where the possession was actually changed; yet being done for the purpose of defeating creditors, the transaction has been held fraudulent, and, therefore, void." The authorities on the point were elaborately discussed in the case of *Hakim Lal* v. *Mooshahar Sahu* (1) and we agree with the view taken by the learned Judges as to the result of the authorities. In that particular case, the transfer impeached as fraudulent was made in favour of a creditor and there was adequate consideration for the transfer, and it was accordingly held that the transfer was not invalid. The Judicial Committee in affirming the decision of this Court observed:—"The transfer which defeats or delays creditors is not an instrument which prefers one creditor to another, but an instrument which removes property from the creditors to the benefit of the debtor. The debtor must not retain a benefit for himself. He may pay one creditor and leave another unpaid." Their Lordships were dealing with a case where the transfer was in favour of a creditor.

In the present case, Basanta Kumar was not a creditor and he had full knowledge of the fraudulent intention of the transfer. Under the circumstances the transfer is void as against the plaintiff even if Basanta Kumar had paid full value for the property purchased by him.

It is said that the first conveyance was executed in favour of Basanta Kumar for payment of certain debts which Sarat owed to certain ladies of Hem Chandra's family. We have referred to the evidence on the point, and have expressed our opinion that the existence of the debts or the payment thereof by Sarat out of the consideration of the said Kobala was not satisfactorily proved. But assuming that there were some debts and that a portion of the consideration money paid by Basanta Kumar was applied in payment of such debts, we do not think that the transfer is for that reason valid. We fully agree with the observations quoted from *Lockram* v. *Rastan* (4) in the case of *Hakim Lal* v. *Mooshahar Sahu* (1) referred to above and which run as follows:—"A person who purchases for a present consideration is in every sense a volunteer; he has nothing at stake, no self-interest to serve: he may with perfect safety keep out of the transaction. Having no motive of interest prompting him to enter into it, if yet he does enter, knowing the fraudulent purpose of the grantor, the law very properly says he enters into it for the purpose of aiding that fraudulent purpose. Not so with him who takes the property in satisfaction of a pre-existing indebtedness, he has an interest to serve: he can keep out of the transaction only at the risk of losing his claim. The law throws upon him no duty of protecting other creditors. He has the same right to accept voluntary preference that he has to obtain a preference by superior diligence; he may know the fraudulent purpose of the grantor, but the law sees that he has a purpose of his own to serve and if he goes no further than is necessary to serve that purpose, the law will not charge him with fraud by reason of such knowledge."

So far as the second conveyance is concerned, there is no evidence that any creditor was paid off with the consideration for the said conveyance. Hem Chandra says that Sarat sold his property in order to raise money for a business in rice. If that is so, he converted his immoveable property into money, so that the creditor might be defeated. Under the circumstances we think the transfers in favour of Basanta Kumar are void against the plaintiff.

It is contended, however, on behalf of Basanta Kumar that this is not a suit under section 53 of the Transfer of Property Act on behalf of the creditors to set aside a fraudulent conveyance, that the issues which arise in such a suit were not raised and evidence was not gone into on such issues, and that the plaintiff having challenged the conveyances as *benami* and without consideration and having failed to prove the same, the suit should

(3) (1776) 2 Cowper 432; 98 E. R. 1171.

(4) (1899) 9 North Dakota 434; 81 N. W. 60.

be dismissed. There is no evidence that there are any creditors of Sarat other than the plaintiff, the suit, therefore, is not open to the objection that it was not brought on behalf of all the creditors.

It is true that the suit was based upon the grounds that the conveyances were *benami* and without consideration, and evidence was adduced in support of that case. The questions of *benami* and fraud appear to have been mixed up in the plaint and the evidence, but there are distinct allegations in the plaint that Sarat Chandra, with intent to frustrate the decree and with the help of Hem Chandra, created the false and fraudulent conveyances.

Basanta Kumar in his defence set up that he was a *bona fide* purchaser for value without notice of the attachment. The 4th issue raised in the case was: "Is the defendant No. 1 a *benamidar* for defendant No. 2 and is the Kobala set up by the defendant No. 1 a fraudulent and collusive document?" And the learned Subordinate Judge discussed the question whether Basanta Kumar purchased in good faith. After referring to the authorities relating to fraudulent conveyances, he observes:— "Going carefully through these decisions I think the purchase of Basanta Kumar cannot be said to be *mala fide* merely because the result has been to defeat the creditor. In this connection it is to be noted that in the plaint against Basanta Kumar the plaintiff did not want to avoid the sale because of the bad faith of Basanta Kumar. His purchase was impeached as *benami*. Had the plaintiff based his case on an intention to defraud, the defendant could have been able to prove that the property which Sarat had even after the sale to him, was sufficient to meet any claim of the administrator."

It appears, therefore, that although there were allegations to the effect that the Kobalas were fraudulent and were executed in order to defeat the claim of the plaintiff they were mixed up with the question of *benami*, and the attention of the parties was not directed to the points arising in a suit under section 53 of the Transfer of Property Act, and evidence was not adduced on all such points.

In these circumstances, we think that for the ends of justice the case should be remanded for an enquiry into the assets of Sarat Chandra at the time of the sales to Basanta Kumar, and whether they were sufficient to meet the claim of the administrator in the account suit then pending. If the Court finds that they were not sufficient, the conveyance in favour of Basanta Kumar will be declared void as against the plaintiff. If, on the other land, Sarat had sufficient properties at the time to meet the claim of the plaintiff, the suit will be dismissed. Costs will abide the result.

IN APPEAL NO. 268 OF 1911.

This appeal arises out of the suit (No. 53 of 1910) brought by Shamsere Ally who was unsuccessful in the claim case. He purchased 2½ *gandas* of the Jugdia estate by a Kobala dated the 14th February 1906. The purchase, therefore, was after the second attachment was applied for and before it was effected (between 19th to the 25th February 1906). Shamsere was already the owner of another 2½-*gandas* share, and appears to be a substantial landowner and shopkeeper. The consideration stated in the Kobala is Rs. 2,160. There is evidence to show that the consideration passed and there are entries in his *jama khurach* book showing payment of Rs. 2,160 as consideration besides other expenses for stamp and registration, etc., of the Kobala.

The Court in the claim case was of opinion that the *jama khurch* was not "above suspicion," but we do not see sufficient reason for rejecting the book as unreliable receipts have been produced to show that he received Malikana for the years 1313 to 1316. The account book of 1312, which was produced to show payment of consideration, could not contain entries relating to reciepts of Malikana of that year, as the Kobala was executed at almost the end of the year (Falgoon), although the fact that the books of the years 1313 to 1316 were not produced is open to comment. The only evidence to show that the Kobala was *benami* is that of Aftabuddin and Basiruddin. The first merely says that he "heard" from many people that the Kobalas were without consideration, and the statement of Basir-ud-din (who is also one of the sureties) that Sarat told him about the *benami*

nature of the transaction cannot be relied upon. Shamsere, it is true, admits that he did not make any enquiry about the property, but he was a co-sharer in the property, though the fact that he did not enquire whether the property purchased by him was 'under any debt or not' is suspicious. Having regard, however, to the facts that he already had a share in the estate and had the means to purchase the 2½ *gundas* in question, the evidence as to payment of consideration may be accepted.

Shamsere holds *jamas* in the Jugdia Estate of which Hem Chandra is the Sadar Malguzar and is the "master of giving or refusing settlements" as the witness Abdul Majid says. The Kobala was executed in Hem Chandra's Katchari where Sarat used to serve as Naib, and Shamsere resided at Char Chandia within the Jugdia estate. Basanta Kumar sometimes acted as his Pleader. But there is no direct evidence to show that Shamsere was aware of the suit against Sarat, or of the attachments before judgment or that he purchased with knowledge of the fraudulent intention of Sarat in disposing of his properties, although all the circumstances raise a suspicion that he was aware of the facts. In the absence of the evidence, however, the Court cannot act upon mere suspicion, and under the circumstances we are unable to differ from the Court below or to hold that the purchase was not *bona fide*. This appeal accordingly will be dismissed, but in the circumstances we direct that each party do bear its own costs.

IN APPEAL NO. 269 OF 1911.

This appeal arises out of the suit (No. 161) brought by Aftabuddin against Dewan Das, whose claim was allowed in the claim case. The suit relates to 1-*gunda* share of Jugdia Estate purchased from Sarat Chandra by Dewan Das, on the 31st December 1905, for Rs. 1,296. Dewan Das is said to be more than a hundred years old: his son Gour Das, looks after his properties. Gour Das and a witness Nalini Kumar have been examined to prove the payment of the consideration. No *jama khurach* has been produced, but Gour Das says that they have no *jama khurach* The Malikana receipts have, however, been produced [Exhibits B 11 (1) to B 11 (4)]. The case bears a general resemblance to the case of Shamsere Ally. The Kobala was executed at the Katchary of Hem Chandra and the witnesses to it were the *amlas* of Hem Chandra. Dewan Das already had a 12½ *gundas* share in the estate. His son Gour Das admits that Sarat told him about his debts, but he did not enquire into the particulars. Dewan Das lives at Char Chandia within the Jugdia estate, and appears to be a substantial man. The only evidence as to the Kobala being a *benami* transaction is that of Aftabuddin or Basiruddin and the observations we have made with respect to them in the case of Shamsere Ally apply to this case also. There is no direct evidence to show that Dewan Das or his son Gour was aware of the suit against Sarat or the attachments or that they had knowledge of the fraudulent intention of Sarat in disposing of his properties, although as in the case of Shamsere a suspicion arises that they were aware of the facts. Under the circumstances, we must dismiss this appeal also, each party to bear his own costs.

IN SECOND APPEAL NO. 2918 OF 1913.

We now come to the second appeal preferred by Dewan Das which arises out of suit (No. 53 of 1911) brought by him for declaration of his right to 1-*gunda* 3-*karas* share of the Jugdia Estate which was purchased by him in the name of his son Gour Das by a Kobala dated the 26th February 1906, that being the last Kobala by which Sarat Chandra sold away his share in the Jugdia Estate. The suit was tried by another Subordinate Judge and he came to the conclusion that the evidence regarding the passing of the consideration was very doubtful but that even supposing that the amount was actually paid to Sarat, "there could be no doubt that the object of the Kobala was to convert the property out of the reach of the decree expected to be passed in the account suit," and that the plaintiff had full knowledge of the fraudulent intention of Sarat. The suit accordingly was dismissed by the Court of first instance. On appeal the learned District Judge affirmed the decree of the first Court. The learned

Judge says:—"The evidence as to the passing of the consideration was held to be unsatisfactory by the lower Court. I do not differ from the lower Court on this point. It may or may not be true. But I cannot believe that the plaintiff or rather his son Gour had no knowledge of the proceedings against Sarat." Then after making certain other observations he states his conclusion thus:—"But no unquestionable evidence is forthcoming to prove the passing of consideration and the Courts must presume the facts to be according to the common course of natural events and that Gour had knowledge of Sarat's motive in disposing of his property." The finding that the consideration for the Kobala was not proved by unimpeachable evidence is a finding of fact and is binding upon us in second appeal.

It is true that we have in appeal No. 269 upheld the first Kobala of Dewan Das on the ground that there was no direct evidence that he had knowledge of the attachments or the fraudulent intention of Sarat. But that Kobala was executed on the 31st December 1905 and the Kobala in the present case was executed on the 26th February 1906. It was the last Kobala by which Sarat disposed of his share in Jugdia Estate, and it is so recited in the Kobala itself.

It may at first sight seem anomalous that the same person (Gour Das) who obtained both the conveyances should be held to have had knowledge of the fraudulent intention of the transferor in the one case and not in the other, though the circumstances disclosed are somewhat similar in both cases. But he might have had no knowledge of such intention in December 1905 when the first Kobala was taken, whereas he might have knowledge of it two months later. The suit relating to the second Kobala was instituted later. We do not know what evidence was adduced in this suit or what presumption of fact could be drawn therefrom. However that may be, it is unnecessary to examine the finding as to the knowledge of the fraudulent intention. There is the finding that consideration for Kobala was not proved and Dewan Das is the plaintiff in the present case, while he was the defendant in the other case. It comes to us by way of second appeal and we are bound by the finding of fact arrived at by the lower Appellate Court. We must accordingly dismiss this appeal with costs.

Appeal dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 833 OF 1915.

December 18, 1917.

Present:—Mr. Justice Beaman and Mr. Justice Marten.

JANARDAN GANESH KHADILKAR AND ANOTHER—APPELLANTS

versus

RAVJI BHIKAJI KONDKAR—PLAINTIFF—RESPONDENT.

Easements Act (*V of* 1882), *ss.* 2 (c), 17 (c)—*Water rights—Right to take river water over another's lands in undefined channel, nature of—Presumption of lost grant—Easement.*

From time immemorial the plaintiff and his ancestors as owners of certain non-riparian lands had been taking water from a river at or about a certain spot on the banks and thence over the lands of the defendants successively till the plaintiff's lands were reached. The water was brought not in a defined channel but was allowed to spread over and irrigate defendants' lands first and then the plaintiff's:

Held, that even if the right enjoyed by the plaintiff and his ancestors could not be acquired as an easement, there was nothing intrinsically unreasonable in it; on the contrary it was compatible with the usages and sentiments of the agricultural population in many parts of India and having been enjoyed from time immemorial it was saved by section 2, clause (*c*), of the Easements Act. [p. 449, col. 1.]

Per *Marten, J.*—The plaintiff's claim was to river water and not to mere surface water on the defendants' lands and consequently section 17 (*c*) of the Easements Act had no application to the case. [p. 450, col. 1.]

The presumption of a lost grant is one which may be made in India as well as in England. The presumption arises out of the strong desire of the Courts to find a legal origin for an ancient and uninterrupted user. The presumption may be rebutted like other presumptions. It also requires certain conditions and one is that the right could have been the subject of a grant. [p. 450, col. 2.]

Second appeal from the decision of the Assistant Judge at Thana, in Appeal No. 17 of 1914, confirming the decree passed by the Subordinate Judge at Bhiwandi, in Civil Suit No. 452 of 1911.

The Hon'ble Mr. *Jinnah* (with him Messrs. *S. R. Bakhale* and *B. V. Desai*), for the Appellants.

The Hon'ble Mr. *Wadia* (with him Mr. *A. G. Desai*), for the Respondent.

JUDGMENT.

BEAMAN, J.—Assuming (but without deciding) that Mr. Jinnah's contention is sound, *viz.*, that the plaintiff could not have acquired the right which he is suing to enforce under the Indian Easements Act, still the case is saved by section 2, clause (*c*), of that Act.

The lower Courts have found concurrently, as a fact, that the plaintiff has acquired this right and enjoyed it from time immemorial.

Even if it were a right that could not be acquired as an easement, there is nothing intrinsically unreasonable in it. On the contrary it is compatible with the usages and sentiments of the agricultural population in many parts of India. In my opinion the decree of the Court below must be confirmed and this appeal dismissed with all costs upon the appellants.

MARTEN, J.—This second appeal raises an interesting question as to water rights which has been decided in plaintiff's favour in both the Courts below. The facts proved show that from time immemorial the plaintiff and his ancestors as owners of certain non-riparian lands have been taking water from a river at or about a certain spot on the river banks, and thence over the lands of the defendants successively till the plaintiff's lands are reached. The water thus taken has not flowed in a definite channel over the defendants' lands, but has followed the general lines indicated by the colour blue, *viz.*, first to the south of the westernmost embankment coloured red on the map in the suit, and then bifurcating almost at right angles east and west. The map is not so helpful as it might be. It contains no scale and no compass bearings, and only shows a portion of the river, *viz.*, that to the east of the embankment I have mentioned. It is on the site of this embankment that the water has hitherto been taken. The embankment itself was only built some eighteen years ago but the findings are that the plaintiff then pierced this embankment so as to admit of the water flowing as before, and that the pipe he subsequently placed for that purpose was a hollowed palm tree which he subsequently renewed. It was then that the defendants obstructed the pipe and the flow of water for the first time, and consequently this action was brought. The embankment I have referred to is called "the dam in dispute" in the Court of first instance, and must not be confused with the dam which from time to time has been placed by the plaintiff and others in the river bed itself so as to ensure a supply of water in time of drought or scarcity.

The technical difficulty here is that the water has been brought not in a defined channel but has been allowed to spread over and irrigate the defendants' lands first and then the plaintiff's. This indeed appears to be a common method of irrigation in India [see *Villuri Adinarayana* v. *Polimera Ramudu* (1)]. It has at any rate been the method adopted for very many years for irrigating the paddy fields in dispute in the present case. Accordingly the contention of the defendants that the plaintiff's right, if established, "would tend to the total destruction of the defendants' property" within the meaning of section 17 (*a*) of the Indian Easements Act may be summarily dismissed.

The defendants' substantial objection is that the right claimed is really one "to surface water not flowing in a stream" and hence cannot be acquired as an easement under the Indian Easements Act [see section 17 (*c*)], nor be the subject of a presumed lost grant. In my judgment that is not really the right which the plaintiff is claiming. He is really claiming the right to take the water from the river without interruption by the defendants, and to have it conveyed over their lands. According to the Court of first instance the plaint alleges that "from the time of his ancestors the plaintiff has been in the habit of taking the water of that river for irrigating his lands." The plaint then proceeds to give details as to how that water is taken and reaches plaintiff's lands.

Some difficulty was caused by the fact that a large portion of the embankment in

(1) 17 Ind. Cas. 648; 37 M. 304 at p. 306; 12 M. L. T. 637; 24 M. L. J. 17.

question appears to be on land belonging to Government, and not to the defendants as they alleged. The Collector, however, does not appear to take any objection, and so far as the present parties are concerned, I do not know that the point is really very material. Defendant No. 3 is now the Government tenant but has been warned not to obstruct the plaintiff in taking the water.

If, then, my view of the facts is correct, the claim is to river water and not to mere surface water on the defendants' lands and consequently section 17 (*c*) does not apply.

It is no doubt true that the method of conveying that river water over the defendants' lands creates a difficulty, for some is used to irrigate the defendants' lands or may be lost by percolation, and on the other hand the volume of general water on the defendants' lands may be affected by rain water falling on their lands or from other like causes. This might, however, happen just the same if the water was conveyed in a definite open channel. Some of the river water might still be diverted by cross-cuts in that channel on the defendants' lands. Further, rain water falling on the defendants' lands might easily increase the volume of water in the open channel. One may, I think, fairly assume that the method actually adopted in the present case of conveying this river water for all these years is the one best suited to local requirement, and preferable in particular to a definite channel with cross-cuts. *Budhu Mandal* v. *Maliat Mandal* (2) and *Kensit* v. *Great Eastern Railway Co.* (3) are instances of an easement or grant for river water across certain lands.

But the plaintiff does not necessarily depend on the Indian Easements Act. Section 2 (*c*) provides that nothing in that Act is to derogate from "any right acquired before this Act comes into force". Had then the plaintiff or his predecessors in-title acquired any such right before the Indian Easements Act came into operation? I think he had. The decisions in *Ramessur Persad Narain Singh* v. *Koonj Behary Pattuk* (4) and *Rajrup Koer* v. *Abul Hossein* (5) show that the presumption of a lost grant is one which may be made in India as well as in England. The presumption arises out of the strong desire of the Courts to find a legal origin for an ancient and uninterrupted user. The presumption may be rebutted like other presumptions. It also requires certain conditions, and one is that the right could have been the subject of a grant. As Lord Selborne puts it in the leading case of *Goodman* v. *Saltash Corporation* (6): "An open and uninterrupted enjoyment from time immemorial under a claim of right seems to me to be all that is necessary for a presumption that it had such an origin as would establish the right, if a lawful origin was reasonably possible in law."

Is then the grant of the right claimed reasonably possible in law? I think it is. It is true that the plaintiff is a non riparian owner. Presumably, therefore, the riparian owner of the embankment in question could not have made a grant of the river water so as to affect the lower riparian owners [see *Ormerod* v. *Todmorden Joint Stock Mill Co.* (7) and *McCartney* v. *Londonderry and Lough Swilley Railway Co. Ltd.* (8). But the grant would at any rate be good as against such grantor (see same cases), and I assume also against his sequels in title. And the lower riparian owner could not complain unless he was injuriously affected in fact. [See *Kensit* v. *Great Eastern Railway Co.* (3)]. Further, as between himself and the lower riparian owners, the grantor might justify the user by a grant from the lower riparian owner or by prescription [see *McCartney's case* (8)]. In this very case we find a dam erected in the river bed, and this I suppose could only be justified against lower riparian owners by grant or prescription. Possibly the non-riparian grantee could not sue the lower riparian owners in his own name [see *Ormerod's case* (7)]. Here, however, the defendants or their predecessors are either

(2) 30 C. 1077.

(3) (1884) 27 Ch. D. 122; 54 L. J. Ch. 19; 51 L. T. 862; 32 W. R. 885.

(4) 4 C. 633; 6 I. A. 33; 3 Sar. P. C. J. 856; 3 Ind. Jur. 179; 2 Shome L. R. 194; 2 Ind Dec. (N. S.) 402.

(5) 6 C. 394; 7 C. L. R. 529; 7 I. A. 240; 4 Shome L. R. 7; 4 Sar. P. C. J. 199; 3 Suth. P. C. J. 816; 4 Ind. Jur. 530; 3 Ind. Dec. (N. S.) 257 (P. C.).

(6) (1882) 7 A. C. 633 at p. 639; 52 L. J. Q. B. 193; 48 L. T. 239; 31 W. R. 293; 47 J. P. 276.

(7) (1883) 11 Q. B. 155; 52 L. J. Q. B. 445; 31 W. R. 759; 47 J. P. 532.

(8) (1904) A. C. 301 at p. 315; 73 L. J. P. C. 73; 91 L. T. 105; 53 W. R. 385.

the original grantors of the river water, or else are the grantors of the right to have such water conveyed over their land in the way specified. In other words, I think it reasonably possible in law that the defendants' predecessors could have granted the right to convey definite river waters over their lands notwithstanding that such river waters flowed or passed through the defendants' lands in no definite channel. In this respect the case presents a considerable resemblance to that of *Villuri Adinarayana* v. *Polimera Ramudu* (1).

It was suggested that the pleadings in the present case did not permit of the presumption of a lost grant. The plaint, however, clearly pleads the fact of immemorial user, and it is this fact which raises the presumption in law. Further, this very point is dealt with in the judgment of the Court of first instance at page 22, line 41. If necessary, therefore, the pleadings should be treated as amended so as to raise this point expressly, and I decide this case on that footing.

Some objection was made as to the form of the original decree. No objection appears to have been taken on this head in the lower Appellate Court, and I do not see that it is essential to vary the form of the decree. In effect the injunction is intended to preserve the immemorial user.

In my judgment the appeal should be dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 170 OF 1916.

February 12, 1918.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

BANARSI DAS—DEFENDANT—APPELLANT

versus

SHEODARSHAN DAS SHASTRI—PLAINTIFF—RESPONDENT.

Hindu Law—Joint family—Alienation by one member, whether can be impeached by other members not parties to alienation—Stranger, whether can impeach alienation—Grant of property to mahant *and his heirs, whether grant in favour of temple—Appeal by legal representative of deceased party—Procedure.*

If one or more members of a Hindu joint family, purporting to act on behalf of the family as a whole, make an alienation of joint family property, it is open to those members of the family who did not join in the alienation, to contend that the alienation was made without authority and not for valid necessity or for the benefit of the joint family and that it is not enforceable. But such alienation is good as against a person who is not a member of the joint family and does not claim through the joint family. [p. 455, col. 2.]

A grant of property made under a deed in favour of a *mahant* of a temple and his heirs for the services rendered by the *mahant* to the temple is not a grant of the property to the idol or to the temple, and the *mahant* and his heirs are competent to deal with the property as their private property. [p. 457, col. 1.]

A legal representative of a deceased party is not entitled to appeal as such legal representative without first obtaining an order of the Court bringing him on to the record in that capacity. [p. 456, col. 1.]

First appeal from a decree of the Subordinate Judge, Agra.

Mr. *Lalit Mohan Banerii*, for the Appellant.

Messrs. *B. E. O'Conor* and *Peary Lal Banerii*, for the Respondent.

JUDGMENT.

PIGGOTT, J.—The suit out of which this appeal and the connected Appeal No. 317 of 1915 arise, was brought to enforce a mortgage-deed of the 10th of January 1881. The property hypothecated was the equity of redemption in a revenue-free grant in village Gadaya Latifpur and 500 *bighas* of revenue free land in another village called Khankara. It is recited in the deed itself that the latter of these two properties was already mortgaged with possession to the same mortgagees under a deed of the 15th of June 1866. Part of the consideration of the simple mortgage now in suit was the redemption of this older usufructuary mortgage on the land in village Khankara. Out of the total consideration of Rs. 10,801 for the deed in suit a sum of Rs. 7,184 was calculated as due on the usufructuary mortgage of the 15th of June 1866, and was set apart for the redemption of the said mortgage. One effect, therefore, of the deed in suit was that the mortgagors became entitled to re-enter into possession of the land in village Khankara, which had hitherto been in the possession and enjoyment of their mortgagees. It is further stated in the deed in suit that the revenue-free grant in village Gadaya Latifpur was also mortgaged with possession to the same mortgagees under a deed of the 18th of October 1865. It is only the equity of redemption which is hypothecated under

the deed in suit. It is admitted that this mortgage of the 18th of October 1865 has never been redeemed. The relief sought in the present suit is to bring to sale the equity of redemption in respect of the revenue-free grant in village Gadaya Latifpur and the entire right, title and interest of the mortgagors in respect of the land in village Khankara. The mortgagors under the deed are as follows:—

1. Mahant Lachman Das, disciple of Mahant Hari Das.
2. Khubi Ram and Ram Ratan, sons of Gulab Das.
3. Hargobind, son of Hardeo.

The evidence on the record shows that the properties now in question in villages Gadaya Latifpur and Khankara were in the possession in the year 1826 of one Mahant Kesho Das, described as priest of the temple of Sitaramji. They were held by him under revenue-free grants made by the Maharatta Government. This Kesho Das appears to have had a number of *chelas* or disciples, and it seems clear from the record that he himself belonged to a celibate order of religious ascetics. Kesho Das died somewhere about the year 1828 and, under circumstances which will require to be further considered, he was succeeded in possession of the properties in suit by two persons, Hari Das and Gulab Das. The former of these took the title of Mahant, lived as a celibate and would seem to have succeeded Kesho Das in the office of priest. Gulab Das was a married man and brought up a large family, seven sons of his being shown in the pedigree the correctness of which has been admitted. Hari Das, however, adopted *chela*, and as his eventual successor in the Mahantship, Lachman Das, one of the sons of Gulab Das. This is the Lachman Das whose name appears as the first of the mortgagors in the deed in suit. Of the remaining mortgagors two are sons of Gulab Das, while Hargobind is a grandson of Gulab Das, his father Hardeo having presumably died before the execution of the deed in suit. There is a recital in the same deed to the effect that three other persons interested in the mortgaged property as descendants of Gulab Das are "not present here," and the executants of the deed undoubtedly purport to act for and on behalf of these alleged absent members of the family and to deal with the property as a whole, including the shares of the said absent members. The three persons thus specified are Har Prasad, an own brother of the executant Hargobind, Bhola, another grandson of Gulab Das, whose father Baldeo we must presume to have died prior to the execution of this document, and Bal Kishen, another son of Gulab Das There remains one other son of Gulab Das called Bhupal, who is not accounted for in the above statement of facts. His name neither appears as an executant of the mortgage-deed in suit nor in the recital of those members of the family on whose behalf the executants of the deed purport to act. In the absence of any evidence to the contrary it seems a fair presumption that Bhupal had died prior to the execution of this deed, and there is no evidence on the record to prove the contrary. The nearest the defendants have been able to get is the production of certified copies of certain village records which purport to show Bhupal as alive in the year 1879. This does not prove that he was alive in 1881, and does not seem to me to outweigh the presumption of his death which may reasonably be drawn from the wording of the deed in suit. It is an admitted fact in the case that Lachhman Das adopted as his *chela* another grandson of Gulab Das, namely, Raghunath Das, son of Khubi Ram, one of the executants of the deed in suit. This Raghunath Das similarly became a celibate Mahant and succeeded Lachman Das in the office of Mahant in connection with the temple of Sitaramji. Raghunath Das has since departed from the tradition of the family by adopting as his *chela* a person named Banarsi Das who is an outsider, that is to say, not a descendant of Gulab Das, and in respect of whom it is alleged, though the matter has not been enquired into in the present case, that he is disqualified from succeeding to the Mahantship by the fact that he is a house-holder and a married man. At any rate, on the 29th of May 1907, Mahant Raghunath Das executed a deed by which he purported to transfer all his rights, including both his personal property and his office as Mahant and whatever interest

he possessed as priest, manager or trustee of the temple of Sitaramji, to the aforesaid Banarsi Das. A suit was brought by Banarsi Das on the strength of this document, in which he impleaded all the descendants of Gulab Das, together with certain persons alleged to be transferees of property appertaining to the temple, but not the mortgagees under the deed now in suit or any representative of the said mortgagees. The suit was resisted upon a variety of grounds, and after it had been dismissed by the Court of first instance it came before this Court as First Appeal No. 307 of 1910, decided on the 23th of October 1912. The learned Judges of this Court expressly declined to determine the question whether the property in suit in that litigation, which included the property now in suit, was or was not trust property belonging to the temple of Sitaramji. Their decision proceeded upon this line of argument: either the property in suit was trust property, as alleged by Banarsi Das, that is to say, appertained to a trust of which Mahant Raghunath Das was, or had been, the sole manager and trustee, or it did not. If it did not, Banarsi Das obviously had no case at all: assuming for the sake of argument that it did, there was no evidence on the record to satisfy the Court that Raghunath Das had any right to nominate his successor at his own free will and pleasure, still less to transfer the office of Mahant, with the rights and duties of trustee and manager of the temple property, to another person during his own lifetime.

The present suit was instituted on the 29th of March 1910, that is to say, before the declaratory suit brought by Banarsi Das had been decided even by the Court of first instance. The foregoing recital of facts is, however, necessary to the understanding of the pleadings in the present suit; and in the view which I take of the case a proper appreciation of these pleadings is absolutely essential to the determination of the questions raised by these appeals. It may be said at once that the plaintiff is a transferee of the rights of the original mortgagees under the deed in suit, and also under the usufructuary mortgage of October the 18th, 1865. The determination of the present suit has, as a matter of fact, been delayed by the circumstance that a plea, raised by the defendants, against the validity of the plaintiff's document of transfer, was accepted in the first instance by the trial Court; but the decision on this point was taken to this Court in appeal and was disposed of by this Court on the 17th of November 1913 (*vide* First Appeal No. 21 of 1912 the record of which has been before us), with the result that the validity of the plaintiff's document of title was affirmed. It seems just worth while to note at once that the plaintiff is himself the trustee and manager of another religious endowment connected with another temple at Bindraban, and that the money which he has embarked on this speculation presumably comes from the surplus profits of the trust in his hands. It is entirely superfluous, therefore, to allow any considerations as to the feelings of the Hindu public with regard to the sanctity of temple endowments to interfere with the consideration of the questions of law involved in this suit. If the plaintiff succeeds he will bring this property to sale for the benefit of another religious endowment. Nor is it necessary that we should trouble ourselves overmuch with any considerations as to the general equities of the case. The plaintiff is a speculator who has bought up a disputed claim for what it may be worth; while the defendants are in the position of persons who have raised money upon property under a representation that they had every right to do so, and who are now seeking to repudiate the debt on the ground that the property hypothecated was not theirs to deal with.

The array of defendants as originally impleaded was as follows:—

The first defendant was Banarsi Das, who is described in the plaint simply as "disciple of Raghunath Das." The next six defendants were representatives of the family of Gulab Das, being his grandsons, great-grandsons or great-great-grandsons, together with the widow of a deceased descendant, who was presumably impleaded as a matter of precaution. The eighth defendant was stated to be an auction-purchaser of whatever rights Raghunath Das had possessed in the property in suit; while the ninth defendant was the suc-

cessor-in-title of the original mortgagee, who had transferred his rights to the plaintiff. Subsequently, three more defendants were added; two of these were alleged to be also transferees of the rights of Raghunath Das in the property in suit; and Raghunath Das himself was also impleaded, apparently at the suggestion of the Court. He is described as "Mahant Raghunath Das, a disciple of Mahant Lachman Das, *gaddi-nashin* and managing trustee of the temple of Thakur Sri Sitaramji Maharaj, placed at Mauza Gadaya Latifpur." In the petition by which Raghunath Das was impleaded the plaintiff carefully refrained from admitting that Raghunath Das was in any way a necessary party to the suit. He admitted him to be the managing trustee of a certain temple; but his case was throughout that the property in suit formed no part of the endowment of that temple, or of the trust property in the hands of Raghunath Das. The property in suit was alleged by the plaintiff to be the personal property of the original mortgagors, and Banarsi Das was impleaded, instead of Raghunath Das, on the ground that the latter's deed of the 29th of May 1907, whatever might be its effect as regards the trusteeship and the trust property, did operate to transfer in favour of Banarsi Das whatever rights Raghunath Das possessed in any personal property of his own. In a petition which he presented to the Court after he had been impleaded, Raghunath Das disclaimed all interest in the litigation. He apparently intended to support the contention of Banarsi Das that the property in suit was not merely trust property, but appertained to an endowment in favour of the temple of Sitaramji of which Raghunath Das had been the sole trustee and manager, until he transferred his rights to Banarsi Das. Those defendants who resisted the suit raised a variety of pleas; but the point to be noticed for my present purpose is that there was a marked difference in the position taken up by Banarsi Das on the one hand, and by the descendants of Gulab Das on the other. Both these parties took the plea that the property in suit was trust property appertaining to the temple aforesaid, and as such inalienable; but they were as much at variance amongst themselves as they were with the plaintiff. Banarsi Das expressly pleaded that the property in suit appertained to a trust of which he was himself the sole manager, by appointment in succession to Raghunath Das; he pleaded that "Radha Ballabh and other defendants, the heirs of Gulab Das, have no interest in the property." On the other hand, those of the descendants of Gulab Das who contested the suit denied that Banarsi Das had any interest in the matter. They not merely denied that he had succeeded to the interests of Raghunath Das, whatever they may have been, in the property in suit; but they set up a trust under which the descendants of Gulab Das were joint trustees along with whatever Mahant for the time being had succeeded to the rights of Hari Das and of Lachman Das. They pleaded, and in view of the position taken up by them they were clearly entitled to plead, that Raghunath Das was a necessary party to the suit, and that his absence from the array of original defendants was a fatal objection to the maintainability of the entire suit, inasmuch as he had been impleaded after the expiration of the special period of limitation prescribed by section 31 of the Indian Limitation Act (IX of 1908), within which the present suit was instituted. The learned Subordinate Judge fixed a number of issues, and one of these issues was whether Banarsi Das or the defendant Raman Das (a grandson of Hargobind, one of the executants of the mortgage-deed in suit) was the lawful successor to Mahant Raghunath Das. In the end, however, the Court below came to the conclusion that this was an issue which arose only as between two of the defendants and did not require to be decided in order to the determination of the suit. He overruled on various grounds all the pleas raised by all the defendants, except the plea taken by the descendants of Gulab Das to the effect that the shares of those members of the family who had not joined in the execution of the mortgage-deed in suit were not affected by the mortgage and could not be brought to sale in satisfaction of the same. On this basis he has given the plaintiff a decree for the full amount claimed by him, but enforceable

only as against an undivided 17/24ths share of the property in suit. All the defendants except Banarsi Das have submitted to this decree, and I regard it as most important to insist upon the fact that the appeal now before us is by Banarsi Das alone. On the other hand the plaintiff has filed a separate appeal No. 317 of 1915, in which he asks that the decree of the Court below be modified by making it enforceable as against the whole of the mortgaged property. This appeal I propose to deal with in a separate judgment.

The memorandum of appeal presented by Banarsi Das is a somewhat prolix and argumentative document, but it has been agreed before us that in substance only three points are raised:—

(1) It is contended that the property in suit is trust property, belonging to the idol worshipped in the temple of Sitaramji at Gadaya Latifpur, and to no other person whatsoever, so that the executants of the mortgage-deed in suit had no right to alienate the same and it cannot be brought to sale in execution of the mortgage decree.

(2) It is contended that Mahant Raghunath Das was a necessary party to the suit, and that the suit must fail on the mere ground that he was impleaded after the expiration of the prescribed period of limitation.

(3) A plea is taken, in the alternative, to the effect that, on the view of the facts taken by the Court below and assuming that the joint family formed by the lineal descendants of Gulab Das were owners, or part owners of the property in suit, then it should be held as a matter of law that the executants of the mortgage-deed had no right to hypothecate either their own shares or the shares of any person in the joint ancestral family property, and that this ground alone would be sufficient to warrant the dismissal of the plaintiff's suit.

I propose to take these points in the reverse order, because the last two can, in my opinion, be very briefly disposed of. I do not think there is any force in the third plea, and I propose to deal with it more in detail in my judgment on the cross-appeal filed by the plaintiff. For the purpose of the appeal now under consideration it is sufficient to say that this plea is not open to Banarsi Das. He is not, never was, a member of the joint family formed by the descendants of Gulab Das. If one or more members of a Hindu joint family, purporting to act on behalf of the family as a whole, make an alienation of joint family property, it is, of course, open to those members of the family who did not join in the alienation to contend that it was made without authority, that it was not made for valid necessity, or for the benefit of the joint family, and that it is not enforceable. As against a person like Banarsi Das, who is not a member of the joint family and does not claim through the joint family, the alienation is good.

In dealing with the question of limitation I have one further point to note. A document which is on this record at page A12 shows that Raghunath Das died on the 19th of January 1913, during the pendency of this suit in the Court below. The plaintiff made no attempt to have any person brought on the record as successor to Raghunath Das; and from his point of view he was obviously right in not doing so. He had contended throughout that Raghunath Das was not a necessary party to the suit and that any interest which he had ever possessed in the property in suit had passed to other hands. Banarsi Das in his memorandum of appeal to this Court says that he files his appeal in the capacity of trustee of the *waqf* property belonging to Thakur Sitaramji, representing Raghunath Das in that capacity. He has never applied to this Court to be brought upon the record as successor to Raghunath Das. Had he made such an application, it seems clear to me that it could not have been granted without some further enquiry, seeing that the right of succession to the office of Mahant and to the trusteeship held by Raghunath Das was a matter in controversy in this very suit The document to which I have already referred does, no doubt, afford some evidence in support of the contention that Banarsi Das, whatever his rights may be, has succeeded in obtaining effective possession of the temple and of any property appertaining to the temple other than the property now in suit. At the same time it seems clear that no litigant has a right to assume to himself

the position of legal representative of a deceased litigant, without making an application to the Court in proper form and obtaining the orders of the Court thereon. In the suit itself the position taken up by Banarsi Das was that he had already taken the place of Raghunath Das as manager and trustee of the temple in virtue of the transfer of the 29th of May 1907. The plaintiff impleaded Raghunath Das as manager and trustee of the temple, but denied that the property in suit had any concern with the trust of which Raghunath Das was the manager. The question of limitation, therefore, if it can be raised at all by Banarsi Das in this appeal, depends for its determination on the decision of the Court in respect of the main question. If the property in suit is found to belong to a trust of which Mahant Raghunath Das was, on the date of the institution of this suit, the sole trustee and manager, the suit will fail on its merits, and it must also be held to be barred by limitation on the ground that the trustee was impleaded after the expiration of the limitation period. On a contrary finding it would follow that Mahant Raghunath Das had, on the date of the institution of the suit, no interest in the property in question and was not a necessary party. This was the position taken up by Raghunath Das and by Banarsi Das himself in the Court below, and I very much doubt if the appellant can be permitted to resile from it now. I may say further that, after carefully considering the memorandum of appeal filed by Banarsi Das in connection with this question of limitation, I am by no means satisfied that it is incumbent upon us at all to hear Banarsi Das on the merits. He does not appeal in his personal capacity as Banarsi Das, defendant No. 1 in the suit. He expressly claims to appeal as the representative of Raghunath Das, the person subsequently impleaded as defendant No. 10 in the suit. He has, no doubt, adopted this attitude in the hope that it may lend force to his plea of limitation; but he has neglected to observe that he is not entitled to appeal as a legal representative of a deceased defendant, without first obtaining an order of the Court bringing him on to the record in that capacity. He has not amended his pleadings in any way in consequence of the decision of this Court in First Appeal No. 307 of 1910, and must be taken to stand by the position originally taken up by him that the trusteeship of the temple had been transferred to him prior to the institution of this suit by the deed of the 29th of May 1907. In the absence of any amended pleading on his part or of any application from him asking to be brought upon the record as the legal representative of Mahant Raghunath Das, after the death of the latter, and of any order to this effect from the Court, it seems to me that his appeal as filed is not maintainable at all.

It is only because this point was not properly brought out in the course of argument before us that I prefer to pass on to the consideration of the main plea raised by Banarsi Das, instead of throwing out his appeal on this ground alone. With regard to this question whether the property in suit forms part of a religious endowment, there is a great deal of evidence of one kind or another on the record and I quite admit that portions of that evidence have not been satisfactorily dealt with in the judgment of the Court below. At the same time it seems to me that the issue as between Banarsi Das and the plaintiff (and these are the only parties with whom we are concerned in this appeal) lies within a very narrow compass. I find no force in the contention, pressed upon us in argument, that the property in suit never belonged to Mahant Kesho Das, but was from the very outset a religious endowment, the true owner of which was the idol of Thakur Sitaramji worshipped in a particular temple. It is admitted that the revenue-free grants by the Maharatta Government in respect of the lands in both the villages in suit were at one time in existence in writing, but the grant in respect of village Gadaya Latifpur is not forthcoming. I find nothing on the record to lend colour to the suggestion made on behalf of the appellant that this document is in the hands of the plaintiff and is being wilfully kept back by him. It is expressly referred to in one of the older documents on the record as having been lost. What

is described in the judgment of the Court below as "the original *sanad of muafi* Mouza Khankara, dated 10th *Jamadi-ul-awwal* 1321 *Hijri*" is on this record and has been produced by the plaintiff. It is a very ancient document and, partly in consequence of the defective processes employed in our Courts for the binding of records, is now in an extremely damaged condition. The official translators of this Court have been compelled to report that they are unable to prepare any intelligible translation of the document. The learned Judge of the Court below is a Muhammadan gentleman: I have no doubt that he was quite capable of reading the document in question with comprehension, and it would appear that he was able to do so while its condition was less dilapidated than it is at present. He states in his judgment that this *sanad* confers the property as a personal grant or *muafi* from generation to generation; and I can see no reason why we should not be content to accept this account of its contents. There is nothing unusual or inconsistent with Hindu religious ideas in the making of a grant to the Mahant of a temple for the personal enjoyment of himself and of his successors after him. No doubt the person making the grant is influenced by the fact that the grantee is the priest of a temple and performs religious services in connection therewith, but that is no reason why a grant made for the enjoyment of the Mahant personally should be construed as a grant in favour of the idol as a juristic personality. Moreover, there is one consideration which seems to me decisive against the appellant as regards this part of the case. The one document in the appellant's favour, without which he would have no arguable case at all, is the *bhetnama* (deed of endowment, or of dedication) executed by Mahant Kesho Das on the 9th of May 1826. At the time when he made that grant Kesho Das obviously regarded himself as having full right of disposal in respect of the property dealt with therein. The appellant himself asks us to regard this document as creating an endowment in favour of the temple, or of the idol as a juristic personality; and this position is inconsistent with the suggestion that the endowment was already in existence, or that the idol was already the owner of the property and Mahant Kesho Das nothing more than a trustee. The one difficult point in the case is the meaning and the legal effect of this document itself. The learned Subordinate Judge has brushed it aside somewhat lightly with the remark that it was never acted upon. I freely concede to the appellant that this is not a satisfactory way of dealing with it. If the Court has before it a document which undoubtedly created a trust or religious endowment, it is not a sound position to take up that the document became of no effect as soon as the trustee or trustees appointed thereunder began to commit breaches of trust in respect of the properties thus placed in their hands. I think the document requires to be considered, both in connection with the pleadings of the parties to this appeal, and in connection with the available evidence bearing on the position of Kesho Das at the time, and the events immediately following on his death. We have it from Mahant Kesho Das that he had a good many *chelas* or disciples, and he was obviously anxious to arrange that the property in his hands should pass peaceably after his death into the hands of the two particular persons whom he desired to nominate as his successors. It is to be noted that he described them somewhat differently in the deed in question. He speaks of Hari Das as "my disciple, and of Gulab Das as my adopted son." Seeing that Kesho Das was certainly a very old man when he executed this document and that he died within two years of its execution, I think that we may take it that Gulab Das was already a family man in the year 1826, was married and had begotten children. The fact that he is described as "my adopted son," and not as "my disciple," suggests that Mahant Khesho Das himself was doubtful whether Gulab Das would be accepted by Hindu religious feeling as a qualified successor to himself in the office of Mahant and of temple priest. At the same time he was obviously anxious to make provision for Gulab Das and his family and to insure for their benefit a right to share in the profits of the property in question. It must be remembered, further, that he held this pro-

perty under revenue-free grants. Those grants might or might not be confirmed by the British Government. The property itself, that is to say, the share in Gadaya Latifpur and the land in village Khankara, Mahant Kesho Das might perhaps dispose of by Will so as to secure peaceable succession to the same for the benefit of his legateee; but the value of the property would be greatly diminished if the Government refused to continue the revenue-free grant and proceeded to assess the land to revenue. I take it that these considerations dictated the peculiar form of the document which we have to consider. It is curiously worded, and one part of it is difficult to reconcile with another. In one place the Mahant purports to make a gift or dedication of the property in question (which by the way includes other property besides that now in suit) to Thakur Sitaramji as a juristic personality, and merely to appoint Hari Das and Gulab Das to perform the worship and services of the idol. Further on, however, he speaks of them as his "donees," and says that, while they should be careful to keep up the worship and services of the Thakurji, they are to regard themselves as owners of the gifted property and to enjoy the same as such. Another point which was not noticed in the course of argument before us, but which seems to me of some significance, is that the idol of Thakur Sitaramji spoken of in this document does not seem to be identical with the idol of which, according to the plaintiff, Mahant Raghunath Das was the managing trustee on the date of the institution of the suit. The latter is in a temple at Mauza Gadaya Latifpur; but in the deed of 1826 Mahant Kesho Das describes himself as priest of the temple of Sitaramji situated in Mohalla Pulan in the town of Bindraban, and there is nothing in the document to suggest that the "Thakur Sitaramji" subsequently referred to is any other than the idol worshipped in this temple in the town of Bindraban. After the death of Mahant Kesho Das the question of the continuance of this revenue-free grant in favour of his legatees or successors was considered by the British Government and was the subject of a good deal of correspondence, extracts from which are to be found printed in this record. The revenue-free grant was continued; but it is beyond question that neither the temple, nor the idol of Thakur Sitaramji regarded as a juristic personality, was ever entered in the revenue papers as the holder of the grant. At page A6 of the record is an extract from the register of revenue-free grants relating to village Khankara. The name of the holder of the grant there given is "Hari Das Bairagi." There is a note that it was granted for the love of God and for the expenses of Thakurji in "Gadaria Ilaka Farrah." The name "Gadaria" in this place would seem to be a variant of the name of Gadaya Latifpur. A similar paper of the year 1868 relating to this latter village shows that the British Government finally remitted the revenue assessable on this village in favour of Hari Das and Gulab Das, heirs to Kesho Das. The word 'heirs' is to my mind of great significance. Under the heading 'designation of the tenure' appears the following entry:—"for the maintenance of the priest and the expenses of the temple of Thakur Sitaramji." In the mortgage-deed of October the 18th, 1865, Gulab Das and Lachhman Das, the successor of Hari Das, speak of the property in Gadaya Latifpur as constituting a *muafi* in perpetuity granted by Maharaja Sri Madho Rao Sahib Bahadur of Gwalior for generation after generation and upheld as such by the British Government, and as having been "in our proprietary possession up to this day." They unquestionably assume to themselves the right to deal with this grant as their own and to alienate it in such manner as they think proper. At the same time, while putting the mortgagees in possession, they reserved to themselves the right to receive one rupee daily from the mortgagees, "for the expenses of the temple of Sitaramji Maharaj situated in the village aforesaid." Now there has been much litigation arising out of this stipulation, and the question of the position of the mortgagors and mortgagees under this deed of 1865 does not come to us precisely as *res integra* in the present litigation. The documents which especially require consideration are a judgment of the District Judge of Agra, dated February the 19th, 1892, at page 10R of this book, and a

judgment of the same Court, dated July the 12th, 1912. With regard to the former of these documents it is to be remarked that the decision of the District Judge was not affirmed by this Court on appeal: there was an order of remand which resulted eventually in a judgment (which the parties have neglected to print) by which the decision of the District Judge was considerably modified. The net result of this litigation has been that this allowance of one rupee *per diem* has been held not to appertain to any trust or endowment, either in favour of the temple or in favour of the idol worshipped therein, but to be a personal right reserved to themselves by the mortgagors. Further, it has been held that the successors of the original mortgagors are entitled to recover this allowance piecemeal in certain definite shares; that is to say, a right to receive one-half of the allowance has been affirmed in favour of the successor to the Mahantship, the other half the heirs of Gulab Das have been permitted separately to recover for the benefit of the joint family to which they belong. The decision of the District Judge of Agra in the litigation of 1912 seems to me of particular importance. I do not say that it operates as *res judicata* as between Banarsi Das and the plaintiff. But even as between them it is relevant evidence, as an instance in which a certain right was contested and was affirmed by the Court. In that litigation the present plaintiff, as successor of the original mortgagees, was arrayed on one side along with Raghunath Das, while the descendants of Gulab Das, who were claiming a half share in the arrears of the daily allowance, were arrayed upon the other. In deciding that the heirs of Gulab Das were entitled to receive the half share claimed by them, the learned District Judge expressly proceeded upon a finding that the mortgagors in the deed of 1865 had hypothecated their personal property, and not endowed property belonging to the temple for the services of which it was said that the allowance ought to be expended. It seems to me that this finding is conclusive as between the plaintiff on the one hand and the descendants of Gulab Das on the other, and this may be the reason why the latter have not seen fit to contest this appeal. The position of Banarsi Das is not quite the same; but we must limit ourselves to a consideration of the case as it stands between the appellant and the respondent now before us on their own pleadings, and on the evidence on the record it seems to me that Banarsi Das has no substantial case. The one document in his favour is the *bhetnama* of May the 9th, 1826, and that document, if it is evidence of any kind of trust, is no evidence at all of the particular trust alleged and contended for by Banarsi Das in this case. On any possible interpretation of that deed, it does not create a trust the benefits of which are to go wholly to the temple of Thakur Sitaramji, still less to a temple of that deity situated in Gadaya Latifpur; still less does it create a trust of which the sole manager and trustee shall be the Mahant of the temple for the time being. If this document can be construed as creating any sort of a trust, then it is a trust for the maintenance of the worship of the idol in a certain temple, but principally for the benefit of the trustees themselves, and these trustees are Mahant Hari Das and his successors after him and Gulab Das and his descendants after him. If I felt that this appeal could not be disposed of without going further into the question of the possible creation of a trust of this nature, and the legal consequences which would follow in the event of such a trust being proved, I should have a good deal more to say; but I do not think this question is now in issue. Mahant Banarsi Das (as I observe that he now calls himself) set up a trust for the benefit of the idol Thakur Sitaramji, of which he was himself the sole manager and trustee. The plaintiff admitted the existence of a trust in favour of the idol of which Mahant Raghunath Das was the sole manager and trustee, but denied that the property in suit appertained to that trust. So far as the parties now before us are concerned, they went to trial on this issue and the one piece of evidence which can be seriously relied on in favour of Banarsi Das is the document of 1826, which is no evidence that the property in suit belongs, or ever belonged, to a trust exclusively in favour of the idol in question,

or of which the Mahant of the temple for the time being was the sole trustee. All the other evidence on the record is entirely against Banarsi Das, and in favour of the contention that the mortgagors of 1881 were right in saying that they had a power of disposal in respect of the property dealt with by the deed in suit.

If it be suggested that I am taking too narrow a view of the pleadings, and that Banarsi Das should be allowed at this stage to set up, at least by way of an alternative pleading, the alleged rights of the descendants of Gulab Das by way of *jus tertii*, although he had expressly denied the existence of those rights in his written statement, even then it seems to me that the position is clear. If Banarsi Das can be heard to plead the rights of the descendants of Gulab Das, he cannot raise on their behalf any plea which would not be open to them. And in my opinion they are precluded by the decision of the District Judge of Agra, of July the 12th, 1912, from asserting that the property now in suit, or rather the half share in that property with which they are concerned, is not their personal property. They have obtained, as against the present plaintiff, a decree which proceeded upon an express finding to the above effect, and which without that finding would have been impossible. On these grounds I am of opinion that there is no force in this appeal, and that it must be dismissed with costs.

WALSH, J.—I agree in the order dismissing the appeal. I do so with some hesitation, solely because I entertain an uncomfortable feeling that the deed of 1826 created a religious endowment of property which could not thereafter be legally alienated under any circumstances except for the purposes of such endowment, and that we are impliedly sanctioning what may be described as a prescriptive right to divert trust property from its original purpose without the approval of any Court. I think the property and those in possession of it have long ceased to pay any but a perfunctory and inconsiderable tribute either in spirit or in cash to the wishes of the original founder of the endowment.

I recognize, however, the force of my brother's observation with reference to the feelings of the Hindu public in this particular case, and having regard to the special circumstances and to the special form in which the case now comes before us in appeal, I think that the order proposed does substantial justice between these parties.

BY THE COURT.—The appeal is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER NO. 143 OF 1916.

September 19, 1917.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Oldfield.

Sri VIDHYA THEERTHA SWAMIGAL, THROUGH HIS AUTHORISID AGENT, M. RAGVENDRA ROW—COUNTER-PETITIONER—APPELLANT

versus

VENKATARAMA IYER—PETITIONER—RESPONDENT.

Limitation Act (IX of 1908), s. 14—Execution—Application for transfer of decree, dismissal of—Subsequent application for attachment—Limitation—Exclusion of time occupied in appeal and second appeal against first order.

A decree-holder applied in the Tinnevelly Munsif's Court on 13th September 1909 for transfer of his decree to the Ambasamudram Munsif's Court. The application was rejected by the Munsif but was allowed in appeal. In second appeal, however, the High Court restored the Munsif's order on 13th February 1913. The decree-holder then applied for attachment of the judgment-debtor's properties on 14th October 1913:

Held, that the application was barred by limitation and that the time occupied in the appeal and second appeal in the matter of the first application could not be excluded under section 14 of the Limitation Act, inasmuch as the application was proceeded with in a Court having jurisdiction and the decree-holder could not be said to have pursued his remedy through a *bona fide* mistake in the wrong Court. [p. 461, col. 1.]

Nrityamoni Dassi v. *Lakhan Chunder Sen*, 33 Ind. Cas. 452; 43 C. 660; 20 C. W. N. 522; 30 M. L. J. 529; (1916) 1 M. W. N. 332; 3 L. W. 471; 18 Bom. L. R. 418; 24 C. L. J. 1; 20 M. L. T. 10 (P. C.), and *Lakhan Chunder Sen* v. *Madhusudan Sen*, 35 C. 209; 7 C. L. J. 59; 3 M.L.T. 90; 12 C. W. N. 326, distinguished.

Appeal against the decree of the District Court, Tinnevelly, in Appeal Suit No. 316 of 1915, preferred against the decree of the Court of the District Munsif, Tinnevelly, in Original Suit No. 75 of 1913, in Execution Petition No. 775 of 1913.

Mr. *T. Narasimha Aiyangar*, for the Appellant.

Messrs. *K. R. Gurusami Aiyar* and *A. Subbaraya Aiyar*, for the Respondent.

JUDGMENT.

ABDUR RAHIM, J.—The question for decision in this appeal is one of limitation in connection with a petition for execution The decree-holder made an application for execution, No. 1571 of 1909, on the 13th September 1909, the object of the application being to get a transfer of the decree from the Tinnevelly Court to the Ambasamudram Munsif's Court. The application was dismissed on two grounds by the District Munsif, *firstly*, that it was not shown that there was no property of the judgment-debtor within the local limits of the Tinnevelly Court and *secondly*, that the application was barred by limitation. Then on appeal the Subordinate Judge reversed that order. But the High Court in second appeal restored the order of the District Munsif. This was on the 13th February 1913. The present application was put in on the 14th October 1913 and limitation is said to be saved by deducting the time between the filing of the application on the 13th September 1909 and the date of the High Court's order, 13th February 1913. The District Judge, who has held in favour of the decree-holder, applied section 14 of the Limitation Act to this case. But it seems to us that that section has no application because it could not be said that the application was proceeded with in a Court without jurisdiction, that is to say, that the application was infructuous because it was proceeded with in a Court without jurisdiction or on a similar ground. The Tinnevelly Court had jurisdiction to deal with the application for transfer, though it could make the order only if certain facts were proved. It could not be said, therefore, that the decree-holder was pursuing his remedy through a *bona fide* mistake in the wrong Court. Further the relief that is now sought, that is, attachment of properties in the Tinnevelly Court is not the same relief which was asked for in the application of the 13th September 1909, because all that was asked for in it was transfer of the decree for execution to another Court.

Then the learned Vakil for the respondent has asked us to uphold the order of the District Judge on the basis of the ruling reported as *Nrityamoni Dassi* v. *Lakhan Chunder Sen* (1), following the ruling in *Lakhan Chunder Sen* v. *Madhusudan Sen* (2). There what was apparently held was that ince the party against whom limitation was pleaded was in fact litigating the same question in another Court, the remedy of the party was suspended during the time that that litigation occupied. This apparently was the principle, so far as I understand it, upon which that case proceeded. I am unable to hold that it applies to the present proceedings. The one complete answer to the argument of the learned Vakil for the respondent is that the remedy which is now sought could have been asked for if he had only put forward proper facts before the Court even while the application of the 13th September 1909 was pending litigation. It was open to him to find out the facts and make an effective application for attachment of the properties. The appeal must be allowed and the execution petition of 14th October 1913 is dismissed with costs here and in the Court below.

OLDFIELD, J.—I agree and only wish to add that I cannot read the decision in *Nrityamoni Dassi* v. *Lakhan Chunder Sen* (1) as in any way affecting the scope of section 14 of the Limitation Act. There is no doubt that the appellant must succeed.

M. C. P.

Appeal allowed.

(1) 33 Ind. Cas. 452; 43 C. 660; 20 C. W. N. 522; 30 M. L. J. 529; (1916) 1 M. W. N. 332; 3 L. W. 471; 18 Bom. L. R. 418; 24 C. L. J. 1; 20 M. L. T. 10 (P. C.).

(2) 35 C. 209; 7 C. L. J. 59; 3 M. L. T. 90; 12 C. W. N. 326.

KUNJ BEHARI LAL v. BHARGAVA COMMERCIAL BANK.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 950 OF 1916.

March 22, 1918.

Present:—Mr. Justice Tudball and Mr. Justice Abdul Raoof.

KUNJ BEHARI LAL—DEFENDANT—APPELLANT

versus

THE BHARGAVA COMMERCIAL BANK—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), s. 176—Pawnee, sale by, of pawned articles—Notice, reasonable, what is.

Section 176 of the Contract Act does not contemplate that the pawnee should give the pawnor information of the actual date, time and place of sale. The section does not mean that a sale should be arranged beforehand and that due notice of all the details should be given to the pawnor. All that the law intends is that the pawnee should give the pawnor a reasonable time within which to exercise his right of redemption and proceed to sell if the property be not redeemed. [p. 462, col. 2; p. 463, col. 1.]

The pawnee's right to sell is analogous to the seller's right of re-selling granted under section 107 of the Contract Act and the two rights must be exercised in more or less the same method. [p. 463, col. 1.]

A pawnee of certain articles of jewellery gave notice to the pawnor that unless the money was paid within a fortnight, the jewellery would be sold without further reference to him. The notice did not mention the actual date, time and place of the intended sale. The articles were sold but the full amount of the debt was not realized. In a suit by the pawnee for the balance, it was contended that the notice given was not a reasonable notice of sale within the meaning of section 176 of the Contract Act:

Held, that the notice given was a reasonable notice of the intended sale within the meaning of the section. [p. 463, col. 1.]

Second appeal from a decree of the District Judge, Agra.

Mr. *Kailas Nath Katju*, for the Appellant.

Mr. *Narain Prasad Asthana* (with him Mr. *Mangal Prasad Bhargava*), for the Respondent.

JUDGMENT.—The facts of this case are simple. The appellant-defendant pawned to the respondent Bank certain gold and silver ornaments as security for a loan in the year 1912. In January 1914 the Bank pressed the defendant for payment and stated that they had an offer of Rs. 1,480 for the ornaments and that if the defendant did not pay within a week the ornaments would be sold for the value offered and that a suit would be brought for the balance. The defendant in reply asked for full particulars of the offer and also asked for time for payment. In his reply he stated that the ornaments were worth more than Rs. 2,400 and that he would hold the Bank responsible if they were sold for less than their value. The Bank on the 26th of February 1914 sent in a statement of account and a list of the ornaments pawned and again gave the defendant fifteen days' time within which to pay, otherwise the Bank would sell. The Bank did not carry out its threat. On the 9th of May 1914 the defendant again asked for 15 days' time as he had a chance of paying off the debt. The correspondence continued and again on the 18th of August 1914 the Bank wrote to the defendant stating that it had an offer of Rs. 1,500 for the ornaments and would proceed to sell. On the 25th of August the defendant asked for further time. On the 12th of September the Bank agreed, and then on the 15th September it again wrote to the defendant saying that unless the money was paid within 15 days the jewellery would be sold without further reference to him. The Bank did not sell on the 30th of September, but it actually waited till the 5th of October and then carried out the sale. A suit was then brought for the balance and both the Courts below have decreed the claim. One point was urged in the Court below, and that is that the notice given on the 15th of September was not a reasonable notice of the sale within the meaning of section 176 of the Contract Act. It was contended that notice of the actual date, time and place of the intended sale should have been given to the defendant. This plea was repelled by the Court below. It has again been raised before us, and this is the only point for our decision.

It is urged that under section 177 the pawnor has a right to redeem at any subsequent time before the actual sale of the goods, that unless he is given full information of the date, time and place of the sale, it is impossible for him to redeem, if the property were sold at some other date, time or place. No ruling on the point has been cited. In our opinion section 176 does not contemplate that the pawnee should give the pawnor information of the actual date, time and place of sale. The words are: "He may sell the thing pledged on giving the pawnor reasonable notice of the sale." This, in our opinion, means an intention to sell and it does not necessarily mean that a sale should be arranged

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beforehand and that due notice of all the details should be given to the pawnor. For instance, it would be open to the pawnee to put up the property to auction sale and to sell it to the highest bidder. It would be impossible for him to give the pawnor information beforehand as to who would be the final purchaser. It is quite clear that all that the law intends is that the pawnee should give the pawnor a reasonable time within which to exercise his right of redemption and proceed to sell if the property be not redeemed. His right to sell is analogous to the seller's right of re-selling granted under section 107 of the Contract Act, and we take it that the two rights must be exercised in more or less the same method. The seller's right to re-sell under section 107 may be exercised after giving notice to the buyer of the intention to re-sell after the lapse of a reasonable time. The language of the two sections is slightly different, but their meaning is practically the same. In our opinion in the circumstances of the present case the respondent Bank gave the appellant notice, and a very reasonable notice indeed, of the intended sale. We think the decision of the Court below is correct. We, therefore, dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 372 OF 1917.

February 21, 1918.

Present:—Mr. Justice Oldfield and Mr. Justice Sadasiva Aiyar.

SIVANARASA REDDI AND ANOTHER—PLAINTIFFS NOS. 1 AND 2—APPELLANTS

versus

DORAISAMI REDDI AND ANOTHER—DEFENDANT AND PLAINTIFF NO. 3—RESPONDENTS.

Co-owners—Rent, collection of, by fractional co-owner—Payment of Government revenue—Contribution, suit for, of proportionate share of revenue payable by other co-owners—Set-off of defendant's share of collections plea of, validity of.

Plaintiffs owned a 3ths share in a *mitta*, and the defendant owned the remaining 4th share. Plaintiffs paid the *peishcush* and sued defendant for the share of the *peishcush* paid by them which he was bound to pay. The defendant pleaded that plaintiffs were bound to give him a fourth of the amount of rent collected and he claimed a set-off of such amount as against his share of the *peishcush*. The plaintiffs contended that the total amount collected by them did not exceed their share of the rent and that defendant was bound to meet the common charge, *viz.*, the Government revenue:

Held, that the plaintiffs should be deemed to have made the collections on behalf of all owners, each co-owner being entitled to his fraction in that amount in proportion to his share and that defendant was, therefore, entitled to the set-off claimed. [p. 468, col. 1.]

Per *Sadasiva Aiyar, J.*—Where a co-sharer expressly intends to collect rents for his own share alone and is paid by the tenants expressly for that share, he must be deemed to have collected his own share and not for all the co-owners. [p. 468, col. 1.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Cuddalore, in Appeal Suit No. 7 of 1915, preferred against the decree of the Court of the Additional District Munsif, Villupuram, in Oringal Suit No. 15 of 1914.

Messrs. *T. M. Ramachendra Aiyar*, *T. M. Krishnaswami Aiyar* and *N. A. Krishna Aiyar*, for the Appellants.

The Hon'ble Mr. *T. Rangachariar* and Mr. *C. Padmanaba Iyengar*, for Respondent No. 1.

JUDGMENT.

OLDFIELD, J.—First and 2nd plaintiffs, appellants, with 3rd plaintiff sued defendant to recover his share of the *peishcush* they had paid on the Mitta which all own in common, defendant's interest being one-fourth. The defence was that plaintiffs had collected from the tenants sufficient to cover what they paid for defendant in addition to what they were entitled to retain as their own share of the collections; and the issue between the parties relates to the manner in which the collections should be apportioned, plaintiffs contending that as co-owners they are entitled to all they may collect up to a sum equal to three-quarters of the total demand of the estate; defendant, as his case was put forward in the lower Appellate Court and finally here, that they are entitled to retain only three-quarters of their total actual collections and must hold the balance in trust for him and credit it against the amount they have paid out on his behalf.

Of these methods of calculation that proposed by plaintiffs is evidently open to

the objection, regarded by the lower Appellate Court as *decisive*, that it admits of one side collecting its share of the rents from the solvent tenants and leaves the other to collect at excessive trouble and expense from the insolvent and recalcitrant. But plaintiffs have founded their contention on their alleged right as co-tenants to any enjoyment of the common property which does not involve their receipt of more than their just share of the profits realisable from it or the ouster of the other co-tenants; and this is supported by reference to two Indian and two English cases, in which, it is contended, the law applicable to the co-tenants before us is laid down.

The first of these, *Nallayappa Pillai* v. *Ambalavana Pandara Sannadhi* (1), no doubt dealt with collection of rents and it was said that "not only was the Kattalai, as one of the tenants-in-common, not bound to pay over to the *mutt* (the other) a moiety of what it received from the Ryots, so long as such receipts did not exceed its proper share, but in an action against the Kattalai to account for its receipts over and above what it was entitled to, it was for the *mutt* distinctly to allege and show that the Kattalai's receipts did in fact exceed its due share." But the judgment proceeded, "no averment of that kind having been made and no proof in support of it having been offered, the suit" (brought on an agreement, not, as the District Munsif treated it, for an account) "necessarily failed." The circumstances were peculiar and it appears from the record that not only was the suit not for an account, but the Kattalai had been tendering *pattas* and presumably collecting only its half share. With the English authorities referred to, including *Kennedy* v. *DeTrafford* (2), I deal later. The material fact is that the Court referred to the share of receipts, not of demand; and this is in defendant's favour.

The other Indian decision, *Mahesh Narain* v. *Nowbat Pathak* (3), relied on as supporting plaintiffs, can, in my opinion, be distinguished. The dispute was between one co-tenant of a quarry and a lessee under another, the lessee's rights being discussed as equivalent to those of his lessor; and it was, no doubt, held that, as there was no ouster or destruction of the common property, the co-tenant plaintiff, who himself had not attempted or been debarred from any enjoyment of it, was not entitled to an account in the absence of proof that the lessee had taken more than his lessor's just share of the stone. The case, however, differs from that before us in respect of the manner, in which the profits are claimed and in which they were obtained. Firstly in *Mahesh Narain* v. *Nowbat Pathak* (3) they were claimeddirectly by the plaintiff, co-tenant, whilst as the judgments show, he was disclaiming any liability to contribute towards the expenses incurred. Here not only has defendant been ready to give and plaintiffs have not refused credit for the proper proportion of the expense incurred by the latter in collection, but also defendant's claim is made in answer to one by plaintiffs to be reimbursed for expenditure, essential to the continuance of the common property in the common ownership, but for which it would have been brought to sale by Government for arrears of *peishcush* and no profits could have accrued. It is not suggested that contribution is claimed from defendant in respect of any distinct portion of the estate for which plaintiffs have not collected and he is at liberty to collect, or otherwise than for his unascertained share in the property as a whole.

The second distinction between the present case and *Mahesh Narain* v. *Nowbat Pathak* (3) appears clearly from the quotation from the judgment in one of the English authorities now relied on, *Henderson* v. *Eason* (4), on which the Calcutta decisions are based. The claim in *Henderson* v. *Eason* (4) was to an account and share of the profits derived by a co-tenant from common property, of which he was in possession and which he had cultivated directly, just as the lessee and the co-tenant lessor had enjoyed the quarry, which was in question

(1) 27 M. 465; 14 M. L. J. 81.
(2) (1897) A. C. 180; 66 L. J. Ch. 413; 76 L. T. 427; 45 W. R. 671.
(3) 32 C. 837; 1 C. L. J. 437.
(4) (1851) 17 Q. B. 701 at p. 721; 21 L. J. Q. B. 82; 16 Jur. 518; 85 R. R. 628 at p. 643; 117 E. R. 1451 at p. 1458.

in Calcutta; and it was observed that in such cases it is impossible to say that the co-tenant has received more than his just share. "He takes the whole of the crops; and is he to be accountable for any of the profits, when it is clear that, if the speculation had been a losing one altogether, he could not have called for a moiety of the losses, as he would have been enabled to do, had the land been so cultivated by the mutual agreement of the co-tenants?.....He receives in truth the return of his own labour and capital to which his co-tenant has no right." This ground of decision was as directly available in *Mahesh Narain* v. *Nowbat Pathak* (3) as it is excluded by the facts before us, plaintiffs' acceptance of profits, to the making of which their own exertions or expenditure have not gone, except as regards the latter so far as they claim that defendant was jointly liable for the *peishcush* with them.

The portion of the judgment in *Henderson* v. *Eason* (4) relating to a state of facts similar to those before us is also relied on, because it also is said to support plaintiffs' claim inasmuch as it shows that the English common law to be applied in the present case had previously been that, whilst the co-tenancy continued, one co-tenant had no remedy against another who had received the profits, unless the latter had been expressly appointed the former's bailiff or the former had been ousted. *Vide* also the extract from Co. Litt. 200b in the argument. And it is urged that this view is further supported by *Kennedy* v. *De Trafford* (2), in which Lord Herschell said that a co-tenant collects rents in the right, which he possesses as such, and does not need any special contract (such as was proved in that case) or any agency, express or implied, to justify him in collecting. This *dictum* was, however, relevant only to the question then in issue, whether the co-tenant, who collected the rents, was on that account in a fiduciary relationship with the other co-tenant which would debar him from purchasing the property, when it was sold by a mortgagee. There was no issue and no decision as to his liability to account for any part of his collections or its extent; and there is nothing to affect the conclusion as to the liability in *Henderson* v. *Eason* (4) based on the Statute 4 Ann. C. 16, which was held applicable, in supersession of the common law, to "cases in which one of two tenants-in-common of lands leased at a rent payable to both receives the whole or more than his proportionate share according to his interest in the subject of the tenancy," that "he is bailiff only by virtue of his receiving more than his just share and as soon as he does so, and is answerable for only so much as he actually receives." The Statute is dependent on no local or temporary considerations and has been the English law from prior to the date of its reception in India, as representing justice, equity and good conscience and, if there were no Indian provision for the case, I should treat it not the earlier common law, as applicable.

It is, however, argued, it seems to me correctly, that such provision is available in section 90, Trusts Act (II of 1882), the relevant portion of which provides that, "where a co-owner, by availing himself of his position as such, gains an advantage in derogation of the rights of the other persons interested in the property, or where any such owner, as representing all persons interested in such property, gains any advantage, he must hold, for the benefit of all persons so interested the advantage so gained, but subject to re-payment by such persons of their due share of expenses properly incurred in gaining such advantage." It is unnecessary to decide whether the section was intended to embody the English rule. For it is sufficient that it applies to a co-owner's right existing like defendant's in the present case, but unlike that in question in *Mahesh Narain* v. *Nowbat Pathak* (3) independently of and antecedently to the realizations, which not only his position as co-owner but also his special exertions or expenditure enable him to make. Here defendant, as the plaint admits and the claim made involves, is a co-owner; and it is not disputed that he is, apart from plaintiffs' collection of the rents, entitled to a proportionate share in them. The co-owner, who collects them, can, in the absence of arrangement with the others, do so only as their representative, this

appearing from the fact that, if he attempts to recover by suit, he is bound to join those others, either as plaintiffs or defendants, the Court being able to protect their interests at the execution stage by an order under Order XXI, rule 15. *Nepal Chandra Ghose* v. *Mohendra Nath Roy Chowdhury* (5) and *Pramada Nath Roy* v. *Ramani Kanta Roy* (6). The terms of the section being fulfilled, plaintiffs under it must account to defendant for the advantage they have gained in the shape of the excess over their own proportionate shares in the collection.

No other ground of appeal being argued, this entails concurrence in the lower Appellate Court's decision. The second appeal is dismissed with costs.

SADASIVA AIYAR, J.—The plaintiffs Nos. 1 and 2 are the appellants. They and the 3rd plaintiff own $\frac{3}{4}$ths share in the *mitta* and the defendant owns the remaining $\frac{1}{4}$th share. The lands in the *mitta* are enjoyed by tenants and the plaintiffs' share of the net rents (after deducting costs of collection) is a $\frac{3}{4}$th fraction and the defendant's the remaining $\frac{1}{4}$th fraction. Both the plaintiffs and the defendant are jointly liable for the *peishcush* due to Government. The plaintiffs paid more than their $\frac{3}{4}$ths share of the *peishcush* due for Faslis 1319 and 1320 and the defendant paid much less than his $\frac{1}{4}$th share and hence the plaintiffs brought the suit for the recovery of the excess (over $\frac{3}{4}$ths share) paid by them. The defendant contended (among other defences) that the plaintiffs have collected and enjoyed more than their $\frac{3}{4}$ths share of the rents due by the tenants and that if accounts are taken, nothing would be found due to the plaintiffs.

The District Judge passed an order on the 27th January 1915 calling for a finding from the lower Court, the material portions of the order being as follows:—"The defendant claims in issue No. 3 that the rents collected by the plaintiffs should be set off against their demand. The lower Court has held that so long as the plaintiffs have not collected more than their share of the whole rental, they are not accountable to the defendant. I think that the correct view is that the plaintiffs are accountable for a proportionate amount *on each pattah*." (Italics are mine.) "With joint holders, it would never do for one to be allowed to collect his fraction of the total rent from the solvent tenants leaving it to his fellows to collect their dues from the other tenants. Each landholder is entitled *to a proportionate amount from each tenant who contracts with the landholders jointly*. It is, therefore, necessary in this case to have a statement of account showing what has been paid by each *pattadar* or tenant to each landholder from the beginning of Fasli 1318 up to date of plaint together with the expenses incurred by each landholder for collection. Accordingly I remand this case for submission of such an account." It is not very clear from this remand order whether the District Judge thought (*a*) that after totalling the collections from all the tenants holding under several *pattahs*, it should be ascertained whether the total amount exceeded $\frac{3}{4}$ths of *the total demand* from all the holdings in the village and plaintiffs should account for the balance to the defendant, or (*b*) whether the plaintiffs should account for $\frac{1}{4}$th of *the total collections* made by the plaintiffs to the defendant, or (*c*) whether they should account to the defendant whenever they had collected more than $\frac{3}{4}$ths *of the demand due on any pattah* for the excess over that $\frac{3}{4}$th on that *pattah*, though their total collections from all the holdings might be less than $\frac{3}{4}$ths of the demand on all the holdings or might be less than even $\frac{3}{4}$ths of the total amounts due by the tenants from whom they made collections. From the way, however, in which the accounts were afterwards taken by the District Munsif and by the Commissioner appointed by him without protest, it appears that all the parties understood that the District Judge held that, out of the net collections made by the plaintiffs in each Fasli from all the tenants, they should account for $\frac{1}{4}$th share to the defendant while the defendant in his turn should account for $\frac{3}{4}$ths of his net collections (that is, collections after deducting expenses of collection) to the plaintiffs and that the accounts should be

(5) 31 C. 707.

(6) 35 C. 331; 12 C. W. N. 249; 10 Bom. L. R. 66; 35 I. A. 73; 7 C. L. J. 139; 18 M. L. J. 43; 3 M. L. T. 151 (P. C.).

taken in the above manner. When accounts were taken as above, it was found that a sum of Rs. 134 and odd was due by the plaintiffs themselves to the defendant, and hence the Subordinate Judge (to whom the appeal had been transferred after remand) dismissed the plaintiffs' suit with costs. The second of the grounds in the memorandum of second appeal before us is as follows:—"It having been admitted and proved that the plaintiffs did not collect more than their share of the rent from the Ryots and they paid not only the *peishcush* due by them but also that due by the defendant, the lower Court should have held that the plaintiffs are entitled to contribution and the suit should have been decreed." It is not clear whether the expression 'plaintiffs' share of the rent' found in this second ground of the appeal memo. means, (*a*) *plaintiffs' share of the total annual demand from all the ryots*, or (*b*) whether it means plaintiffs' share of the total demands due by those tenants alone from whom they made collections, or (*c*) the plaintiffs' share of the demand on each particular holding from the tenants of which they made collections. At the arguments Mr. T. R. Ramachandrier for the appellants contended that as the plaintiffs' total collections were not alleged by the defendant to have exceeded $\frac{3}{4}$ths of the total demand from all the Ryots, the plaintiffs were not in law bound to account for $\frac{1}{4}$th share of the net sum so collected by the plaintiffs, as decided against them by the lower Appellate Court in the remand order which decision was adopted by the Commissioner in taking the accounts.

In support of this proposition of law, the learned Vakil relied on the observations in certain English cases and on the *dicta* found in *Nallayappa Pillai* v. *Ambalavana Pandara Sannadhi* (1) and *Mahesh Narain* v. *Nowbat Pathak* (3). A few more facts might be stated here to appreciate the relative positions of the parties. The defendant and the plaintiffs Nos. 2 and 3 were willing in January 1910 to have the 1st plaintiff recognised as the "manager" of the whole *mitta* estate and registered by the Collector as "the senior joint owner", so that he may be recognised as proprietor under Act II of 1894 to exercise the powers of appointment of village officers of reporting against them, of punishing them and so on. As manager, the 1st plaintiff alone issued *puttahs* to the tenants in Faslis 1319 and 1320. And this could have been done only on behalf of all the four joint proprietors. As regards arrears not collected from the tenants, all the three plaintiffs and the defendant filed suits jointly in the Revenue Court for such arrears due for Faslis 1320, 1321 and 1322, and most of the suits have been decreed in favour of all the four jointly. The 1st plaintiff says in his evidence: "Under ordinary circumstances all the four *mittadars* should share equally profit and loss. The profit or loss can be ascertained only after payment of *peishcush*." Each of the four *mittadars* seems to own the Kudivaram also in some of the lands in the estate and usually the rent due by each of the four *mittadars* as a Ryot of these lands (to the four *mittadars* jointly as landlords) is not actually collected, but each debits the rents due by him in the account of collections which he gives to the common Karnam (see the evidence of the Karnam P. W. No. 2). Where attachments or other proceedings have to be taken and expenses incurred, the net collections alone are considered as received by the proprietor who has incurred the cost of such collections. On the above facts, it is clear to my mind that the justice and equity of the case is in favour of the view taken by the lower Appellate Court that every one of the co-owners must be deemed to collect on behalf of all every rupee he obtains as net collection from any tenant, that the net amount must, therefore, be brought into the common account and that each co-sharer is entitled to his fraction in that amount in proportion to his share. After I prepared my judgment up to this point, I had the advantage of a perusal of the judgment just now pronounced by my learned brother and as I entirely concur with him in his discussion of and conclusions on the English and Indian precedents, I think it unnecessary to myself refer to them or detail them. Where there is no risk, no question of adventure or enterprise, no question of employment of real and appreciable labour or skill or capital or industry in the obtaining of pecuniary profits from the common property by one

co-sharer, the reason of the decisions quoted by the appellant does not apply and even if there are old English decisions in which wide language is used as to the irresponsibility of a co-sharer to his other co-sharers under all circumstances, it should be remembered that the rights and liabilities of joint owners, joint debtors and joint creditors were looked at sometimes under the English common law in a too technical manner, not quite consistent with plain equity and justice, and I am not prepared to follow such old decisions, especially after the English Statute of Anne was passed evidently in order to get rid of some at least of the said technicalities based upon the old forms of action. Of course where one co-sharer obtains the amenities of mere comforts, conveniences or residential advantage of mere user and occupation without an adverse *animus* against the other co-owners, he cannot be treated as bound to account to his other co-sharers as if he had obtained the common premises for the rent to which they could have been let to a stranger.

In cases other than those in which the co-sharer *expressly intended to collect for his own share alone, made a demand on tenants for his own share alone, as in the case of* Nallyappa Pillai v. Ambalavana Pandara Sannadi (1), *and was paid by the tenants expressly for or towards that share alone* (those facts being required to be alleged and proved by that co-sharer in any litigation between him and other co-sharers if he wants to rebut the natural presumption that he collected for the common benefit), plain law and equity, in my opinion, is in favour of the view that he collects whatever he collects on behalf of all.

In the result, I concur in dismissing the second appeal with costs.

Appeal dismissed.

M. C. P.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITIONS NOS. 2137 TO 2139 OF 1916.

September 19, 1916.

Present:—Mr. Justice Phillips.

VENGU NAIDU AND OTHERS—CLAIMANTS—PETITIONERS

versus

THE DEPUTY COLLECTOR OF MADURA DIVISION—LAND ACQUISITION OFFICER—RESPONDENT.

Appeals, consolidation of—Appellate Court, power of—Omission of prayer for consolidation in lower Court, effect of—Civil Procedure Code (Act V of 1908), s. 151—Land Acquisition Act (I of 1894), ss. 12, 18, 20—Service of single notice and presentation of single application in respect of acquisition of several plots—Splitting up of awards by District Court, whether disentitles petitioner from treating them as single award.

An Appellate Court has inherent power to consolidate appeals, though it is not conferred by Statute, and Courts can, if necessary, invoke the provisions of section 151, Civil Procedure Code, for the purpose. [p. 469, cols. 1 & 2.]

Courts should, however, consider whether there is a fit case for consolidation having regard to the loss of revenue in Court-fees by allowing consolidation. [p. 469, col. 2.]

Where in respect of several plots only one notice was sent to the owner under section 12 (2) of the Land Acquisition Act and he presented only one application under section 18 and one reference was made by the Land Acquisition Officer to the District Court, the fact that the award was split up by the latter should not prejudice the party who is entitled to treat it as one single award. [p. 469, col. 2.]

The absence of a request for consolidation in the lower Court does not bar consolidation in appeal where the award was split up in the lower Court without notice to or knowledge of the party. [p. 470, col. 1.]

Petitions praying that in the circumstances stated in the affidavits filed therewith the High Court will be pleased to issue an order for consolidation of Original Petitions Nos. 223, 225, 226 of 1915 and Original Petitions Nos. 200, 201, 226 of 1915 and Original Petitions Nos. 27, 197 to 199, 210, 212 to 219, 221 and 227 of 1915 respectively on the file of the District Court, Madura, as single cases and the awards thereon as a single case and allow the claimants to file single appeals respectively against awards in Original Petitions Nos. 223, 225 and 226 of 1915, Original Petitions Nos. 200, 201 and 226 of 1915 and Original Petitions Nos. 27, 197 to 199, 210 212 to 219, 221 and 227 of 1915 respectively on the file of the District Court, Madura.

Mr. *K. S. Jayarama Aiyar*, for the Petitioner.

Mr. *V. Kamesam* (Acting Government Pleader), for the Respondent.

JUDGMENT.—This is an application to consolidate the several appeals from awards passed by the District Judge of Madura on reference made to him by the Land Acquisition Officer under section 18 of Act I of 1894. Several references appear to have been made to the District Judge, but they were all in connection with land taken up for the extension of Madura town, except one with which we are not now concerned. The District Judge treated all the references as 47 separate petitions and passed a separate award on each of these, although they were all tried together and were disposed of in one judgment. It is not quite clear whether the Land Acquisition Officer divided up the references in this way, either of his own initiative or at the request of the District Judge, or whether it was done by the District Judge himself.

The first question argued is whether this Court has power to consolidate appeals. No express power to do so is conferred by the Legislature, but such power has been held to be inherent in the Court, and I think has rightly been so held. So long ago as 1871 the Calcutta High Court approved of the consolidation of two suits and their disposal by one decree. *Enayetoollah* v. *Radha Churn Roy* (1). In *Kashi Prosad Singh* v. *Secretary of State* (2) appeals from 44 references under the Land Acquisition Act were ordered to be consolidated. In *Fink* v. *Secretary of State* (3) it was held that in that case it was too late to consolidate the appeals from references under the Land Acquisition Act, but the Court pointed out the inconveniences that arose from the failure to consolidate and remarked that the Judge and the Collector should have consolidated the references. In *Dorabji Cursetji Shroff, In re* (4), Macleod, J., held that the Court had power to consolidate, and relied on *Fink* v. *Secretary of State* (3). Reference may also be made to *In the matter of the "Falls of Ettrick"* (5), where the question is considered. There appears to be no decision of this Court on the point, and the only case at all analogous is that when two appellate decrees have been passed on appeal from one decree, the second appeals are consolidated into one [*Gangulakurti Sanyasi Lingam* v. *Nidugonda Gavaramma* (6)], but the analogy is somewhat remote. Consolidation is allowed in England and consequently I agree with the Calcutta and Bombay High Courts that a Court has power to consolidate appeals and would, if necessary, invoke the provisions of section 151 of the Code of Civil Procedure in support of the proposition.

The learned Government Pleader takes objection to consolidation only on the ground that if it is allowed the public revenues will be deprived of a portion of the Court-fees payable by appellants. We have, therefore, to consider whether this is a fit case for consolidation. Although several plots of land were acquired from appellants, only one notice was served on them under section 12 (2) of the Land Acquisition Act in respect of all the plots, and under section 18 of the Land Acquisition Act the appellants only made one application to the Collector to refer their objection to the award. Under section 20 of the Land Acquisition Act the Court has to determine the objection, *i. e.*, the objection referred to in section 18 (2). The fact that only one notice was sent under section 12 and one objection filed under section 18 would *prima facie* indicate that there was only one award, the correctness of which had to be determined by the District Court. The fact that the award contained several items does not make it as many awards, for there is no reason why one single award should not decide many questions referred for decision. So far, therefore, as appellants were concerned, there was only one award which was referred under section 18 for the decision of the District Court. The fact that, in the arbitration proceedings before the District Court, the award was split up and amalgamated with other awards, which had reference to other claimants, ought not to be allowed to prejudice the right of the appellants to treat their award as one, and they appear to be equitably entitled to consolidation.

A further objection is taken that the

(1) 15 W. R. 395.
(2) 29 C. 140.
(3) 34 C. 599.
(4) 10 Bom. L. R. 675.
(5) 22 C. 511; 11 Ind. Dec. (N. S.) 341.
(6) 16 M. L. J. 411.

appeals cannot be allowed to be consolidated as there was no consolidation nor even a request for consolidation in the lower Court, and reliance is placed on *Rakhal Chandra Tewary* v. *Manmatha Nath Mitter* (7) and *Janardan Kishore Lal* v. *Sib Prasad Ram* (8). These are, however, appeals not from suits, but from arbitration proceedings [*vide Secretary of State* v. *Chelikani Rama Rao* (9)], and in the lower Court there was no occasion for appellants to ask for consolidation. They had been furnished with only one award to which they objected and consequently there was only their objection to be disposed of, and it was disposed of in conjunction with other objections at one hearing and by one order. The splitting up of the award by the referring officer or by the Court may not even have been known to the parties, and in any case there was no occasion for the claimants to take any objection at the hearing, for all the cases were heard together. The splitting up of the awards, if made by the Land Acquisition Officer, was apparently not communicated to the parties under section 12 (2) of the Land Acquisition Act and consequently there was only one valid award, so far as the appellants are concerned, and they are entitled to appeal against it in one appeal. The petition is, therefore, allowed with costs.

Civil Miscellaneous Petitions Nos. 2138 and 2139 follow the order in the petition. The time allowed for the payment of the costs is three months from this date.

Petitions allowed.

M. C. P.

(7) 10 Ind. Cas. 415; 15 C. W. N. 994.
(8) 36 Ind. Cas. 179; 43 C. 95; 20 C. W. N. 475.
(9) 35 Ind. Cas. 902; 31 M. L. J. 324; 20 C. W. N. 1311; (1916) 2 M. W. N. 224; 39 M. 617; 14 A. L. J. 1114; 20 M. L. T. 435; 4 L. W. 486; 18 Bom. L. R. 1007; 25 C. L. J. 69; 43 I. A. 197 (P. C.).

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 200 OF 1913.

April 29, 1914.

Present:—Mr. Batten, A. J. C.

TUKARAM—APPELLANT

versus

DINAJI—RESPONDENT.

C. P. Land Revenue Act (XVIII of 1881), ss 82, 83, 39—Record of Rights, whether complete before notification under section 39—Ejectment, suit for, against recorded tenant—Burden of proof.

There is nothing in the Land Revenue Act to justify the view that a Record of Rights prepared by a Settlement Officer under section 82 of that Act cannot be considered complete until the Chief Commissioner has under section 39 declared the Settlement to be completed.

It, therefore, lies on a plaintiff, who sues to eject a person who has been recorded as a tenant and in whose favour a settlement *parcha* has been issued to prove that the defendant is not a tenant.

Appeal from the decree of the District Judge, Wardha, dated the 13th December 1912, in Civil Appeal No. 276 of 1912.

Mr. *M. R. Dixit*, for the Appellant.

Dr. *H. S. Gour*, for the Respondent.

JUDGMENT.—In his plaint the plaintiff admitted that defendant was the recorded tenant, and the *parcha* had been issued in the defendant's name by the Settlement Officer who prepared the Record of Rights under section 82 of the Land Revenue Act. There is nothing in the Act to justify the view that the Record of Rights cannot be considered complete until the Chief Commissioner has under section 39 declared the settlement to be completed. Undoubtedly, therefore, the burden of proving that the defendant was not a tenant lay on the plaintiff, and there should have been an issue: "Is not the defendant the tenant of the field in suit?" While the District Judge recognised that the burden of proof lay on the plaintiff, he nevertheless really cast it on the defendant The defendant's evidence cannot be said to disprove his tenancy, it is merely bad evidence in favour of tenancy. The presumption of section 83 is not sufficiently met by the admission that defendant was not the original tenant. As the record stands the plaintiff should fail, but he is entitled to an issue being framed as indicated above. As to joinder of the plaintiff's co-sharers, it is unnecessary to decide whether in every such case they would be necessary parties. But in view of the express pleadings of the defendant in this case they undoubtedly ought to have been joined as parties and must now be so joined.

The suit is remanded for re-trial by the 1st Court in view of the above remarks. I should add that history of the case deduced from the *jamabandis* by the District Judge is not in accordance with the pleadings of either parties. Costs will be costs in the suit.

Suit remanded.

VENKATA RAMAYYA APPA ROW v. CHAKALI VEERASWAMIGADU.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 1312 OF 1917.
(ORIGINALLY FILED AS APPEAL AGAINST ORDER No. 185 OF 1917.)
December 19, 1917.

Present:—Mr. Justice Spencer and Mr. Justice Kumaraswami Sastri.

Sree Rajah VENKATA RAMAYYA APPA ROW BAHADUR ZEMINDAR GARU AND ANOTHER—PLAINTIFFS—PETITIONERS

versus

CHAKALI VEERASWAMIGADU (DEAD) AND OTHERS—DEFENDANTS—RESPONDENTS.

Madras Estates Land Act (I of 1908), ss. 3, 77 (1), 189, 192—Civil Procedure Code (Act V of 1908), s. 115, O. VII, r. 10, O. XLIII, r. 1 (a)—Suit in Revenue Court—Remand by District Court for presentation to Civil Court—Appeal, second, to High Court, maintainability of—High Court, power of, to treat appeal as revision—Rent, suit for, on cessation of service for which tenure granted—Forum—Jurisdiction of Revenue Court, scope of.

No second appeal lies to the High Court against an order of the District Court in appeal remanding a suit instituted in the Revenue Court for presentation to the Civil Court. [p. 472, col. 2.]

Order XLIII, rule 1 (*a*), Civil Procedure Code, which gives the right of appeal against orders passed under Order VII, rule 10, is inapplicable to suits in Revenue Courts by virtue of section 192 of the Madras Estates Land Act. [p. 472, col. 2.]

The High Court has power to treat an appeal as a petition in revision under section 115, Civil Procedure Code, especially when the question in issue is one of jurisdiction. Section 115, Civil Procedure Code, is not controlled by section 192 of the Madras Estates Land Act. [p. 473, col. 2.]

A suit for rent, based on the allegation of the land being a Ryoti land in which the defendant has occupancy rights, is cognisable by the Revenue Court notwithstanding plaintiff's admission that the defendant held at a favourable rent on condition of doing services which were discontinued and which discontinuance disentitled him to claim the reduction. Under the circumstances, the land cannot be said to be held on service tenure *at the date of suit* so as to bring it within the jurisdiction of the Civil Courts. [p. 472, col. 2.]

When the allegations in a plaint bring the case within section 77 of the Estates Land Act, the suit must be filed in the Revenue Court and the jurisdiction of the Court will not depend on any pleas the defendant might raise. The fact that the Court will have to go into complicated questions will not affect the jurisdiction of the Revenue Court. [p. 473, col. 2; p. 474, col. 1.]

Petition, under section 115 of the Code of Civil Procedure, praying the High Court to revise the order of the District Court, Kistna, in Appeal Suit Nos. 110 and 116 of 1914, perferred against the decree of the Court of the Suits Deputy Collector, Ellore, in Sumary Suit No. 1089 of 1913.

Mr. *P. Nagabushanam*, for the Appellants.

Mr. *B. Narasimha Row*, for the Respondents.

JUDGMENT.—The Receiver of the Nidadavole and Medur Estates, who is the appellant, sued the respondent in the Revenue Court to recover Rs. 323-11-7, arrears of rent for Faslis 1320 to 1322. The case for the plaintiff was that the lands were granted by the former Zemindar at low rent to defendants Nos. 1 to 8 who were performing washerman's services, that they ceased to do so and conveyed a portion of the land to the 9th defendant and that plaintiff was consequently entitled to recover the full rent claimed. Defendants Nos. 1 to 8 were *ex parte*. The 9th defendant pleaded *inter alia* that the lands were Ryoti lands, that he has been paying the rent reserved ever since his purchase, that plaintiff has no power under the Estates Land Act to enhance the rent and that the suit was bad for misjoinder of parties. No question was raised as to the jurisdiction of the Court and at the trial plaintiff conceded that the lands were Ryoti lands and that the defendants had occupancy rights. The Suits Deputy Collector decreed Rs. 51-13-9 as the proper rent payable. The 9th respondent appealed, but not on the ground that the Revenue Court had no jurisdiction. The grounds of appeal, on the contrary, proceed on the footing that the Estates Land Act applied. When the appeal was argued before the District Judge, however, a preliminary objection was taken by the appellant in the District Court to the effect that the lands were service *inams* and that the plaintiff ought to have sued in a Civil Court, the Revenue Courts having no jurisdiction.

The District Court upheld the contention and directed the plaint to be presented to the proper Court. The appeal before us is against the order of the District Judge.

A preliminary objection has been taken by the respondent that no appeal lies against the order of the District Judge as the order

was passed under Order VII, rule 10, Civil Procedure Code, 1908 (corresponding to section 57 of old Code), and Order XLIII, rule 1, clause (*a*), which gives the right of appeal against the order passed under Order VII, rule 10, is made inapplicable to suits in Revenue Courts by virtue of section 192 of the Estates Land Act, which specifies the provisions of the Civil Procedure Code applicable to suits, appeals and other proceedings under the Act and excludes Chapter XLIII of the old Code which corresponds to Order XLIII of the present Code. For the appellant it is contended that an appeal from the District Court to the High Court is not a proceeding under the Act but from one Civil Court to another and that Order XLIII applies to such appeals.

There can be little doubt that if the Suits Deputy Collector had returned the plaint presented to him under section 77, clause (1), of the Estates Land Act, no appeal would lie to the District Court.

The question, however, is whether a second appeal lies to the High Court where the order directing the return of the plaint is passed for the first time by the District Court, which is not a Revenue Court.

Section 189 provides that decrees and orders passed by the Revenue Courts shall be subject to appeal as provided in the schedule. No further appeals are specially given by the Act except to the Board of Revenue under section 190. The schedule to the Madras Estates Land Act gives the description of the suit and the Court to which an appeal lies. In respect of suits for rent under section 77 of the Act an appeal lies to the District Court. Section 190 gives a right of second appeal to the Board of Revenue against certain orders passed on appeal by the Collector. So far as appeals from decrees of the District Court are concerned a second appeal has, though not expressly given by the Estates Land Act, been held to lie by virtue of section 100 of the new Civil Procedure Code of 1908 and Chapter XLIII of the old Code which are not excepted by section 192. *Vide, Ravi Veerarghavulu* v. *Bomma Devara Venkata* (1), and *Venkataramier* v. *Vythilinga Thambiran Avergal* (2). As regards orders not coming within the definition of 'decree' in the Civil Procedure Code, section 192, clause (*a*), of the Madras Estates Land Act enacts that Chapter XLIII, which corresponds to Order XLIII and relates to appeals from orders, shall not apply to appeals or other proceedings under the Estates Land Act. It is argued that this section can only apply to appeals from the Revenue Courts to the District Court, because it is only such appeals as are appeals under the Act, and that for appeals from the District Court to the High Court we have to fall back upon the provisions of the Civil Procedure Code, as appeals from orders of the District Court are not appeals or proceedings under the Estates Land Act. Reference has been made to *Secretary of State* v. *Chelikani Rama Rao* (3) and it is argued that the observations of their Lordships of the Privy Council (at page 624*) to the effect that when proceedings reach the District Court, that Court is appealed to as one of the ordinary Courts of the country, with regard to whose procedure, orders and decrees the ordinary rules of the Civil Procedure Code apply, would cover equally cases of appeals under the Estates Land Act. The Forest Act does not contain any provision analogous to section 192 of the Estates Land Act excluding the operation of certain sections and chapters of the Civil Procedure Code, and *Secretary of State* v. *Chelikani Rama Rao* (3) can be distinguished on that ground. There is a great deal to be said for the contention of the appellant, but the matter is not *res integra*. The point is covered by authority and we think we are bound by the decision of this Court to the contrary when the question directly arose for determination.

In Appeals against Orders Nos. 349 to 353 of 1915 and *Vilvanatha Mudaliar* v. *Mannar Naidu* (4) it was held by Ayling and Seshagiri Aiyar, JJ., and by Ayling and Napier, JJ., that no second

(1) 25 Ind. Cas. 365; 37 M. 443; 16 M. L. T. 262; (1914) M. W. N. 695; 1 L. W. 779; 27 M. L. J. 45; 20 C. L. J. 375; 19 C. W. N. 97; 16 Bom. L. R. 852; 41 I. A. 258 (P. C.).

(2) 24 Ind. Cas. 754; 1 L. W. 89; 38 M. 655.

(3) 35 Ind. Cas. 902; 39 M. 617; 31 M. L. J. 324; 20 C. W. N. 1311; (1916) 2 M. W. N. 224; 14 A. L. J. 1114; 20 M. L. T. 435; 4 L. W. 486; 18 Bom. L. R. 1007; 25 C. L. J. 69; 43 I. A. 197 (P. C.).

(4) 25 Ind. Cas. 425; 1 L. W. 667.

*Page of 39 M.—*Ed.*

appeal lies against an order of remand under Order XLI, rule 23, of the Civil Procedure Code, and in Second Appeal No. 235 of 1917, Ayling and Phillips, JJ., held that no second appeal lies against an order dismissing a suit for default. The contention now raised by the appellant before us that the appeals from the District Court to the High Court are not appeals contemplated by the Estates Land Act and the question of the effect of the observations of the Privy Council in *Secretary of State* v. *Chelikani Rama Rao* (3) were not raised in the above cases, but, as already pointed out, there is nothing in section 10 of the Forest Act which excludes any of the provisions of the Civil Procedure Code from its operation and second appeals have not been expressly excluded. It has been argued that section 190 of the Estates Land Act would render the decision of the District Judge, who returns a plaint to be presented to the Civil Court on the ground that the suit does not relate to an estate within the definition of the Act, *res judicata* in all subsequent proceedings and can only be set right by the High Court in second appeal from the decision of the Civil Court to which the plaint is presented under orders of the District Judge; that proceedings will then have to be begun *de novo* in the Revenue Courts and that it could hardly have been the intention of the Legislature that this circuitous course should be followed when an appeal from an order of the District Court to the High Court would be a quick and adequate remedy. We have to construe the plain meaning of section 192, however desirable it may be that the Legislature should amend section 192 by giving a right of appeal against orders of remand.

It is argued by the appellant's Vakil that if Order XLIII of the Code is not to apply to suits under the Estates Land Act, then the order directing the return of the plaint would be a decree within the meaning of the Civil Procedure Code, as it would be an adjudication as to which no appeal would lie under Order XLIII by virtue of section 192 of the Estates Land Act. It is difficult to see how the definition of 'decree' in the Civil Procedure Code can be controlled by anything in the Estates Land Act.

The preliminary objections must, therefore, prevail.

We have been asked to treat the appeal as a revision petition under section 115 of the Civil Procedure Code. This section is not excluded by section 192 of the Estates Land Act, and we have power to deal with the appeal as a revision petition as the question in issue is one of jurisdiction.

The case for the plaintiff is that the land is Ryoti land and that the defendants Nos. 1 to 8 who are *pattadars* are liable to pay the rent claimed. The 9th defendant is treated as sub-tenant. It is open to the plaintiff under section 145 of the Estates Land Act to assent to the transfer of 5 acres and odd out of the 13 acres and odd held by defendants Nos. 1 to 8 in favour of the 9th defendant and we take it that the suit against the 9th defendant amounts to an assent. All that the 9th defendant pleaded was that the lands are Jiroyati lands and that the rent was being paid for a along time. He also claimed occupancy rights. Defendants Nos. 1 to 8 raised no defence. At the trial plaintiff's Vakil admitted that the lands were Ryoti lands and that the defendants had occupancy right. The only question that remained for consideration was whether the rent due was at the rate claimed by the plaintiff or the rate admitted by the 9th defendant. Section 3 no doubt excludes lands granted on service tenure at favourable rent so long as the service tenure subsists, but in the present case it is not alleged by the defendants in the written statement that the lands are now held on service tenure and on the evidence the Deputy Collector finds that the service is no longer rendered. There is no particular formality or procedure prescribed by the Act for putting an end to service tenures or anything which the landlord has to do in case services are discontinued in order to make the lands Ryoti lands, in cases where lands which were once Ryoti lands are given to the occupancy Ryot on a favourable rent in consideration of services to be rendered. Under circumstances of this case it cannot be said that the lands must be deemed to be held under service tenure on the date of the suit. When the allegations in the plaint bring the case within section 77 of the Act, the suit must be filed in the

Revenue Court and the jurisdiction of the Court will not depend upon any pleas the defendant might raise. The fact that the Court may have to go into complicated questions as to the right of resumption by the landlord or the continuance of the service on which lands were granted on favourable tenure will not affect the jurisdiction of the Revenue Court. [*Vide, Polemera Thammu* v. *Godey Chitti* (5).]

We are of opinion that, on the admission of the plaintiff and 9th defendant that the lands were at the date of suit Ryoti lands it must be taken that the lands in the possession of the 9th defendant were not held on service tenure on the date of the suit so as to bring the case within the exception to the definition of Ryoti land, in section 3. Whether lands continue to be held on service tenure is a question of fact which must be raised on the pleadings.

We set aside the decision of the District Judge and remand the appeal for disposal on the merits. Costs will abide and follow the result.

Appeal allowed; *Case remanded.*

M. C. P.

(5) 7 Ind. Cas. 809; (1910) M. W. N. 431; 8 M. L. T. 287.

Pancham Singh v. *Nankoo Singh*, 3 N. L. R. 182, followed

Appeal from the decree of the Court of the District Judge, Chhindwara, dated the 17th July 1914, in Appeal No. 93 of 1914.

Mr. *V. D. Kale*, for the Appellant.

Mr. *J. Mitra*, for the Respondent.

JUDGMENT.—The appellant's present contention is that Anandrao was *benamidar* for his father Ganpatrao and that the mortgagor and mortgagee, the brothers Jagannath and Ganpatrao, were tenants-in-common divided as between themselves in estate, though the absolute occupancy holding had not been divided by metes and bounds. The question is whether a mortgage of his half share in the ancestral holding by Jagannath in favour of Ganpatrao is binding on the landlord. It appears to me that the question is concluded by the ruling in *Pancham Singh* v. *Nankoo Singh* (1), to the effect that a tenancy, so far as the landlord is concerned, is indivisible and cannot be affected by an act to which the tenants alone are parties. As for this reason the mortgage is not binding on the landlord, it is idle to enquire whether section 41 (7) of the Tenancy Act, would be applicable, supposing the mortgage to be binding apart from the provisions of that sub-section. The appeal is dismissed with costs.

Appeal dismissed.

(1) 3 N. L. R. 182.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 634 OF 1914.

April 26, 1915.

Present:—Mr. Batten, A. J. C.

ANAND RAO MINOR, GUARDIAN GANPATRAO—APPELLANT

versus

Seth GIRDHARILAL MINOR, GUARDIAN *Musammat* PARBATI BAI—RESPONDENT.

Landlord and tenant—Tenancy, whether divisible—Mortgage by one co-tenant in favour of another, whether binding on Malguzar.

A tenancy, so far as the landlord is concerned, is indivisible and cannot be affected by an act to which the tenants alone are parties. Therefore, a mortgage of his share by one co-tenant in favour of the other is not binding upon the landlord.

MADRAS HIGH COURT.

CIVIL APPEAL No. 398 OF 1917.

December 4, 1917.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Oldfield.

MANAKARI VENKAPPA CHARI—DEFENDANT No. 1—APPELLANT

versus

HOLAGUNEL POMPANA GOWD AND OTHERS—PLAINTIFF AND DEFENDANTS Nos. 4 AND 5—RESPONDENTS.

Madras Revenue Recovery Act (Mad. II of 1864), ss. 25, 38—'Defaulter,' meaning of—Sale for arrears of

MANAKARI VENKAPPA CHARI v. HOLAGUNEL POMPANA GOWD.

revenue, suit to set aside, maintainability of—Jurisdiction of Civil Courts—Omission to distrain moveables, whether sufficient to set aside sale—Collusion among bidders, effect of.

An irregularity in the conduct of a sale held under section 38 of Madras Act II of 1864 empowers the Collector to set it aside, but there must be other sufficient grounds for a Civil Court to interfere. [p. 475, col. 1.]

An agreement made between the purchaser and other persons after the sale to go in shares, a collusive agreement between the bidders not to bid against each other, the omission of any attempt to distrain the moveable properties of the defaulter or the crops on the land are not sufficient grounds to set aside the sale by a suit filed in the Civil Court. [p. 475, col. 2; p. 476, col. 1.]

The 'defaulter' referred to in section 25 of the Madras Revenue Recovery Act who is entitled to notice or demand before attachment and sale is the ostensible registered proprietor. To plead that section the plaintiff must show that he is the defaulter. A person who owns the land but allows the *patta* to stand in another person's name and thus puts him forward as the ostensible owner, cannot claim the benefit of the section or complain that Government erroneously served the written demand on the latter. [p. 476, cols. 1 & 2.]

Appeal against the decree of the District Court, Bellary, in Original Suit No. 30 of 1912.

Messrs. *C. Ramachandra Row* and *P. R. Ganapathy Aiyar*, for the Appellant.

Dr. *S. Swaminathan*, for the Respondents.

JUDGMENT.

ABDUR RAHIM, J.—This is an appeal against the decree of the District Judge of Bellary, setting aside a sale, for arrears of revenue, of certain land. The sale took place on the 20th May 1912 and the appellant, the 1st defendant in the suit, purchased it. The second defendant is the mortgagee, who apparently was in possession of the land at the time of the sale. The grounds on which the sale was sought to be set aside are set out specifically in paragraph 3 of the plaint, and made part of the issues at the time of the trial. It is clear that grounds (*a*), (*b*) and (*c*) would not be good grounds for a Civil Court to set aside the sale. The Collector has got power, if the sale is vitiated on account of any irregularity in the conduct of it, to set it aside.

But, it is contended, that the sale was bad, *firstly*, because it was fraudulently brought about. Supposing that, if made out, would be a sufficient reason for setting aside the sale, it is quite clear that it has not been shown that there was any such collusion or fraud as would make the sale liable to be set aside. The case of the plaintiff on this point rests on Exhibit C, which is an agreement entered into between the 1st and the 2nd defendant, that is, the purchaser and the mortgagee, on the 23rd May 1912, by which they agreed to divide the land among themselves in certain shares. That was after the sale had been held, and it is difficult to conceive how the Judge held that the agreement must be taken to amount to a fraud vitiating the sale. Even if there was an agreement among certain bidders before the sale that they would not bid against each other or that they would divide the property among themselves after the sale had been concluded, that would not be a sufficient ground for setting aside the sale. It is enough to refer for authority to *Mahomad Mira Ravuthar* v. *Savvasi Vijaya Raghunadha Gopalar* (1), which is a decision of the Judicial Committee of the Privy Council. In fact here there was a number of bidders, at least 9, and it is not shown that there was any sort of understanding or collusion among them not to bid against each other.

Then it was suggested that the demand was not served on the plaintiff, the owner of the land, and, therefore, on that ground, the sale was bad. But the point does not appear to have been taken in the form of an issue before the lower Court and, so far as we can gather from the judgment of the learned District Judge, no such question was investigated by him. The validity of such grounds depends upon who was the defaulter within the meaning of the law, and whether the demand was not served on such defaulter in accordance with section 25 of the Revenue Recovery Act, II of 1864. That section says:—

"Such demand shall be served by delivering a copy to the defaulter, or to some adult male member of his family at his usual place of abode, or to his authorised agent, or by affixing a copy thereof on some conspicuous part of his last known residence, or on some conspicuous part of the land about to be attached."

(1) 23 M. 227; 2 Bom. L. R. 640; 4 C. W. N. 228 27 I. A. 17; 10 M. L. J. 1; 7 Sar. P. C. J. 661; 8 Ind. Dec. (N. S.) 561 (P. C.).

That the terms of this section were not satisfied there is no evidence to show. Then the plaintiff is alleged to have purchased the land from the widow of one Durvasappa, who had himself purchased it from one Balappa, in whose name the *patta* stood and who died sometime in 1907. It is alleged that the plaintiff had made an application for transfer of *patta* in his name, but even that is not borne out by the record, so far as our attention has been drawn to the evidence. It is sufficient to say that the question was not raised before the Court of trial and we are unable to hold that the procedure laid down by the Act was not followed on this point.

It may be pointed out that the learned District Judge has not really confined himself to the issues that arose before him. He proceeded on grounds which do not appear to have been raised by the issues and which do not come apparently within the purview of the Act; take for instance grounds Nos. (*a*) and (*b*), namely, 'no attempt was made to distrain the moveable properties of the defaulters which were more than sufficient to liquidate the arrears' and 'no attempt was made to distrain the crops on the land before the land was attached.' These would not be good grounds for setting aside the sale by a suit. Then he finds in paragraph 10 of the judgment: 'Further more there was combination among the bidders.' If any such case was relied upon by the plaintiff, it should have been taken distinctly in the issues. Beyond a general allegation that the sale was illegal, irregular and fraudulent, it was not alleged that there was any conspiracy among the bidders which would vitiate the sale.

I would set aside the judgment of the District Judge and dismiss the plaintiff's suit with costs here and in the Court below.

OLDFIELD, J.—I agree with my learned brother's conclusion, and desire only to say a few words with reference to the plaintiff's contention, that the sale is bad because he had no such notice of the attachment, as he was entitled to under section 25 of the Revenue Recovery Act, II of 1864. That section entitled a defaulter to notice of the attachment in the shape of a written demand served upon him; but in order to plead that section, the plaintiff must show that he is the defaulter. The facts are that the plaintiff had bought land about 2 years before the sale, which stood in the name of one Bellappa who was not his vendor and died before the sale and that the *patta* was never transferred, to plaintiff's name. The *patta* in fact is alleged to have remained in the name of Bellappa, notwithstanding his decease. The plaintiff, however, says that he had applied for transfer of *patta* on the date of the sale. But the only evidence as to such application is given by the plaintiff's 8th witness, the plaintiff's agent, and it does not show when the application he speaks of was made or granted or whether it was before the sale. The 1st defendant further denies that the application referred to by the witness related to the suit land and the evidence of the witness is not absolutely clear on the point. There is further the failure to examine the plaintiff's 2nd witness the Reddy regarding it. In the circumstances it does not seem to me to be proved that any application had been made when the sale took place.

Then it is contended that, even if there was no registration in plaintiff's favour and no application for any, he was the defaulter, because he owned the land, and had not paid the revenue. This can, I think, be answered by reference to *Zamorin of Calicut* v. *Sitarama* (2). There, no doubt, the *patta* stood in the name of a tenant, and the complaint was that there was no demand on the landlord. The decision, however, was: "By suffering the registry to stand in the tenant's name, the proprietor puts him forward as the ostensible owner, and as between him and the Government the service upon such tenant must be taken to be, in law, service upon the real owner. He cannot complain that the Government is in error in serving the written demand on the person whom he permitted to appear as the ostensible land-owner". I do not think that the plaintiff's position can be better than that of the proprietor referred to in *Zamorin of Calicut* v. *Sitarama* (2), when instead of allowing some one else to appear as the ostensible *pattadar*, his conduct has resulted in there being no ostensible *pattadar* at all. For these reasons, I think that the plaintiff's contention based on section 25 of

(2) 7 M. 405; 2 Ind. Dec. (N. S.) 865.

the Act must fail even on his allegations of fact.

I agree further with my learned brother that the record indicates that the plaintiff did not think it worth while to press this contention at the trial, and that we ought not to allow him any opportunity to revive it now.

M.C.P.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 536 OF 1914.

July 23, 1917.

Present:—Justice Sir Chales Chitty, Kt., and Mr. Justice Beachcroft.

KRISHNA CHANDRA DUTTA ROY, MINOR, BY HIS MOTHER AND NEXT FRIEND PROMADAMOYEE DASYA *alias* SANTAMOYI DASYA—DEFENDANT No. 18—APPELLANT

versus

HEMAJA SANKAR NANDI MOZUMDAR AND OTHERS—PLAINTIFFS AND REMAINING DEFENDANTS—RESPONDENTS.

Minor and guardian—Compromise effected by guardian in consideration of settlement of disputed claim, whether binding upon minor—Claim under alleged Will, whether can form consideration for compromise where Will not genuine.

A *mimanshapatra* (deed of compromise) executed by a father on behalf of his minor son, by which the interest of the minor in an inherited estate is given up in consideration of the other party giving up a portion of their claim under an alleged Will, is not binding upon the minor, unless it is proved by the other party that there was in fact such a Will and that under that Will they had a claim which was made honestly and in good faith, though it is not incumbent upon them to prove the Will in solemn form after a long distance of time. [p. 478, col. 1.]

The position of a minor son is different from the position of the father who executes a *mimanshapatra* on his behalf; for though the father might not be able to avoid a *mimanshapatra* which he had executed for himself, the minor through his guardian can avoid a *mimanshapatra* executed on his behalf if his interest is not properly protected by his father in executing it. [p. 479, col. 1.]

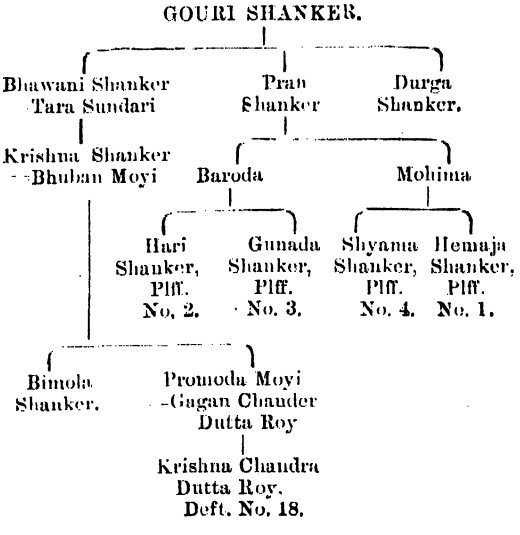
Appeal against the decree of the Subordinate Judge, 2nd Court, Mymensing, dated the 4th June 1914.

Babus *Jogesh Chandra Roy and Sasankajiban Roy*, for the Appellant.

Babus *Dwarkanath Chuckerbutty, Jatindra Mohan Choudhury* and *Khitish Chandra Neogy*, for the Respondents.

JUDGMENT.

CHITTY, J.—This appeal is preferred by defendant No. 18 and arises out of a partition suit brought by Hemaja Sanker Nandi Mozumdar and others against a number of defendants for partition of a *taluq* known as Tilak Nandi Ram Mozumdar No. 2624 with a Sudder Jama of Rs. 27-12-0. Out of the same case arose Appeal No. 328 of 1914 which we decided last week. The dispute in the present appeal is between Krishna Chandra Dutta Roy—defendant No. 18—the minor son of Jagan Chandra Dutta Roy and his wife Promoda Moyi on the one side and the plaintiffs who are the descendants of Pran Shanker on the other. The relationship of the parties will appear from the following genealogical table. There is no dispute as to the share of the plaintiffs in this estate which they inherited from their ancestor Pran Shanker. They claim, however, in addition to that 5-annas 10-*gundas* share a portion of another 5-annas 10-*gundas* share which in ordinary course of inheritance would have devolved from Bimola Shanker upon his sister's son, the present appellant.



The plaintiff's case is that by a *mimanshapatra*, dated 28th March 1903, Gagan Chandra Dutta Roy acting as the natural guardian

of his minor son relinquished in favour of the plaintiffs a part of the minors's share in the estate in consideration of the plaintiffs not pressing the claim which they had to the whole of that share under an alleged Will of Krishna Shanker Nandi Mozumdar. The only question before us is whether that relinquishment is binding on the minor appellant. The learned Subordinate Judge has found that there was such a Will as the plaintiffs allege, that the plaintiff's claim under it was honest and *bona fide* and that it accordingly formed a good consideration for the relinquishment.

The following facts are not in dispute. Krishna Shanker Nandi Mozumdar died on 10th March 1902, leaving him surviving his widow Bhuban Moyi, an adopted son Bimola Shanker, and a daughter Promoda Moyi, the mother of the appellant. Bhuban Moyi died about a year after her husband, sometime in 1309. Bimola Shanker at the age of 11 or 12 died on 11th March 1906. At that time the present appellant was only 2 or 3 months old. He was the next heir of his maternal grandfather. It was not till after Bimola Shanker's death that anything was heard of this alleged Will, but as soon as he had died the plaintiffs came forward with their claim. We have been taken through the evidence of both parties and have examined it minutely, and I think that the only possible conclusion on that evidence is that there was no such *bona fide* claim as the plaintiffs would have us believe. It was argued that the plaintiffs could not at this distance of time be expected to prove this Will on solemn form. I do not think that any such obligation lies upon them. It was, however, necessary for them to show that there was a Will and that upon that Will they had a claim which was made honestly and in good faith.

As to the contents of the *mimanshaptra* there can, of course, be no dispute. It was admittedly executed by Gagan at the time and under the circumstances alleged. The recital of that deed is important and runs as follows:—"Now we the first party" (that is the plaintiffs) "contend that the said Krishna Shanker Nandi Mozumdar deceased executed a Will on the 18th *Falgun* 1308 and thereby provided that in the event of his adopted son dying unmarried the properties left by him should devolve in equal shares upon us, the Nandi Mozumdars, and that, therefore, the properties left by him have devolved upon us in equal shares and we claim those properties accordingly and I, Gagan Chandra Dutta Roy, father of the second party," (*i.e*, the appellant before us) "urge on his behalf that as the aforesaid Will is not found it is likely that he" (meaning Krishna Shanker) "set it aside and destroyed it and that, therefore, the second party Krishna Chandra Dutt Roy is entitled to succeed to those properties as the heir of his maternal uncle, the said Bimola Shanker Nandi Mozumdar deceased."..."It is apprehended that if the dispute continue for a long time and if litigation be carried up to the highest Court, both the parties will suffer much loss and injury and the properties which form the subject-matter of the dispute will go to rack and ruin. Moreover, no one amongst the co-villagers and relations of the late Krishna Shanker Nandi Mozumdar knows of the destruction or cancellation of his Will aforesaid and the said Will was executed in the presence of many respectable gentlemen whose names are given in Schedule (*Ka*) and they attested it as witnesses, and the Will after being read out in their presence was signed by the testator and was then signed by them in the presence of the testator as attesting witnesses. There is no certainty as to what the result will be if there be any litigation carried on in that connection and both the parties are nearly related to each other. So we both the parties, acting through the arbitration of friends, relations, well-wishers and lawyers and with their advice, settle the matter and the dispute amicably in the way stated below and execute this deed in this town of Nasariabad while in enjoyment of sound sense and composed mind of our accord and free will." Gagan Chandra Dutta Roy now says that he was threatened by Kali Kumar Chowdhury and thus induced to give up his son's property by the *mimanshapatra*.

In 1909, the mother of the appellant was appointed the guardian of his person and property and she represented him in this partition suit and is representing him in this appeal. The question appears to

be not between Gagan Chandra Dutta Roy and the plaintiffs but between the plaintiffs and the minor. There is a considerable difference between the two as Gagan Chandra might not be able as a man of full age, and presumbaly of intelligence, to go behind his deliberate deed. It by no means follows, however, that the minor son would be bound by his father's action. Several cases were cited to us by the learned Pleader for the plaintiff respondents with regard to family settlements. Those cases do not, however, assist us much in coming to a conclusion in the present case. There is no doubt as to law. The question is one entirely of fact. We were referred by him to the case of *Miles* v. *Newzealand Alford Estate Co.* (1). That case is certainly useful as showing what the law is in such matters. Cotton, L. J., said: "What I understand to be the law is this, that if there is in fact a serious claim honestly made, the abandonment of the claim is a good 'consideration' for a contract; and if that is the law, what we really have to now consider is whether in the present case there is any evidence on which the Court ought to find that there was a serious claim in fact made, and whether a contract to abandon that claim was the consideration for this letter of guarantee." He further quoted the dictum of Lord Blackburn, in *Cook* v. *Wright* (2), to this effect: "We agree that unless there was a reasonable claim on the one side, which it was *bona fide* intended to pursue, there would be no ground for a compromise; but we cannot agree that (except as a test of the reality of the claim in fact) the issuing of a writ is essential to the validity of the compromise." Bowen, L. J., whose remarks alone the learned Pleader quoted, also laid down the law to the same effect. He said: "We must treat the thing in a business way and draw an inference of fact as to what the real nature of the transaction was as between business men. But an attempt was made to show that the forbearance was worth nothing. Of course forbearance of a non-existing claim would not be forbearance at all". He then went on to point out that the mere fact that the success of the claim might be unlikely would not necessarily indicate that it was not a *bona fide* claim. Fry, L. J., also agreed in his statement of the law. In that case the learned Judges differed in their view as to whether the claim there was an honest and *bona fide* claim or not, Cotten, L. J., and Fry, L. J., thinking that it was not, while Bowen, L. J., took the opposite opinion. Applying that test to the facts before us, what do we find? In this case plaintiff No. 1, Hemaja Shanker Nandi Mozumdar, and five witnesses have given evidence on the plaintiffs' side. Against them Gagan Chandra Dutta Roy has been called; and his brother Shib Chandra Dutta Roy, one Haranath Ghose, a servant of Krishna Shanker, and Promoda Moyi have also given evidence. The learned Subordinate Judge has found that there was in fact a Will as alleged by the plaintiffs, or at any rate, that the plaintiffs put forward an honest claim *bona fide* believing that Krishna Shanker Nandi Mazumdar had executed such a Will.

The learned Subordinate Judge has certainly in two instances found as facts proved what I have been unable to discover in the evidence as recorded. He says that Gagan admitted before the witness Babu Srinath Roy, a Pleader of that Court, that a Will was executed, but that it was destroyed by the testator. Now a perusal of the evidence of Babu Srinath Roy shows that Gagan did nothing of the kind, on the contrary the witness distinctly stated that Gagan denied the Will. In cross-examination he stated that he heard at a meeting prior to the execution of the *mimanshapatra* that the Will was annulled. When asked in re-examination, who told him this, he said that it was Gagan Roy. What he meant by the expression "the Will was annulled" is not clear. The Judge has taken it as equivalent to destruction by the testator; but that does not, in my opinion, follow. The second error of fact into which the learned Subordinate Judge appears to have fallen is when he states that Shyama Charan Babu, another Pleader, advised that it, was possible to obtain probate of a copy in the absence of the original Will, and that, in

(1) (1886) 32 Ch. D. 266; 55 L. J. Ch. 801; 54 L. T. 582; 34 W. R. 669.

(2) (1861) 1 B. & S. 559 at p. 569; 30 L. J. Q. B. 321; 4 L. T. 704; 7 Jur. (N. S.) 121; 121 E. R. 822; 124 R. R. 649.

consequence, an application for probate was drafted. It does not appear from the evidence of Shyama Charan Babu or indeed from any of the other witnesses that he ever gave such advice. He was asked, it is true, but what his advice was has not been elicited. All that he says is "everything was settled," whatever that may mean. He does not even recollect that he prepared any draft of the application for probate.

The story of the plaintiffs, as they now put it before the Court, is that soon after the death of Bimola Shanker, Hemaja Shanker came to Mymensingh with a view to applying for probate of this Will. We are told that there was a draft or a copy of that Will which was shown to Shyama Charan Babu, that an attempt was made to take out probate of the Will and that an application for that purpose was drawn up. Hemaja states that probably Shyama Charan Babu drew it up, though the Pleader himself does not remember having done so. Then began the negotiations for an amicable settlement between the plaintiffs and Gagan Chandra, at which at least three Pleaders and several other persons assisted. These negotiations are said to have gone on for 8 or 10 days, when ultimately Gagan, on behalf of his minor son agreed to execute the *mimanshapatra* upon the plaintiffs' giving up any claim which they might have under the alleged Will.

The plaintiffs' story appears to me to be full of the most suspicious circumstances. In the first place, Krishna Shanker had died just four years before his son Bimola Shanker. In those four years nothing had been heard of any Will executed by him. Now Bimola appears to have been very sickly. It is difficult to believe that if a Will to the effect alleged really existed, the plaintiffs would not have taken prompt measures to establish their title under it as reversioners in case of Bimola's dying childless. The evidence, so far as it goes, of Krishna Shanker's state of health immediately before his death throws very grave doubt on his capacity, both physical and mental, to execute a Will. He was suffering, as appears from the evidence of Promoda Moyi and Hara Nath Ghose, from diabetes. He was troubled also with some cerebral affection, with the result that he was sometimes unconscious and sometimes delirious. He appears to have been in this state more or less for at least a month before his death. He died on 28th *Falgun* 1308 (10th March 1902) and the Will is said to have been executed on the 18th. It is more than doubtful whether he was in a condition to execute a Will. Directly the heir dies the plaintiffs come forward with an alleged Will, by which Promoda Moyi and her son are to be disinherited in favour of the cousins of the deceased. No one has ever seen this Will. In the *mimanshapatra* it is stated that the Will was attested by no less than 18 persons whose names are given in Schedule (*Ka*) to that document. It is not suggested that all these 18 persons have died or were not available for the purpose of giving evidence in this case. The only one who has been spoken of by any witness is Chandra Kishore Sarcar, who, no doubt, is dead. No one, however, of the remaining 17 witnesses was called before the Court to state that, as a fact, Krishna Shanker executed a Will and that they attested it. The plaintiffs are said to have come to Mymensingh with a draft or copy of the Will. The plaintiff Hemaja Shanker is a medical man and presumably a person of ordinary intelligence. He has not thought fit to state to the Court whether the document which he brought was a draft or a copy, still less has he vouchsafed to give the Court any explanation why the original Will, if it existed, was not produced, whether it had been destroyed or lost. This mysterious draft or copy is not forthcoming. Some of the witnesses speak to having seen it but no one says whether it was a copy or a draft. There is a considerable difference, of course, between the two. A draft does not necessarily imply execution by the testator. A copy, if it were a correct copy, would re-produce the whole Will, including the names of the testator and the witnesses. On a copy probate might be obtained if there was satisfactory evidence of the loss or destruction of the Will itself, not so of the draft. The witnesses state vaguely that an application for probate was drafted. There was no statement, who was the executor named in this Will,

or, if no executor was named, whether the application was really for letters of administration with the Will annexed. This must have been within the knowledge of the plaintiff Hemaja Shanker. No draft or copy of this alleged application for probate has been produced. It is not stated whether it is in existence or not. It is impossible that these persons—the plaintiffs, the three Pleaders, the Am-Mukhtear Lakshan Chandra Laha and Kali Kumar Chowdhury, can all have forgotten all the matters of importance, which they should have spoken to in this connection. The story as it is now put forward by the plaintiff is entirely inconsistent with the evidence which Hari Shanker Nandi Mozumdar, plaintiff No. 2, gave on 30th May 1910 in Suit No. 2341 of 1909. There he stated that the Will was with his *jethi*, *i. e.* Bhuban Moyi, that after Bimola's death they wanted to take out probate of the Will and searched for it but it could not be found, and that Hemaja then attempted to take out probate on verbal proof of the Will. He admitted then that he had never seen the Will and that they had got a draft of the Will either from Ambica Charan Roy of Banagram or Iswar Roy of their own village when they made a search for it. "The draft," he said, "may be with us." Then he said, "probably it is not with us now.", That presumably would be the draft which was taken to Mymensingh for the purpose of the application for probate. The witness Hara Nath Ghose, who was called on behalf of defendant No. 18, but who appears to have been gained over to the plaintiffs' side, gave a version as to the execution of the Will which is also wholly inconsistent with the plaintiffs' case. In cross-examination by the plaintiffs he stated: "I have heard Krisha Shanker Mozumdar executed a Will. I heard of it before the death of Krishna Shanker Mozumdar, probably 5 or 6 days before his death. I heard it from Chandra Sarkar. He got a written piece of paper and asked me to raise Krishna Shanker Mazumdar to a sitting posture. We both raised him and made him sit. He signed it and then Chandra Sarkar took away the paper. He said that it was a Will." Later he said, "I cannot say who attested it." Apart from the facts that this witness had already stated in examination-in-chief that Krishna Shanker Mozumdar had become almost unconscious for 5 or 6 days before his death, this evidence is entirely inconsistent with the fact of the Will having been attested by the 18 witnesses named in the *mimanshapatra*. It is impossible if such a thing had happened that this witness should not know about it, as he was in Krishna Shanker's service and in close attendance upon him till he died. He states that he was continuously in the *bari* of Krishna Sankar Roy from 10 to 15 days before his death. The evidence of Shib Chandra Dutt Roy, who is brother of Gagan and a Muktear, does not carry the matter any further. He admits having advised Gagan to settle the matter, but he admits that he never saw the Will or knew anything about it. On this evidence it appears to me to be impossible to come to the conclusion, either that there was a Will at all, or even that the plaintiffs ever thought that there was. There was no honest and *bona fide* claim put forward by them but merely a sham claim with a view to inducing Gagan Chandra to give up some of the property in their favour. If this be the case, it is obvious that the minor cannot possibly be bound by the act of his father. There was no consideration for the agreement even had the parties been of full age, still less in the case of a minor could his property be thus bargained away.

It was urged upon us that Gagan after the execution of this document acted upon it; and we were shown a case in which registration of names was effected and another case in which he had brought a suit in his son's name for a portion of the property. We are not concerned in this matter with what Gagan did. It may well be that having executed the document he felt that he had no alternative but to act upon it. His subsequent acts, however, cannot bind his minor son if his initial act in executing the document is invalid against him. How Gagan came to execute this document there is not sufficient evidence before us to determine. Whether he was, as he now says, threatened or cajoled into signing it, I cannot say. It appears, however, probable that considerable

pressure was brought to bear upon him. He is a man in a lowly position of life, merely a copyist in a Civil Court in more or less temporary employ. It may well be, when the plaintiffs assisted by three Pleaders, all of whom it may be noted are relations of the plaintiffs, recommended him to avoid possible litigation by entering into this agreement, that he consented. It does not appear to me to be the act of a man of ordinary intelligence. One would at least have expected that he would ask to see the Will, make enquiries of the witnesses, and most probably take advice of some independent Pleader. It is clear that he did nothing of the kind. That the settlement was not for the minor's benefit cannot be disputed. It was directly contrary to his interests. About half his share in the property was given up in exchange for what, in my opinion, was a sham claim on the plaintiffs' part. In these circumstances, I hold that the *mimansapatra* is not binding on the infant and that his share, which he inherited from Bimola Shanker, cannot be said to have been conveyed away by that document.

It was said that it was Gagan Chandra who was now putting forward this plea on his son's behalf. There does not appear to be any foundation for that though, no doubt, he has given evidence more or less in favour of his son's contention. His wife Promoda Moyi is her son's certificated guardian. She may possibly have been assisted by her husband. What we have to consider, however, is not who is now representing the minor, but what are the minors' interests in this matter, have they been properly protected, and if not, what should this Court now do in his behalf? It is just as though the minor had attained his majority and was himself seeking to impugn his father's action. It is clear that he could not be held bound by it.

I think that the decree of the Subordinate Judge, so far as it relates to the dispute in this appeal, must be set aside and that it must be declared that the plaintiffs are entitled only to a 5-annas, 10-*gundas* share while the defendant No. 18 is entitled also to a 5-annas 10-*gundas* share in the property in question. This will necessitate a revision of the allotments. Plaintiffs must pay the costs of defendant No. 18, both in the Court below and in this Court.

BEACHCROFT, J.—I agree that this appeal must be decreed in the manner indicated by my learned brother. Before stating my reasons for coming to this conclusion, I wish to refer to the two points on which the learned Subordinate Judge appears to have misstated the evidence, both points of some importance one particularly so. He says in his judgment that Gagan admitted before Srinath Roy, the Pleader, that a Will had been executed but destroyed by Krishna Sanker. In Srinath Roy's evidence there is no allegation of an admission by Gagan. I presume the learned Judge is referring to two statements, which are as follows: "I heard in the sittings that the Will was annulled;" and in re-examination, "I heard from Gagan Roy that the Will was annulled." Possibly the learned Judge is right in interpreting the word "annulled" as meaning "destroyed by the testator." But even so, I cannot treat these two sentences as disclosing an admission by Gagan that a Will had been executed. They are equally consistent with a suggestion by him that the Will had been destroyed assuming, while not admitting, the allegation of the plaintiffs to be true, that one had in fact been executed. Nor can I find any trace of any admission by Gagan elsewhere in the evidence that any Will had ever existed. Evidence will naturally be somewhat vague when the witnesses speak to what happened eight years previously; but the rest of the evidence, such as it is, suggests the contrary. Kali Kumar says, "Plaintiffs said that there was a Will of Krishna Sanker and Gagan Roy denied it." Revati Sankar Roy says, "Gagan could not positively say if there was or was not any Will." Lakshan Chandra Laha says, "Gagan Babu said the Will was missing." I think it would be straining language to find in any of these statements an admission by Gagan that Krishna Sanker had in fact executed a Will.

The other misstatement is that the Pleader Shyama Charan advised that it was possible to obtain probate in the absence of the original Will. Shyama Charan does

not say so, nor does the plaintiff Hemaja. Syama Charan no doubt says he saw a paper purporting to be a draft or copy of a Will and made a draft of an application for probate, but he was not asked if he advised that probate could be obtained without the original. Hemaja does not even say that he consulted Shyama Charan. The Pleaders whom he consulted were Mohendra Babu and Mohim Roy Babu. I think it may be inferred that Syama Charan was consulted even if not by Hemaja, but from the mere fact that he prepared the draft of the application for probate, if indeed he did prepare it, for he does not remember doing so, it cannot be presumed that he advised that probate might be obtained. Nor are we told that any other Pleader gave such advice.

Not a single witness has been called on behalf of the plaintiffs to speak to the fact that Krishna Sanker did execute a Will, though a number of persons are named in the compromise as having witnessed such execution. And it has been reiterated in argument that the plaintiffs were not bound to prove execution of a Will. No doubt that is true, and it is equally true that primarily all that it was necessary for them to prove was that they had a *bona fide* claim, even though it may have been a weak one, which they intended to litigate, for where that is the case, withdrawal from litigation is ordinarily a sufficient consideration and the party supporting a compromise is not called upon to prove the quantum of the consideration against the party impugning it. That they alleged a claim there is no doubt and that they would have attempted to litigate it is not improbable, considering the value of the property. But to prove that the claim was a *bona fide* one there could hardly have been better evidence than that of persons who had seen Krishna Sanker execute a Will, especially if coupled with evidence that the plaintiffs obtained legal advice that they had a good fighting claim. Not that it was necessary for them to show even that they had a strong claim or one likely to succeed, for as Bowen, L. J., said in *Miles* v. *New Zealand Alford Estate Company* (1): "It is a mistake to suppose it is not an advantage, which a suitor is capable of appreciating, to be able to litigate his claim, even if he turns out to be wrong."

Lakshan no doubt says he came to know of the Will the day after it was executed and Hemaja speaks of hearing of it 3 months after Krishna Sanker's death. But none of the witnesses ever saw the Will, and no attempt appears to have been made to take probate of it till Bimola died some years later, or even to see that it was kept in safe custody. There is no doubt a suggestion in Hemaja's evidence that Gagan had taken the Will, with the implication that he made away with it, but the suggestion was never put to Gagan, who with the other witnesses for the defendant was examined after plaintiffs' second witness and before Hemaja.

It is strongly contended on behalf of the plaintiffs that as regards the execution of a Will they need do nothing more than refer to Gagan's own statement in the *mimanshapatra* that a Will had been executed, and it was repeatedly urged that even now Gagan does not deny that one was executed. As regards the latter point Gagan's evidence is perfectly clear that he had never heard of the Will before Bimola's death and has no personal knowledge of there ever having been a Will. To the first point there are two answers; the argument identifies Gagan with the minor and thereby begs the question at issue, and in fact Gagan in the *mimanshapatra* does not admit execution of a Will. What is stated in the document is that the first party alleged execution of a Will while Gagan urged that the disappearance of the alleged Will pointed to its destruction, but there is no admission by Gagan that a Will had been executed. Nor do I think that such an admission can be spelled out of the following sentence, that certain persons named in the schedule were witnesses to the Will.

Now while, on the evidence before us, there is every reason for doubting whether Krishna Sanker did ever in fact execute a Will, apart from the question of his having subsequently destroyed it, what we have mainly to look to is the facts before the parties at the time of the compromise, and to ascertain whether the compromise was for the benefit of the minor and the test of the minor's benefit is no

whether he got a good bargain out of the compromise but whether the guardian, who acted for him, acted as a prudent man would have acted in arranging his own affairs. The minor will not be bound by the guardian's act, if there has been a concealment of material facts or if the facts necessary to enable the guardian to correctly appreciate the minor's interests have not been disclosed.

Gagan says he was induced to enter into the compromise by threats, the threats being to the effect that plaintiffs would litigate the matter up to this Court and that the property would be ruined by the litigation. He says, seeing that the property was of small value, he realised that litigation would ruin it and so consented. It is argued by the plaintiffs, and it was so found by the learned Subordinate Judge, that Gagan knew that the value of the property was considerable, certainly much more than he chooses to admit that he understood it to be. I think that finding to be correct, though the fact that Gagan's own house was near Gachihata is not, considering that Gagan was employed in the Civil Court, in my opinion, a good reason for coming to that conclusion. He had, however, assisted in the management of the property after Krishna Sanker's death and must have had a fair idea as to the value of it. But that very knowledge should have told him that there was not the same fear of ruin of the property from the threatened litigation as there would have been in the case of a smaller estate. Facts which might justify compromise where a small estate is at stake, might not justify compromise in the case of a large property.

Now, what was the position? The minor would succeed to the whole estate in the absence of a Will. Litigation was threatened on the ground that Krishna Sanker had executed a Will, but admittedly no Will could be found and Gagan knew it. Gagan was in a strong position. One would have expected some evidence as to the course which the deliberations took, to show how Gagan was persuaded that compromise was in the minor's interest. After such a lapse of time the evidence might not be very definite as to details but the broad features might have been indicated. There is no such evidence. There is no suggestion that any of the persons who are said to have been witnesses to the Will told Gagan of what they knew. It is not alleged that Gagan was shown the draft or copy on the strength of which the plaintiffs were threatening to apply for probate. It was not even suggested to Gagan that he had ever seen that paper. It was not suggested that the plaintiffs were ready with an explanation for the disappearance of the alleged Will. In fact the deed of compromise negatives the idea that they had any explanation.

Possibly Gagan was overwhelmed by the Pleaders who were advising compromise as friends of the parties. An indication that their advice was not altogether disinterested is to be found in the evidence of Ravati Sanker Roy. He says: "in the sitting of execution we did not raise any question about Will as the matter was going to be compromised between the parties. We rather asked him not to do anything which would give us the trouble of deposing in a Court. We did not raise any question about any term of the *solehnama* lest the compromise would fail". Ravati does not remember giving any help in bringing about the compromise. His evidence rather suggests that he took no part in it beyond attesting the document. He was, however, according to his evidence given to understand that the Will was in existence, and his evidence that at the time of execution they asked Gagan to do nothing which would bring them into Court as witnesses suggest that even at the eleventh hour Gagan was oppressed with doubts.

It does not appear that Gagan consulted any Pleader. It is argued that he had the advice of his brother Sib Chandra Roy, a Mukhtear. That is true and Gagan says that Sib Chandra advised him to compromise. Sib Chandra admits that he did so, but also admits that he made no enquiry whether any Will had been executed. He says his first impression was that the Will was in existence. That impression was apparently corrected later, though we do not know when it was first corrected, for he says, "it was said that the Will had been missing." At the time of execution of the

compromise, he says Lakshan Hemaja and Hari Sanker said the Will was missing. The information given to Ravati, to which I have already referred, as to the Will being in existence shows at least a suppression of the truth and to that extent corroborates Sib Chandra's evidence that he at first believed the Will to be in existence and that belief might be sufficient to cause him to advise Gagan to compromise. One would have expected that advice to be withdrawn when Gagan told him, as one cannot but imagine he must have, that no Will was to be found. However, it is at least doubtful whether Sib Chandra was in possession of the full facts when he advised compromise, there is certainly no evidence that when he did so he knew the plaintiffs were basing their claim to probate on what has been described as a copy or a draft of a Will but the real character of which is unknown.

That Gagan subsequently acted on the deed of compromise as evidenced by applications for registration of the minor's name and the *kabuliyat* Exhibit 8, is not surprising whatever view may be taken of Gagan's conduct in the compromise.

The conclusions, to which I come on the evidence are that it is extremely doubtful whether the plaintiffs had a *bona fide* claim, for even the filing of an application for probate would not necessarily indicate that the claim was *bona fide*, and that the compromise was certainly not for the benefit of the minor. Gagan did not act as a prudent man would have acted in his own interests. Whether he was careless or over-timid, it is clear that he acted without a proper appreciation of the facts and that the minor's interests suffered in his hands.

Appeal decreed.

MADRAS HIGH COURT.

CIVIL APPEAL No. 352 OF 1916.

December 21, 1917.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Kumaraswami Sastri.

MYLAPPA CHETTIAR AND ANOTHER—PLAINTIFFS NOS. 1 AND 2—APPELLANTS

versus

THE BRITISH INDIA STEAM NAVIGATION COMPANY, LIMITED, AND OTHERS—DEFENDANTS NOS. 1 AND 2 AND PLAINTIFFS NOS. 3 TO 5—RESPONDENTS.

Carriage of goods—Non-delivery of goods, action for—Landing agent or carrier, liability of—Privity of contract—Limitation Act (IX of 1908), Sch. I, Art. 31, applicability of.

In the case of continuous carriers the authorities establish (1) that when goods have to be carried with the aid of different transport agencies in order to arrive at the destination to which they are booked, the carrier with whom the contract is made at one end is, in the absence of any contract limiting his liability to his own transport system, liable for the loss or destruction of the goods on portions beyond his own system or in consequence of acts or default of persons other than his own servants; (2) that in the absence of a contract to the contrary, the consignor cannot hold the company with whom he does not contract liable for damages when all that can be complained of is non-feasance, though such company may be liable in tort for breach of duty arising from the mere fact that it has undertaken the liability of carrying goods or property belonging to another; (3) when there is an agreement between two companies the effect of which is to constitute one company the agent of the other and the traffic is carried for the joint benefit of both the companies, either company may be sued at the option of the consignor. [p. 487, cols. 1 & 2.]

The 'carrier' in its general sense means a person or company who undertakes to transport the goods of another person from one place to another for hire. [p. 487, col. 1.]

Article 31 of the Limitation Act is not restricted in its application to common carriers. It applies to carriers who come within the above definition. [p. 487, col. 2; p. 486, col. 1.]

Appeal against the order of the Court of the Subordinate Judge, Negapatam, in Original Suit No. 55 of 1914.

Mr. *T. R. Venkatarma Sastri*, for the Appellants.

Messrs. *C. V. Ananthakrishna Aiyar*, *N. M. Malim Sahib* and *T. S. Ramaswami Aiyar*, for the Respondents.

JUDGMENT.

WALLIS, C. J.—A case somewhat similar to this case came before the Courts in the *British India Steam Navigation Co. Ltd.*, v. *Hajee Mahomed Esack and Co.* (1), where it was held that the stipulation for a claim for

(1) 3 M. 107; 1 Ind. Dec. (N. S.) 631.

short delivery being made on the shipowner at Calcutta within a month was not reasonable. This appears to be a sufficient answer to the claim against the British India Steam Navigation Company.

As regards the Madura Company, the second defendant, who was the agent, Sir Charles Turner, C. J., and Innes, J., observe in the course of their judgment as regards Ramanjulu and Sons, who were in the same position as the Madura Company here, that "they were the agents of the appellants (The British India Company) to retain the goods, receive freight and give delivery; they were also the agents of the respondents (the consignees) to land the goods, but they were not the agents of the appellants to receive claims for compensation for the non delivery of goods."

This passage recognises, I think correctly, the existence of a contractual relation between the landing agents and the consignees who paid them for their services. This appears to me to be one of those cases in which privity of contract is readily inferred from the well-known course of business according to which the landing agents are paid by the consignees and from the necessities of the case. Compare the cases referred to by my learned brother in the recent Full Bench case, *Jaldu Venkatasubba Rao* v. *Asiatic Steam Navigation Co.* (2), and also the cases as regards carriage of goods over Railways having continuous lines; *Gill* v. *Manchester, Sheffield and Lincolnshire Railway Co.* (3), *Great Indian Peninsula Railway Co.* v. *Radhakrisan Khushaldas* (4).

The proper inference appears to be that, as in these cases, the final stage of performance including carriage from the ship's side which at Negapatam is a matter of some miles and delivery is performed by the 2nd defendant. The suit as against the 1st defendant is barred under Article 31 according to the Full Bench ruling in *Jaldu Venkatasubba Rao* v. *Asiatic Steam Navigation Co.* (2), and I see no reason why the 2nd defendant should not also be considered a carrier for the purposes of the Article. It would be anomalous if a different Article were applicable to the shipowner and to the landing agent in respect of what are successive stages in the performance of one transaction, the carriage of the goods and delivery to the consignees. The appeal is dismissed with costs of respondents Nos. 1 and 2.

(2) 30 Ind. Cas. 840; 39 M. L. J. 29 M. L. J. 342; 2 L. W. 805; 18 M. L. T. 226; (19 ?) M. W. N. 644 (F. B.).

(3) (1873) 8 Q. B. 186; 42 L. J. Q. B. 89; 28 L. T. 587; 21 W. R. 525.

(4) 6 B. 371; 5 Ind. Jur. 646; 3 Ind. Dec. (N. S.) 244.

KUMARASWAMI SASTRI, J.—The plaintiff, who was the consignee of certain timber consigned from Rangoon through the British India Steam Navigation Company under bills of lading setting forth the terms and conditions under which the British India Steam Navigation Co. undertook to carry the goods, sued to recover Rs. 2,417-12-0 alleged to be due in respect of timber consigned but not delivered. The 2nd defendant, which is a firm engaged *inter alia* in landing goods from the steamers of the British India Steam Navigation Co., is sought to be made liable as they are landing agents at Negapatam in respect of all goods that arrive at the port in the vessels belonging to the British India Steam Navigation Co. and levy and receive from plaintiff separate charges for their undertaking to land and deliver goods.

Various defences were raised but it is only necessary to consider the grounds on which the Subordinate Judge dismissed the suit, namely, the question of limitation so far as the 1st defendant was concerned and want of privity of contract as regards the 2nd defendant.

The bill of lading provides that "the Company is to have the option of delivering the goods or any part thereof, into the receiving ship, or landing them at the risk and expense of the shipper or consignee, as per scale of charges to be seen at the agents' office and is also to be at liberty until delivery to store the goods or any part thereof in receiving ship, godown or upon any wharf, the usual charges therefor being payable by the shipper or consignee.....In all cases and under all circumstances the liability of the Company shall absolutely cease when the goods are free of the ship's tackle and thereupon the goods shall be at the risk for all purposes and in every respect of the shipper or consignee."

It seems to me that the bill of lading provides that goods are to be conveyed

from Burmah and landed at Negapatam by two agencies, one carrying the goods up to the port and the other from the ship's tackle to the godowns on the shore and that the agreement limits the liability of the Company to the period when the goods pass from the ship to the landing agent.

Mr. M'Conechy of the 2nd defendant's firm, who is the only witness called in the case, deposes that the 2nd defendant collects landing charges from the merchants to whom the goods are consigned through the 1st defendant Company, which has nothing to do with the 2nd defendant's charges though the charges are subject to the 1st defendant's sanction. He states that the 2nd defendant Company, owns a number of boats and that it is bound to unload goods from all the steamers of the 1st defendant Company and has the option of refusing to unload goods of others. He also states that merchants cannot engage the services of any other boat agency to land goods from the 1st defendant's steamers.

The case is, therefore, one of continuous carriage of goods, the 1st defendant Company making arrangements for the carriage though limiting its own liability to one stage of the transit.

There can be little doubt that the 2nd defendant Company are carriers, though not common carriers within the meaning of the Carriers Act of 1865. The word 'carrier' in its general sense means a person or company who undertakes to transport the goods of another person from one place to another for hire (Wharton Law Lexicon), and the 2nd defendant falls within the definition.

I do not think that the 2nd defendant Company can, on the facts proved in this case, escape liability on the ground of any want of privity between itself and the plaintiff.

In the case of continuous carriers the authorities establish (1) that when the goods have to be carried with the aid of different transport agencies in order to arrive at the destination to which they are booked, the carrier with whom the contract is made at one end is, in the absence of any contract limiting his liability to his own transport system, liable for the loss or destruction on portions beyond his own system or in consequence of acts or default of persons other than his own servants: *Muschamp* v. *Lancaster and Preston Junction Railway Co.* (5), *Bristol and Exeter Railway Co.* v. *Collins* (6), *Foulkes* v. *Metropolitan District Railway Co.* (7) *Aldridge* v. *Great Western Railway Co.* (8); (2) that in the absence of a contract to the contrary, the consignor could not hold the company with whom he did not contract liable for damages when all that could be complained of was non-feasence, though such company may be liable in tort for breach of duty arising from the mere fact that it has undertaken the liability of carrying goods or property belonging to another: *Foulkes* v. *Metropolitan District Railway Co.* (7); (3) when there is an agreement between two companies the effect of which is to constitute one company the agent of the other and the traffic is carried for the joint benefit of both the companies, either company may be sued on the option of the consignor. *Gill* v. *Manchester, Sheffield and Lincolnshire Railway Co.* (3) *Great Indian Peninsula Railway Co.* v. *Radhakisan Khushaldas* (4).

If, however, the 2nd defendant Company are carriers, and I think they are, it is clear that Article 31 of the Limitation Act would apply equally to them. It is not necessary for the purpose of Article 31 that they should be common carriers.

Whatever doubt may have existed as to the applicability of Article 31 in cases of failure to deliver goods where the action was laid *ex-contractu*, the matter has been set at rest by the Full Bench decision of this Court in *Jaldu Venkatasubba Rao* v. *Asiatic Steam Navigation Co.* (2). It is, therefore, unnecessary to refer to the various conflicting prior decisions on the point referred to by Mr. Venkatarama Sastri.

It was admitted before the Subordinate Judge that if Article 31 applies, the suit is barred by limitation as the claim arose more than a year before suit. There is nothing in the records to show that there was any acknowledgment of liability so as

(5) (1841) 8 M. & W. 421; 10 L. J. Ex. 460; 2 Ry. Cas. 607; 5 Jur. 656; 58 R. R. 758; 151 E. R. 1103.

(6) (1859) 7 H. L. C. 194; 29 L. J. Ex. 14; 5 Jur. (N. S.) 1367; 11 E. R. 78; 115 R. R. 106.

(7) (1880) 5 C. P. D. 157; 49 L. J. C. P. 361; 42 L. T. 345; 28 W. R. 526.

(8) (1864) 15 C. B. (N. S.) 582; 33 L. J. C. P. 161; 143 E. R. 913; 137 R. R. 667.

to take the case out of the Statute of Limitation.

I agree with the Chief Justice that the suit is barred and dismiss the appeal with costs of respondents Nos. 1 and 2.

Appeal dismissed.

M. C. P.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1145 OF 1916.

February 20, 1918.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

RAM BARAN RAI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

HAR SEWAK DUBE AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Regulation XVII of 1806, *s.* 8—*Mortgage by way of conditional sale—Foreclosure proceedings—Notice, service of—Evidence—Redemption.*

In order to prove that the equity of redemption of a mortgage by way of conditional sale has been extinguished by proceedings taken under section 8 of Regulation XVII of 1806, the mortgagee must establish that he caused the mortgagor or his legal representative to be served with a copy of his own written application for foreclosure and also with a notice or *perwana* under the seal and official signature of the District Judge, warning him that the mortgage would be finally foreclosed in the event of his failing to redeem within a period of one year. [p. 488, col. 2.]

The records of the proceedings taken under the Regulation cannot be accepted as *prima facie* proof of the fact of service of notice. [p. 488, col. 2.]

Second appeal from a decree of the District Judge, Gorakhpur, dated 19th April 1916.

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

Messrs. *Haribans Sahai* and *Lakshmi Narain Tewari*, for the Respondents.

JUDGMENT.—This was a suit in which the plaintiffs claim redemption of a mortgage by conditional sale effected on the 27th of December 1866. The plaintiffs are the son and grandsons of the original mortgagor, and the defendants are the sons and grandsons of the original mortgagee. The fact of the mortgage is admitted, and we find that it was never pleaded that the said mortgage, if redeemable at all, was redeemable only for a larger sum than that tendered by the plaintiffs. The defendants, however, contended that the equity of redemption had been extinguished by reason of certain proceedings taken in the year 1876 by the mortgagee under section 8 of Regulation XVII of 1806. Both the Courts below have found in favour of the defendants on this point and have added a finding that the present suit is barred by limitation. This latter finding, as it stands, is difficult to accept. The suit was one for redemption and was brought within the statutory period of limitation. Either the equity of redemption has been extinguished, or it has not. Of course if it has been extinguished, the suit fails not by reason of any bar of limitation, but because the plaintiffs have failed to prove their cause of action, namely, a subsisting right to redeem. If, on the other hand, the equity of redemption has not been extinguished, the suit is obviously within time. The essential question for determination is whether the proceedings taken by the mortgagee in the year 1876 had the effect of extinguishing the equity of redemption. This must depend in the first instance upon whether the mortgagee caused the mortgagor, or his legal representative, to be served with a copy of his own written application for foreclosure and also with a notice or *perwana* under the seal and official signature of the District Judge, warning him that the mortgage would be finally foreclosed in the event of his failing to redeem within a period of one year. The evidence by which it is sought to prove this fact consists of certain records of the proceedings of the Court of the District Judge of Gorakhpur. There is abundant authority to support the proposition that such records cannot be accepted as *prima facie* proof of the fact of service. It has been contended before us on behalf of the respondent that most of the decisions on the point were pronounced in cases in which the mortgagee had come into Court asking for a decree for possession, or a decree declaring his proprietary title, after he had taken the requisite proceedings under Regulation XVII of 1806. There is, however, a Bench decision of this Court in which the same principles have been applied to a suit for redemption exactly on all fours with the suit now before us. We refer to the case of

Badal Ram v. *Taj Ali* (1). We have been asked to re-consider the decision in that case; but we do not ourselves see any adequate reason to dissent from it, and in any case we prefer to follow it on the principal of *stare decisis*. The evidence relied upon by the learned District Judge, as proving that the equity of redemption was extinguished by reason of the proceedings taken in 1876, was not evidence which could be accepted as establishing the facts sought to be proved on behalf of the defendants, and the decision of the District Judge on this point is based upon an erroneous view of the law and is open to interference by this Court under section 100 of the Code of Civil Procedure. We may note that the Bench case to which reference has already been made was also decided in second appeal. This consideration is sufficient to dispose of the present appeal. We set aside the decrees of both the Courts below and in lieu thereof we give the plaintiffs a decree for redemption to be drawn up in the form prescribed by Order XXIV, rule 7, of the Code of Civil Procedure, allowing redemption of the property in suit on payment of the sum of Rs. 393-1-0 (rupees three hundred and ninety-three and anna one only) on account of principal and interest within three months from this date. The plaintiffs will be entitled to their costs in all three Courts.

Decrees set aside.

(1) 4 A. L. J. 717; A. W. N. (1907) 266.

MADRAS HIGH COURT.

CIVIL APPEAL No. 52 OF 1916.

January 21, 1918.

Present:—Justice Sir William Ayling, KT., and Mr. Justice Seshagiri Aiyar.

KARAKKATTITATHIL RAYARAPPA NAMBIAR KARNAVAN AND MANAGER OF HIS TARWAD—PLAINTIFF—APPELLANT

versus

KOYOTAN CHABLE VEETIL KAMARAN KARNAVAN OF HIS TARWAD (DEAD) AND OTHERS—DEFENDANTS—RESPONDENTS.

Malabar Law—Compromise of suit by Karnavan on behalf of Tarwad—Karnavan not impleaded as such, effect of—Compromise decree, whether binds Tarwad—Burden of proof—Registration Act (XX of 1866)—Non-registration of compromise decree—Appeal, presentation of, to wrong Court, whether saves limitation—Limitation Act (IX of 1908), s. 5—Delay in presenting appeal—Presentation to wrong Court, whether sufficient cause.

Delays in presentation of appeals are within section 5 of the Limitation Act and the Court has power to excuse delays. [p. 490, col. 1.]

Where an appeal is time-barred on the date of its presentation and the delay is due to the fact that it was previously presented in a wrong Court and returned for re-presentation to the proper Court, the delay can be excused under section 5 of the Limitation Act. [p. 490, col. 1.]

The validity of a decree passed on compromise was not dependent on registration under the Registration Act of 1866. [p. 491, col. 1.]

The onus of proving that a compromise is illegal or void is on the party asserting it. [p. 492, col. 1.]

Pulliah Chetti v. *Varadarajulu Chetti*, 31 M. 474; 18 M. L. J. 469, followed.

Gunjeshwar Kunwar v. *Durga Prashad Singh*, 42 Ind. Cas. 849; 34 M. L. J. 1; 22 M. L. T. 403; 22 C. W. N. 74; 26 C. L. J. 557; 16 A. L. J. 1; 20 Bom. L. R. 38; (1918) M. W. N. 16; 7 L. W. 94; 4 P. L. W. 1; 45 C. 17 (P. C.), distinguished.

Where a decree is in effect against a Tarwad, the fact that the Karnavan was not specially impleaded in his representative capacity will not make it the less a decree against the Tarwad. [p. 491, col. 2.]

Vasudevan v. *Sankaran*, 20 M. 129; 7 M. L. J. 102; 7 Ind. Dec. (N. S.) 90 F. B., explained.

It is not the form of the suit that is essential, but the question in each case is whether in substance the person suing or sued conducted the litigation for his own benefit or as representing the family of which he was the head. [p. 492, col. 1.]

Appeal against the decree of the Court of the Subordinate Judge, North Malabar, in Original Suit No. 16 of 1913.

Mr. *Chamier*, for the Appellant.

Mr. *Menon*, for the Respondents.

JUDGMENT.—Plaintiff, as the Karnavan of his Tarwad, sues to recover possession from the defendants. His case is that his Tarwad is the *jenmi* of the properties in suit, that its title was recognised by the 1st defendant in Original Suit No. 142 of 1868 on the file of the Court of the District Munsif of Kavvayi (under the Zilla Court of Tellichery), and that the 1st and other defendants who are Anandravans of the defendant's Tarwad hold the property under a Kanom from the plaintiff's Tarwad. The plaintiff further stated that a sum of Rs. 400 was paid towards the Kanom and that the defendants are bound to surrender on the receipt of the balance. The defendants contended that the *jenm* title belonged to their Tarwad and not to the plaintiff's Tarwad.

The Subordinate Judge dismissed the suit. The plaintiff has appealed. A preliminary objection is taken by the respondent that the appeal filed in this

Court is barred by limitation. The original valuation of the suit was below five thousand rupees; the plaintiff first presented an appeal to the District Court which admittedly was in time. Objection was there taken that the appeal should be preferred to the High Court. Upholding this objection, the District Judge returned the appeal for presentation to this Court on the 24th of January 1916, and it was filed on the 31st January 1916.

Mr. Menon contended that the filing of the appeal in the District Court was due to an error of law and that section 5 of the Limitation Act is not applicable to such a case; and he relied on *Ramjiwan Mal* v. *Chand Mal* (1). That and other decisions were considered by the Judicial Committee in *Brij Indar Singh* v. *Kanshi Ram* (2), where it was pointed out that it is not the rule that delays due to an error of law are not within section 5 of the Limitation Act. We hold, therefore, that we have power to excuse the delay. As regards the interval between the return of the plaint and its presentation in the High Court, having regard to the fact that a fresh *vakalat* had to be obtained from the parties and to the distance between Madras and Tellicherry, we do not think there was any negligence. We, therefore, overrule the preliminary objection.

On the merits the facts are these. The property in suit admittedly belonged to a Devaswom. The plaintiff claimed that he acquired the trusteeship as well as the right to be in possession of the properties of the temple from the Uralam. He has produced no documents in support of the claim, excepting the *razinama* decree to which we shall presently refer. The defendants also trace their title to the Devaswom. They base their title on an alleged Saswatham grant from a person who at one time called himself the Samudayee but who defendants assert was really the Uralam of the temple. Exhibits I and III are the title-deeds. It is not necessary to examine the respective titles of the parties any further as the basis of the present litigation is the compromise decree passed in the Kavvayi Court. The parties to that litigation were the then Karnavan of the plaintiff's Tarwad, the present 1st defendant and the assignor of that defendant. The plaintiff's Tarwad then contended that the property was in their possession for a long time and that the defendants who claimed through a Samudayee were not entitled to it. It is said that before the written statement was filed, the parties entered into a compromise which was embodied in the decree of the Court. The result of that compromise was to recognise the title of the plaintiff's Tarwad to the property and to grant a Kanom in favour of the defendants' Tarwad. This was in the year 1868. The present suit is to enforce the terms of that compromise. The main contention of defendants Nos. 2 and 3 was that the compromise which gave up the rights of their Tarwad was not binding on them.

The Subordinate Judge bases his judgment upon three conclusions, (1) that the compromise did not confer any rights to the property and was not receivable in evidence for want of registration; (2) that as there were no doubtful rights to be settled the compromise was not binding upon the Tarwad; and (3) that the defendants have been in adverse possession. As regards the 1st contention reliance was placed upon the absence of an exemption for registration in favour of decrees of Court in the Registration Act of 1866. Under that Act the Court passing a decree for property over a hundred rupees in value was directed to send that decree to the Registering Officer for registration. See sections 41 and 42. Under section 17 of the same Act, documents executed by the parties for similar properties were compulsorily registrable. The contention of the learned Counsel for the respondents is that the provisions of the Act of 1877 which exempted decrees from registration should not be applied retrospectively, and that as at the time of the compromise the decree could not confer any title to im-

(1) 10 A. 587; A. W. N. (1888) 258; 6 Ind. Dec. (N. S.) 395.

(2) 42 Ind. Cas. 43; 33 M. L. J. 486; 22 M. L. T. 362; 6 L. W. 592; 126 P. W. R. 1917; 15 A. L. J. 777; 19 Bom. L. R. 866; 3 P. L. W. 3.2; 26 C. L. J. 572; 104 P. R. 1917; (1917) M. W. N. 811; 22 C. W. N. 169; 127 P. L. R. 1917; 45 C. 94 (P. C.).

moveable property, it was not receivable in evidence. In the first place, it must be noted that parts III and VIII of the old Registration Act dealt with two different classes of cases, sections 17 to 21 which are in part III dealt with documents *inter partes*. Section 41 referred to documents sued upon being superseded by a decree of the Court, section 42 to decrees otherwise declaring rights in immoveable property. In section 49 the reference was not to documents mentioned in part VIII but to documents referred to in section 17. It is clear, therefore, that the validity of a decree was not dependent upon registration under the old Act. The provision in part VIII is only to complete the Record of Rights by the Registration Department. If it was intended by the Legislature that a decree should not confer rights of property unless registered, it would have been included in the prohibitory section 49. We hold that the compromise decree did confer title on the plaintiff's Tarwad, notwithstanding non-registration. The decisions in *Purmanand Das Jiwandas* v. *Vallabdas Walljee* (3) and in *Raju Balu* v. *Krishnarav Ramchandra* (4), although they related only to the admissibility in evidence and not to the conferring of rights contain observations which support our view. There can be no doubt that the document is receivable in evidence as well.

The next point for decision is whether the compromise is not binding upon the defendant's Tarwad. The 1st defendant having been a party to it, it is not open to him to dispute it. The main contention on behalf of defendants Nos. 2 and 3 is that, prior to the compromise, the defendants' Tarwad had been successful in every litigation against the plaintiff's Tarwad, that the former were in possession of the properties, that there was no doubt as to their paramount title at the time and, therefore, the Karnavan, the 1st defendant, was not justified in surrendering the rights of the Tarwad and in accepting in lieu thereof the subordinate right of a Kanomdar. As to this, the materials which influenced the 1st defendant in consenting to the compromise have not been placed before the Courts; the evidence of the 1st defendant does not show that in agreeing to the decree he was acting in fraud of the Tarwad or that he was unduly influenced by the plaintiff.

Mr. Menon for the respondents argued with great insistence that as the decree was passed against the 1st defendant not as Karnavan but in his individual capacity, it is not binding on the Tarwad. He relied upon the observations of Shephard, J., in *Vasudevan* v. *Sankaran* (5). The Full Bench in that case held that the Karnavan of a Malabar Tarwad honsetly defending a suit in his representative capacity will bind the Tarwad. From this judgment, the learned Counsel argued that the converse of the proposition, namely, that if the decree is not passed against the Karnavan in his representative capacity, it is not binding on the Tarwad, follows. It was conceded (by Mr. Chamier for the appellant and by Mr. Menon for the respondent) that there is no decision which establishes this converse proposition. In the Full Bench judgment Mr. Justice Shephard says: "One negative proposition is clearly established by the cases to which I have referred—a decree made against a Karnavan is clearly not binding on the Tarwad unless he sued or was sued in his representative character." The learned Judge does not say, as was contended before us, that the Karnavan should be impleaded as such. We do not understand from the above quotation that, although in effect the suit was against the Tarwad, yet if the Karnavan is not specially impleaded as Karnavan the Tarwad will not be bound. Under Hindu Law if a suit is brought against a manager of a Hindu family, although he is not impleaded as such in the suit, there sult of the litigation will bind the other co-parceners. See *Subbanna Bhatta* v. *Subbanna* (6), *Baldeo Sonar* v. *Mobarak Ali Khan* (7), *Sheo Shankar Ram* v. *Jaddo Kun-*

(3) 11 B. 506; 6 Ind. Dec. (N. S.) 333.

(4) 2 B. 274; 2 Ind. Jur. 762; 1 Ind. Dec. (N. S.) 607.

(5) 21 M. 129; 7 M. L. J. 102; 7 Ind. Dec. (N. S.) 90 (F. B.).

(6) 30 M. 324 at p. 326; 2 M. L. T. 83; 17 M. L. J. 180.

(7) 29 C. 583 at p. 586; 6 C. W. N. 370.

war (8). It is not the form of the suit that is essential ; but the question in each case will be whether in substance the person suing or sued conducted the litigation for his own benefit or as representing the family of which he was the head. We see no reason for not applying this principle to cases governing Malabar Tarwads.

On examining the compromise we find that the rights secured were not for the individual benefit of the 1st defendant but for the Tarwad, and not that of the individual defendent. We are satisfied upon the evidence of the 1st defendant and upon a perusal of the *razinama* that the 1st defendant was sued as representing his Tarwad and that he agreed to the compromise in his representative capacity.

On the question whether it was a *bona fide* settlement of a disputed claim, the burden is on the defendants to show that the compromise was not honestly come to. In *Pulliah Chetti* v. *Varadarajulu Chetti* (9) it was held that it is for the party who impeaches the compromise to prove that it was illegal or void. As regards *Guneshwar Kunwar* v. *Durga Prashad Singh* (10), which was strongly relied on by the respondents' Counsel, it is enough to say that the finding of the Judicial Committee in that case showed that one of the parties to the litigation possessed information which he withheld from the other party and induced that party dishonestly to agree to the terms of the compromise. In the present case there is nothing to show that both parties were not equally cognisant of all the facts which led up to the compromise. There is no evidence that the then plaintiff wrongfully induced the 1st defendant to accept the compromise to which he was not a willing party. The compromise has stood unquestioned for nearly half a century. We must, therefore, hold that it is binding on the defendants.

We agree with the Subordinate Judge that it has not been satisfactorily proved that any portion of the Kanom amount was paid by the plaintiff's Tarwad to the defendants. The result is that the decree of the Subordinate Judge must be reversed and a preliminary decree for redemption must be passed in favour of the plaintiff.

There is an issue as to improvements which has to be decided before accounts are taken and the final decree is passed in the case. Costs hitherto incurred will be provided for in the revised decree.

Appeal allowed.

M. C. P.

(8) 24 Ind. Cas. 504; 36 A. 383; 18 C. W. N. 968; 16 M. L. T. 175; (1914) M. W. N. 593; 1 L. W. 695; 20 C. L. J. 282; 12 A. L. J. 1173; 16 Bom. L. R. 810; 41 I. A. 216 (P. C.).

(9) 31 M. 474; 18 M. L. J. 469.

(10) 42 Ind. Cas. 849; 34 M. L. J. 1; 22 M. L. T. 403; 22 C. W. N. 74; 26 C. L. J. 557; 16 A. L. J. 1; 20 Bom. L. R. 38; (1918) M. W. N. 16; 7 L. W. 94; 4 P. L. W. 1; 45 C. 17 (P. C.).

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 105 OF 1916.

January 22, 1918.

Present:—Mr. Justice Beaman and Mr. Justice Heaton.

NARSO RAMAJI KULKARNI—PLAINTIFF—APPELLANT

versus

NAGAVA ISHVARAPPA—DEFENDANT—RESPONDENT.

Registration Act (XVI of 1908), s. 90—Bombay Land Revenue Code (Bom Act V of 1879), ss. 74, 76—Razinamas and kabuliyats, whether evidence of transfer—Registration.

Per *Beaman, J.*—Although *razinamas* and *kabuliyats* are not in themselves documents of transfer, they are fairly conclusive evidence that a transfer has in fact been made. [p. 493 col. 1.]

Razinamas and *kabuliyats* executed between a mortgagor and his mortgagee extinguish the equity of redemption. [p. 493, col. 1.]

Quære.—Whether in proper cases governed by the Bombay Land Revenue Code, *razinamas* and *kabuliyats* stand in need of registration at all?

Per *Heaton, J.*—It is quite possible that *kabuliyats* are exempted from registration in consequence of the provisions of clause (*b*), section 90, of the Registration Act, as they appear to evidence assignments by Government of an interest in land. [p. 493, col. 2.]

Second appeal from the decision of the District Judge, Belgaum, in Appeal No. 88 of 1915, confirming the decree passed by the Subordinate Judge, Bail-Hongal, in Civil Suit No. 341 of 1913.

Mr. *Nilkant Atmaram*, for the Appellant.

Mr. *S. R. Bakhale*, for the Respondents.

JUDGMENT.

BEAMAN, J.—In this case one Venkaji mortgaged four survey numbers in four lots, that is to say, a quarter of each to each of four mortgagees. The learned Judge of first appeal, it is true, doubts whether these facts are proved, but it is on that footing that the appellant has argued the case and it seems to be the view most favourable to him. I

shall, therefore, assume that the facts were as I am now setting them forth, and that after these four mortgages, the mortgagor executed a Razinama in respect of each of the four survey numbers to each one of the four mortgagees, the said mortgagees in turn executing complementary Kabuliyats. The effects of these as Razinamas and Kabuliyats have frequently been discussed and to more than one judgment on the subject I have been a party. The latest case, *Imam Ibrahim* v. *Bhau Appaji Jadhav* (1), was decided by Scott, C. J., and myself. The learned Chief Justice gave a very exhaustive analysis of the legal contents of the matter then in dispute. But I am again in some doubt whether we did not exaggerate our difficulties. I am speaking now of the theoretical difficulties generally, because probably on the facts of that case the provisions of the Land Revenue Code, read with section 90 of the Indian Registration Act of 1908, would not have been of much assistance. It may well, however, be doubted whether in proper cases governed by the Land Revenue Code, Razinamas and Kabuliyats stand in need of registration at all. If they do not, although I agree that they cannot in themselves be documents of transfer, they would always, I think, be fairly conclusive evidence that the transfer had in fact been made, and so I might work back to the position I took when deciding a case of this kind [*Venkaii Narayan Kulkarni* v. *Gopal Ramchandra* (2)] with my brother Hayward, where we held that Razinamas and Kabuliyats executed between (and to use somewhat loose language) a mortgagor and his mortgagee extinguish the equity of redemption. For if in fact an occupancy holder mortgaged his holding and thereafter agreed with the mortgagee to relinquish his occupancy right in favour of the latter, pursuant to which agreement he handed in his Razinama and the mortgagee tendered his Kabuliyat, the result would carry out the intention of the parties to extinguish any further right the original mortgagor had in the equity of redemption. In effect, we understand that the learned Judge below has found that the possession of the defendants, which *de facto* at any rate seems to have commenced after the mortgagor had handed in his four Razinamas, was taken in respect of the quarters of the three survey numbers from the new Kabuliyatdars. And on that footing he has held that the possession was taken from the true owners and that the mortgagor had no further right subsisting. As regards the fourth number, that of which the defendant himself became the Kabuliyatdar or occupancy-holder, the learned District Judge says that it is not disputed that the mortgage was extinguished as regards that land. Probably because the learned Judge was much more conversant with the facts than we were when the case was opened, we found some difficulty in understanding his judgment. But we have little doubt that in the result his finding is right and that there was no equity of redemption outstanding in 1912, when the descendant of the original mortgagor purported to convey it to the plaintiff. If that be so, then the plaintiff has no right upon which he can ask the Court to be allowed to redeem and his suit must fail.

We think that this appeal should be dismissed with all costs.

HEATON, J.—I agree. We are settling this case on certain representations made by the Pleader for the appellant, and accepting those representations as the correct presentment of the facts, the conclusion evidently is, in my opinion, that stated by my learned brother. As certain cases have been referred to, the judgments in which deal with this matter of Razinamas and Kabuliyats, I should like to refer to a judgment of my own in the case of *Motibhai Jijibhai* v. *Desaibhai Gokalbhai* (3) in which I find, as a result of the argument before us, I think nothing that I need change, the only thing I would like to add being that possibly I exaggerated the supposed difficulty arising from the circumstance that Kabuliyats unlike Razinamas are not exempted from registration. For, I think, it is quite possible it will be found that they are exempted from registration in consequence of the provisions of clause (*b*), section 90, of the Indian Registration Act, as they appear to evidence assignments by Government of an interest in land. However that may be, I do not doubt that in this case the decree of the lower Appellate Court is correct and should be affirmed.

Appeal dismissed.

(1) 40 Ind. Cas. 68; 19 Bom. L. R. 329; 41 B. 510.
(2) 27 Ind. Cas. 613; 16 Bom. L. R. 718; 39 B. 55.
(3) 38 Ind. Cas. 838; 18 Bom. L. R. 976; 41 B. 170.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 987 OF 1916.

March 13, 1918.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

ANANDI KUNWAR—PLAINTIFF—APPELLANT

versus

RAM NIRANJAN DAS AND ANOTHER—DEFENDANTS—RESPONDENTS.

Valuation of suit—Suit for declaration that property attached is not liable to sale, value of—Jurisdiction—Civil Procedure Code (Act V of 1908), O. XXI, r. 63.

The value for purposes of jurisdiction of a suit for a declaration that a certain property attached in execution of a decree is not liable to sale, is the value of the decree sought to be executed, and not the value of the property attached.

Second appeal from a decree of the District Judge, Benares.

Mr. *Narmadeshwar Upadhya* (with him Dr. *Surendra Nath Sen*), for the Appellant.

Messrs. *B. E. O'Conor* and *Haribans Sahai*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit in which the plaintiff sought a declaration that certain property was not saleable in execution of a certain decree. It appears that the principal defendants had a decree against the plaintiff's husband. In execution of that decree they attached certain property, alleging it to be the property of their judgment-debtor. The decree was for in or about Rs. 2,000. The plaintiff in the present suit objected to the attachment. The objection was overruled and the plaintiff had to bring the present suit. The Court of first instance dismissed her claim holding that the property was the property of the judgment-debtor and dismissed the plaintiff's suit. The plaintiff has now preferred this second appeal. The first and main objection urged is that the District Judge had no jurisdiction to hear the appeal because the value of the property was over Rs. 5,000. This objection does not come very well from the plaintiff, considering that it was she herself who preferred the appeal to the District Judge. If the argument held good, it would mean that the judgment of the Court of first instance had become final and the probabilities are that no Court would allow an appeal now to be presented from the judgment of the first Court. We think, however, that the value of the subject-matter of the suit and the appeal was below Rs. 5,000. What the plaintiff claimed was

a declaration that the property was not saleable in execution of the decree, that is, for the realisation of the amount of the decree. The defendants were only concerned to the extent of the amount due under their decree. They did not care whether the plaintiff could keep the property after their decree had been satisfied. This very point was decided in the case of *Khetra Pal* v. *Mumtaz Begam* (1). We have been referred by Mr. Upadhya to the case of *Radha Kunwar* v. *Reoti Singh* (2). This ruling, it seems to us, supports the view that we take in the present case. There it was held that though the mortgage decree, which was sought to be satisfied, was far above Rs. 10,000, the value of the property to the decree-holder and to the judgment-debtor was below Rs. 2,000, and their Lordships of the Privy Council held that this must be taken to be the value of the subject-matter of the appeal. We consider that the appeal lay to the District Judge. It was for that Court to decide questions of fact and we think that the findings arrived at conclude the present appeal. It is accordingly dismissed with costs.

Appeal dismissed.

(1) 31 Ind. Cas. 874; 38 A. 72; 13 A. L. J. 1104.

(2) 35 Ind. Cas. 939; 14 A. L. J. 1002; 38 A. 485; 20 C. W. N. 1279; 20 M. L. T. 211; (1916) 2 M. W. N. 200; 31 M. L. J. 571; 18 Bom. L. R. 850; 24 C. L. J. 203; 5 L. W. 456 (P. C.).

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 866 OF 1916.

January 31, 1918.

Present:—Sir Stanley Batchelor, KT., Acting Chief Justice, and Mr. Justice Shah.

SHIDAYA VIRBHADRAYA KODLIMATH—PLAINTIFF—APPELLANT

versus

SATAPPA BHARMAPPA MUTGAUDA—DEFENDANT—RESPONDENT.

Dekkhan Agriculturists' Relief Act (Bom. XVII of 1879), s. 48—Civil Procedure Code (Act V of 1908), s. 48—Execution of decree—Conciliator's certificate, time spent in obtaining, exclusion of.

The words "period of limitation prescribed" in section 48 of the Dekkhan Agriculturists' Relief Act control and modify the period of time allowed for execution of a decree by section 48 of the Civil Procedure Code, so that a decree-holder is entitled to exclude from the period of limitation allowed by the latter

section the interval of time occupied in obtaining a conciliator's certificate. [p. 495, col. 2.]

The intention of the Legislature in enacting section 48 of the Dekkhan Agriculturists' Relief Act was to secure that the judgment-creditor, compelled by the new Act to approach the conciliator for a certificate, was not to be damnified by any lapse of time before the conciliator gave him the certificate. [p. 495, col. 2.]

Second appeal from the decision of the District Judge, Belgaum, in Appeal No. 386 of 1914, confirming the decree passed by the Subordinate Judge, Bail-Hongal, in Darkhast No. 254 of 1913.

Mr. *A. G. Desai*, for the Appellant.

Mr. *H. B. Gumaste*, for Respondents Nos. 2 to 4.

JUDGMENT.

BATCHELOR, Ag. C. J.—This is an appeal in execution, and the only question involved is whether the application to execute is barred by time. The decree was obtained on the 28th October 1899, and was followed by three Darkhasts, all of which must, for the purposes of this appeal, be taken to have been made within the time allowed. The fourth and present Darkhast is dated the 23rd August 1913, that is, more than twelve years after the decree. The delay, however, is sought to be excused in this way. The suit was governed by the Dekkhan Agriculturists' Relief Act, and on the 1st of July 1911, the appellant, the judgment-creditor, applied for a conciliator's certificate as under the Act he was then bound to do. He did not get the certificate till the 29th March 1913, and the only question to be answered in the appeal is whether under section 48 of the Dekkhan Agriculturists' Relief Act, he is entitled to exclude this interval of time occupied in obtaining this certificate.

The learned Judges below have both held against the judgment-creditor, but the only ground for their decision is the ruling of this Court in *Dayaram* v. *Laxman* (1). If that case, however, be read with attention, it will, I think, be recognised that it has no bearing whatever upon the question now in controversy. For the only point in *Dayaram's case* (1) was whether the phrase "the period of limitation prescribed" in section 48 of the Dekkhan Agriculturists' Relief Act could cover not only the period of limitation expressly mentioned in an Article of the Limitation Act, but also an added section of that Act, namely, section 31, under which a special temporary concession was allowed to mortgagees. The Court held that the words "the period of limitation prescribed" in section 48 of the Dekkhan Agriculturists' Relief Act must refer only to the period expressly prescribed in the Limitation Act, and could not include the exceptional concession subsequently allowed. With all that, however, we have nothing to do here, where the question which confronts us is totally different, and is this, whether the words "the period of limitation prescribed" in section 48 of the Dekkhan Agriculturists' Relief Act can control or modify the period of time allowed, not in the Statute of Limitation at all, but in section 48 of the Civil Procedure Code. It is necessary for the judgment-debtor to contend for the negative, but it appears to me clear that the affirmative is the correct answer. In the first place, if it had been the intention of the Legislature to enact that the period of limitation in section 48 of the Dekkhan Agriculturists' Relief Act, should be exclusively the period of limitation to be found within the Limitation Act, nothing would have been easier than to express that intention clearly. So far from this being done, we have a complete omission of any reference to the Limitation Act, and the words are general and comprehensive, namely, "the period of limitation prescribed for any suit or application." That, I take it, means the period of limitation prescribed in any law for the time being in force, and it seems to me clear that the intention of the Legislature in enacting this section 48 of the Dekkhan Agriculturist's Relief Act was to secure that the judgment-creditor, compelled by the new Act to approach the conciliator for a certificate, was not to be damnified by any lapse of time before the conciliator gave him the certificate. But unless the judgment-creditor's argument is to be allowed in this case, it is manifest that grave injustice must often ensue. For, if we suppose that a week before the expiration of the twelve years, the judgment-creditor approached the conciliator for a certificate, and the conciliator then, as he did here, slept over the matter for the space of two years, the judgment-creditor must inevitably be out of time through no fault of his own. This result, it appears to me, it was the precise intent

(1) 10 Ind. Cas. 910; 13 Bom. L. R. 284.

tion of the Legislature to avoid by section 48 of the Dekkhan Agriculturists' Relief Act. And our present case is little less strong than that which I have put, for on the 1st July 1911, when the application to the conciliator was made, it was admittedly in time. This view of the case seems to me to receive direct support from the language employed by the Legislature in Articles 181 and 182 of the Limitation Act of 1908, for those Articles deal with applications provided or not provided for "by section 48 of the Code of Civil Procedure." Clearly, therefore, in the mind of the Legislature section 48 of the Code of Civil Procedure provided a period of limitation, and I can see no reason for thinking that the period of limitation thus provided falls outside the general words employed by the Legislature in section 48 of the Dekkhan Agriculturists' Relief Act. On these grounds I am of opinion that the appeal must be allowed, the lower Court's decree must be reversed and the Darkhast must be proceeded with as being in time. The appellant to have his costs. It will be open to the respondents, if so advised, to raise the point of limitation as to the earlier Darkhasts.

SHAH, J.—I agree.

Appeal allowed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 259 OF 1912.

March 13, 1913.

Present:—Mr. Stanyon, A. J. C.

DHANOOLAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RAMLAL—DEFENDANT—RESPONDENT.

Landlord and tenant—Ejectment—Co-sharer landlord, whether can eject tenant—Partial ejectment, whether can be allowed—Tenancy, whether can be created by prescription.

No co-sharer landlord can put an end to a tenancy unless he represents the entire proprietary body. Any co-sharer can sue to eject a trespasser from the entire area covered by a trespass, but only the full landlord can sue to eject a tenant.

A man who is put on the land as a tenant by a co-sharer and who remains with his status undisputed for many years, is *prima facie* a tenant who has been accepted as such by the proprietary body.

There can be no such thing as a partial ejectment of a tenant to the extent of the share of the co-sharer claiming joint possession, nor can there be joint possession by the landlord with the tenant.

Semble:—There can be created no tenancy by prescription.

Kanhayalal v. *Dularsingh*, 17 Ind. Cas. 606; 8 N. L. R. 163, followed.

Appeal from the decree of the Court of the District Judge, Chhindwara, dated the 6th of February 1912, in Appeal No. 198 of 1911.

Mr. *R. B. Gadgil*, for the Appellants.

JUDGMENT.—The appellants have no case, and never had any in this litigation. Ramlal is the recorded tenant of the fields in dispute, and has been so for over 12 years. I am clear that no co-sharer can sue to put an end to the tenancy unless he represents the entire proprietary body. Any co-sharer may sue to eject a trespasser from the entire area covered by the trespass. Only the full landlord can sue to eject a tenant. A man who was put on the land as a tenant by any co-sharer, and who has remained thus with his status undisputed as in this case for many years, is *prima facie* a tenant who has been accepted as such by the proprietary body. There can be no such thing as the partial ejectment of a tenant to the extent of the share of the co-sharer claiming joint possession, nor can there be joint possession by landlord and tenant. The lower Appellate Court's decree as regards plot No. 19/5 is erroneous but no appeal has been made against it. The whole suit should have been dismissed. On the plaintiff's allegation that Ramlal is a trespasser, his suit is barred as to the other plots. If the lower Appellate Court found that Ramlal is an ordinary tenant by prescription, the finding is wrong: *Kanhayalal* v. *Dularsingh* (1). On the facts found, however, Ramlal is an ordinary tenant and so no co-sharer can sue to eject him without the consent of the whole proprietary body. If the plaintiffs are not content to abide by the opinions of the majority of the shareholders in this matter, their remedy lies in partition.

The appeal fails and is dismissed with costs without notice to the other side.

Appeal dismissed.

(1) 17 Ind. Cas. 606; 8 N. L. R. 163.

BOMBAY HIGH COURT.

CRIMINAL CONFIRMATION CASE No. 34 OF 1917 WITH CRIMINAL APPEAL No. 523 OF 1917.

January 11, 1918.

Present:—Mr. Justice Shah and Mr. Justice Marten.

HARI RAMJI PAVAR—ACCUSED—APPELLANT

versus

EMPEROR—RESPONDENT.

Oaths Act (X of 1873), s. 13—Evidence of child witness—Omission to administer oath, effect of—Evidence, weight of—Evidence Act (I of 1872), s. 118—Witness, competency of—Penal Code (Act XLV of 1860), s. 302—Murder—Punishment—Capital sentence, when not to be passed.

Per *Shah, J.*—The evidence of a witness of tender years, though taken without any solemn affirmation in the prescribed form, is admissible by virtue of the provisions of section 13 of the Oaths Act. Such evidence, however, must be received with due care and caution. [p. 498, cols. 1 & 2.]

It is necessary that before proceeding to examine such witnesses the Court should satisfy itself that the witness is competent to testify, that is, is capable of understanding the questions put to him and of giving rational answers to those questions. Thereafter the Court should proceed to administer an oath or affirmation as required by the Oaths Act. [p. 498, col. 1.]

If the witness is found to be incapable of understanding the obligations of such an oath or affirmation, he may be examined without an oath or affirmation, provided he is found to be a competent witness. These facts may be noted, so that the record may show that before taking the statement of a witness of that character, the trial Court had ascertained that the witness was a competent witness under section 118 of the Indian Evidence Act and that the omission to administer an oath or affirmation was due to his want of understanding the obligations of an oath. [p. 498, cols. 1 & 2.]

The ignorance of a child on such a matter as the nature of a solemn affirmation is not necessarily equivalent to an inability to understand ordinary questions and give rational answers. [p. 498, col. 2.]

There is a certain degree of reluctance on the part of Judges to pass a capital sentence, when the substantial part of the evidence which the prosecution rely upon is evidence recorded without an oath or affirmation as required by the Oaths Act. [p. 499, col. 1.]

Criminal confirmation case with appeal from conviction and sentence passed by the Sessions Judge, Ahmednagar.

Mr. *Velinkar* (with him Mr. *Pilgamkar*), for the Appellant.

Mr. *S. S. Patkar* (Government Pleader), for the Crown.

JUDGMENT.

SHAH, J.—In this case the accused was charged with committing the murder of a boy named Vishwas on the 13th of August last, the murder having been caused by drowning the boy in a river. He was tried by the Sessions Judge of Ahmednagar, who, in agreement with the assessors, has found him guilty. He has been sentenced to death subject to confirmation by this Court.

We have heard full arguments in this case. The case for the prosecution depends mainly upon the evidence of the witnesses Daji and three boys, Babaji, Parya and Bhika, and upon certain circumstances.

It will be convenient at the outset to deal with the point about which we felt some difficulty and on which we invited arguments at the Bar. That relates to the admissibility of the evidence of these three boys. Two of them are seven years old and one of them is nine years old, and we find it stated in the judgment of the learned Sessions Judge that "an oath was not tendered to the boys as they appeared to be too young to understand it but they promised to speak the truth." The original record of the depositions of these boys in Marathi does not show that no oath was administered. But the notes of evidence in the Judge's own hand-writing show that the boys were not examined on oath but were examined on simple affirmation to speak the truth. In the diary of the case the boys are stated to have been examined like other witnesses on solemn affirmation. Though we had some difficulty in determining in this case as to what actually happened, I think the statement in the judgment makes it clear that the boys were examined not on oath, *i. e.*, as I understand, no solemn affirmation in the form prescribed by the High Court was administered as required by the Indian Oaths Act.

This raises the question as to whether the omission to administer an oath or affirmation as required by the Indian Oaths Act to a witness of tender years renders his evidence inadmissible. The answer depends upon the meaning to be attached to the word "omission" in section 13 of the Indian Oaths Act. Several cases have been cited to us on this point, and it is clear that there is a difference of opinion on the question. So far as I

can see, however, in this Presidency the view taken by the Full Bench of the Calcutta High Court in the case of *Queen* v. *Sewa Bhogta* (1) is accepted, as would appear from the judgment of Mr. Justice Jardine in *Queen-Empress* v. *Shava* (2) and from *Emperor* v. *Kusha Yamaji Sutar* (3).

I am conscious of the considerations in favour of the other view which have been set forth in the dissenting judgment of Jackson, J., in the Full Bench case to which I have referred, in the judgment of Mahmood, J., in *Queen-Empress* v. *Maru* (4) and in the judgment of Collins, C. J., in *Queen-Empress* v. *Viraperumal* (5). But on the whole it seems to me that the view consistently adopted by this Court should be adhered to. I, therefore, hold, following the view accepted in this Presidency, that the evidence of these boys, though taken without any solemn affirmation in the prescribed form, is admissible in virtue of the provisions of section 13 of the Indian Oaths Act.

I desire, however, to add that it is necessary to follow the procedure pointed out by this Court in the cases above referred to in recording the evidence of witnesses of tender years. It is necessary that before proceeding to examine such witnesses the Court should satisfy itself that the witness was competent to testify, that is, was capable of understanding the questions put to him and of giving rational answers to those questions; and that thereafter the Court would proceed to administer an oath or affirmation as required by the Indian Oaths Act. If the witness is found to be incapable of understanding the obligations of such an oath or affirmation, he may be examined without an oath or affirmation, provided he is found to be a competent witness. These facts may be noted so that the record may show that before taking the statement of a witness of that character, the trial Court had ascertained that the witness was a competent witness under section 118 of the Indian Evidence Act and that the omission to administer an oath or affirmation was due to his want of understanding the obligations of an oath.

I wish to make it clear that, as pointed out in the case of *Emperor* v. *Kusha Yamaji Sutar* (3), the ignorance of a child on such a matter as the nature of a solemn affirmation is not necessarily equivalent to an inability to understand ordinary questions and give rational answers.

I am satisfied in this case that the evidence of the boys is admissible. The weight, however, to be attached to this evidence is quite a different matter and it is obvious that evidence of witnesses of such tender age must be received with due care and caution.

The case for the prosecution is that there was a dispute between Baburao, the father of the deceased boy, and the accused and his father with respect to certain land, that there was a decree in respect of the land in August 1916, that the possession of the land was to be handed over to the father of the deceased boy on the 13th of August last, and that possession was in fact handed over at about 11 o'clock that morning. The accused was not present at the time of handing over the possession to Baburao. He was seen going towards the place where the deceased boy and his other companions were playing when Baburao and other persons were going towards the field. Soon after this the accused took away the boy on the pretext of giving him big thorns to play with and at once threw him into the river, which was very near the place where these boys were playing. He jumped into the river after throwing the boy in it. This is said to have been seen by the three boys and the witness Daji. The complainant Baburao, the father of the deceased boy, was at once informed of this fact when he returned from the field and he immediately gave information to the Patil. Both the information given to the Patil and the report made by the Patil to the Sub-Inspector refer to the accused Hari as the person who threw Vishwas into the river. The Sub-Inspector arrived at night on that very day and he examined

(1) 14 B. L. R. (F. B.) 294; 23 W. R. Cr. 12.
(2) 16 B. 359; 8 Ind. Dec. (N. S.) 717.
(3) 5 Bom. L. R. 551.
(4) 10 A. 207; A. W. N. (1888) 86; 6 Ind. Dec. (N. S.) 139.
(5) 16 M. 105; 1 Weir 823; 5 Ind. Dec. (N. S.) 781.

the boys and the witness Daji on the following day, *i. e.*, on the 14th of August. This evidence has been subjected to critical examination by the learned Counsel for the accused, and after considering all that has been said in favour of the accused, I see no reason to disbelieve the evidence either of Daji or of the boys. I am satisfied that these boys and the deceased Vishwas were playing together on that day and that the deceased Vishwas was taken away by the accused and thrown into the river. There is really no good reason to distrust the evidence of Daji. It appears from his evidence that Hari, that is the accused, was taken out of the water and made to stand there at the time. This evidence, coupled with the fact that the information was immediately given, leaves no doubt in my mind that the prosecution case is true.

There is a further circumstance about the foot-prints. So far as it goes, it is in favour of the prosecution case; but I do not attach much importance to it, because there is no means of testing whether the foot-prints tallied as deposed to by the Panch in this case.

There can be no doubt, in my opinion, about the correctness of the conviction.

The murder was undoubtedly brutal and the boy murdered was an innocent boy who had given no offence whatever to the accused. Under these circumstances ordinarily I should think that the capital sentence would be appropriate. At the same time I notice a cerain degree of reluctance on the part of Judges from the reported cases to pass a capital sentence, when the substantial part of the evidence which the prosecution rely upon is evidence recorded without an oath or affirmation as required by the Indian Oaths Act. I do not wish to be understood as laying down any general rule applicable to all such cases. But taking that into consideration along with the circumstances of this case, I am of opinion that the sentence of transportation for life would not be inappropriate.

I would, therefore, commute the sentence of death to one of transportation for life.

MARTEN, J.—Despite Mr. Velinkar's able arguments, the only difficulty I have felt in this case is as to the admissibility of the evidence of the three children. If I thought the conviction depended on their evidence, the proper course, in my opinion, would be to call for a report from the learned Sessions Judge as to the precise steps he took before allowing these children to give evidence: *Cf. Queen-Empress* v. *Shava* (2), and as to what precisely he means by "affirmed not sworn because of age" and "on affirmation to speak the truth, not on oath" with reference to their evidence. It may be too that in that event I should, speaking for myself, have thought the point to be one fit for a Full Bench having regard, amongst other things, to the conflicting decisions in the various Indian Courts. But it is only fair to the learned Judge to add that the point in question was never taken before him, and that before us Counsel for the prisoner admitted in his reply that having regard to *Emperor* v. *Kusha Yamaji Sutar* (3) he could not rely on the point.

In my opinion, however, the conviction ought to stand even if one eliminates, as I do, the evidence of the three children. I believe the evidence of the alleged eye-witness Daji, and it is in keeping with the surrounding circumstances in evidence. The prisoner's statements I regard as a tissue of lies; and it is noteworthy that he called no evidence—not even his brother—in support of his statement that he was ploughing with his brother one and-half miles off at the time the boy was drowned. His statement must, therefore, be disregarded. This still leaves the prosecution with the obligation to succeed on the strength of its own evidence and not on the weakness or want of evidence for the defence. In my opinion the prosecution has discharged that obligation.

I would accordingly confirm the conviction. As regards the sentence I concur with my learned brother in thinking that having regard to the special circumstances of the case and the course which has been adopted in several of the authorities cited to us, it would be proper to reduce the sentence of death to that of transportation for life.

Sentence commuted.

CHHOTE LAL V. EMPEROR.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 95 OF 1918.

March 22, 1918.

Present:—Justice Sir P. C. Banerji, KT.

CHHOTE LAL—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 437—Charge framed in warrant case—Plea of not guilty—Discharge of accused, effect of—Further enquiry, order for, legality of.

In a warrant case after a charge had been framed against the accused he was called upon to plead, and he pleaded not guilty. The Magistrate thereupon wrote a judgment and 'discharged' the accused. This order was set aside by the District Magistrate, who ordered further enquiry under section 437 of the Criminal Procedure Code:

Held, that the only order which the Magistrate could have passed, after a charge had been framed against the accused and he had pleaded to the charge, was either an order of acquittal or an order of conviction and as he was not convicted he must be deemed to have been acquitted and not 'discharged' and that being so the District Magistrate was not competent under section 437 of the Criminal Procedure Code to order further enquiry and the order made by him, therefore, for such enquiry was illegal. [p. 500, col. 2; p. 501, col. 1.]

Criminal revision from an order of the District Magistrate, Shahjahanpur.

Mr. *Gulzari Lal*, for the Appellant.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—Chhote Lal, the applicant, was charged with having rescued his father, who had been arrested under the orders of the Revenue Court in execution of a decree passed by that Court. The Magistrate who tried him recorded the evidence for the prosecution, framed a charge against him and called upon him to plead. The record shows that the accused pleaded not guilty but refused to call witnesses. A date was fixed for the hearing of the case after the charge had been framed and the plea of not guilty had been entered; and on that date, for reasons stated in the judgment, the Magistrate trying the case passed an order of "discharge." This order was set aside by the District Magistrate and a further enquiry was ordered. The present application has been filed against the order of the District Magistrate directing a further enquiry by another Magistrate.

It is contended that the order of the Magistrate who tried the case, though it is in terms an order of discharge, is in substance and reality an order of acquittal, and that, therefore, the District Magistrate was not competent under section 437 to order further enquiry. Under the section last mentioned the Magistrate of the district is authorised to order further enquiry in a case of dismissal of a complaint under section 203 or section 204 of the Code of Criminal Procedure, or in a case in which the accused has been discharged. The real question, therefore, in this case is whether the order of the trial Magistrate passed on the 18th of June 1917 was an order of "acquittal," because if it was an order of "acquittal," further enquiry could not be ordered by the District Magistrate. Section 253 of the Code of Criminal Procedure provides that if upon taking all the evidence and making such examination of the accused as the Magistrate thinks necessary, he finds that no case against the accused has been made out, which if unrebutted would warrant a conviction, the Magistrate shall discharge him. It is thus clear that an order of discharge should be made *before* a charge has been framed. Section 254 provides for the framing of a charge if the Magistrate is of opinion that there is ground for presuming that the accused has committed the offence with which he is charged. The present case was a 'warrant case' and, therefore, section 253 and the following sections applied to the case. Under section 255, the Court is required to ask the accused after a charge has been framed and read out and explained to him, whether he is guilty or has any defence to make. In the present case it appears from the record that after the charge had been framed, the accused was called upon to plead and he pleaded not guilty. The only order which the Magistrate could have passed after the accused had pleaded to the charge was either an order of acquittal or an order of conviction. In the present case the accused was not convicted. Therefore, he must be deemed to have been acquitted under section 258. It is true that the Magistrate in his judgment used the word "discharged", but that was a misuse of the word. The only order which he could have passed, if he did not convict, was an order of acquittal, and, therefore, the order passed on the 18th of June 1917

must be deemed to be an order of acquittal. This being so, the District Magistrate was not competent under section 437 to order further enquiry and the order made by him for such enquiry is illegal. I accordingly set aside the order of the District Magistrate, dated the 14th of August 1917.

Order set aside.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 404 OF 1917.

February 22, 1918.

Present:—Mr. Justice Shah and Mr. Justice Marten.

In re KHIMA RUKHAD—ACCUSED—APPLICANT.

Criminal Procedure Code (Act V of 1898), ss. 517, 520—Acquittal by First Class Magistrate—Order for disposal of property—Sessions Judge, whether can interfere with order—Court of Appeal.

A Court of Appeal, within the meaning of section 520 of the Criminal Procedure Code, is the Court to which an appeal lies in the particular case, and not the Court to which appeals would ordinarily lie from the Court deciding that particular case. [p. 501, col. 2.]

A First Class Magistrate, who tried the accused on a charge of theft of certain cattle, acquitted them and directed the cattle to be given to one of the accused. The complainant applied to the Sessions Judge, who directed that the cattle be returned to the complainant:

Held, that the accused having been acquitted the Sessions Judge was neither the Court of Appeal nor the Court of Revision with respect to the case and had, therefore, no power to make an order under section 520 of the Criminal Procedure Code regarding the disposal of the cattle. [p. 501, col. 2; p. 502, col. 1.]

Criminal application for revision against an order passed by the Sessions Judge, Ahmedabad, modifying the order passed by the First Class Magistrate at Dhandhuka.

Mr. *Setalvad* (with him Mr. *G. N. Thakor*), for the Applicant.

Mr. *G. S. Mulgaonkar*, for the Opponent.

JUDGMENT.

SHAH, J.—In this case the accused were charged with the theft of certain cattle. The First Class Magistrate, who tried the accused, acquitted them and directed the cattle to be given to the accused No. 1 Khima Rukhad. The complainant applied to the Sessions Court at Ahmedabad as regards the order relating to the disposal of the property. The learned Sessions Judge modified the order of the trial Court and directed that the cattle be returned to the complainant. The present application is made to this Court to revise the order of the Sessions Judge.

It is contended on behalf of the applicant that the Sessions Judge had no jurisdiction in this case under section 520, Criminal Procedure Code, to modify the order of the trial Court. The argument is that the Court of Session is neither a Court of Appeal nor a Court of Revision in this case within the meaning of section 520, Criminal Procedure Code. In my opinion it is not a Court of Appeal, as an appeal from the order of acquittal would lie to this Court and not to the Court of Session. The Court of Appeal within the meaning of the section is the Court to which an appeal lies in the particular case, and not the Court to which the appeals would ordinarily lie from the Court deciding that particular case. This view is supported by the observations of Heaton, J., in *In re Laxman Rangu* (1), though the point that we have to consider did not arise in that case. The decision in *Queen-Empress* v. *Ahmed* (2), to which our attention has been drawn by Mr. Mulgaonkar, is opposed to this view. After giving my best consideration to the judgment, with all respect to the learned Judge, I am unable to agree with the interpretation of the section accepted by him. It is not essential that the appeal allowed should be preferred to the Court of Appeal; but the Court indicated is one to which the appeal lies in that case. The fact that the appeal against an acquittal can be preferred at the instance of the local Government and by nobody else does not make any difference on this point.

I am unable to see how in such a case the Court of Session can be treated as a Court of Revision within the meaning of section 520. Assuming, without admitting, that the complainant having no right of appeal, there was no Court of Appeal so

(1) 9 Ind. Cas. 947; 35 B. 253; 13 Bom. L. R. 131; 12 Cr. L. J. 169.

(2) 9 M. 448; 2 Weir 672; 3 Ind. Dec. (N. S.) 707.

far as he was concerned within the meaning of the section, I think that the Court of Revision in such a case would be the High Court and not the Court of Session for the purpose of section 520, Criminal Procedure Code.

I am, therefore, of opinion that the Court of Session had no power to make the order complained of.

On the merits also, it seems to me that having regard to all the circumstances, the proper order would be to restore the cattle to the person in whose custody they were at the date of their seizure.

It is hardly necessary to add that this order will be without prejudice to the civil rights of the parties.

I would, therefore, set aside the order made by the Sessions Judge and restore that made by the trial Magistrate with reference to the cattle.

MARTEN, J.—I agree. In my judgment the decision of the learned Sessions Judge cannot be upheld either on the question of juri-diction or on the merits.

As regards *Queen Empress* v. *Ahmed* (2) the decision appears to have been that of a single Judge in a case where the parties were unrepresented, and where consequently the Court did not have the benefit of any argument from Counsel. Be that as it may, I respectfully prefer the view taken by my brother Shah in the judgment he has just delivered to that expressed by Mr. Justice Brandt in *Queen-Empress* v. *Ahmed* (2). The disputed agreement Exhibit 18/1 is a curious one, for it purports to treat the cattle in question as a security for the return of the wife of accused No. 1 or alternatively as damages for her non-return. If this agreement be established, the rights of the parties under it can best be determined in a Civil Court. The complainant can, therefore, now do what he could have done in the first instance, *viz.*, have his rights ascertained in a Civil Court instead of attempting to steal a march upon his opponents by instituting criminal proceedings against them for theft of the cattle, the subject of the agreement Exhibit 18/1, charges which the trial Magistrate has held to be unfounded.

I accordingly agree with the order proposed by my learned brother.

Order set aside.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 184 of 1918.

March 22, 1918.

Present:—Justice Sir P. C. Banerji, KT.

BHAGWAN DIN—ACCUSED

versus

MAHMUD ALI—COMPLAINANT.

Workman's Breach of Contract Act (XIII of 1859), s. 1—Dealer in stones, whether artificer, workman or labourer.

Accused who dealt in stones took an advance from the complainant under an agreement to supply the latter with stones from time to time according to the terms of an agreement entered into between the parties. Accused failed to supply the stones and complainant made an application under the Workman's Breach of Contract Act:

Held, that the contract was not a contract by an artificer, workman or labourer nor was the money advanced on account of work to be performed by an artificer, workman or labourer and that, therefore, the provisions of the Workman's Breach of Contract Act had no application to the case. [p. 502, col. 2; p. 503, col. 1.]

Criminal reference made by the District Magistrate, Banda.

JUDGMENT.—Bhagwan Din is alleged to have taken an advance of Rs. 20 from Mahmud Ali, upon an agreement to supply him with certain stones from time to time according to the terms of a contract entered into by him with Mahmud Ali. He having failed to supply the stones, an application was made to a Magistrate under Act XIII of 1859 and the Magistrate made an order against Bhagwan Din. The learned District Magistrate is of opinion that the Act did not apply to a case like the present and has accordingly referred it to this Court with the recommendation that the order of the Magistrate be set aside. I agree with the view taken by the learned District Magistrate. The Act, as the preamble shows, is an Act for the granting of relief for fraudulent breach of contract on the part of artificers, workmen and labourers who have received money in advance on account of work which they have contracted to perform. Section 1 of the Act clearly shows that it applies to cases where an artificer, workman or labourer has received money from a master or employer and has wifully and without lawful or reasonable excuse neglected or refused to perform or get performed any work which he has contracted to perform or get performed. In the present case the contract was not a contract by an

artificer, workman or labourer. The money was not advanced on account of work to be performed by an artificer, workman or labourer, and the person by whom the money was advanced was not his master or employer. The present case was that of an ordinary contract by a person who dealt in stones to supply certain stones to another person. The Act has, therefore, no application in a case of this kind and the learned Magistrate who tried the case was, in my opinion, wrong in holding the Act to be applicable. I accept the recommendation of the learned District Magistrate and set aside the order of the Magistrate of the First Class, dated 26th November 1917. Any sum which may have been paid in pursuance of the said order should be refunded.

Order set aside.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 391 OF 1917.

January 25, 1918.

Present:—Mr. Justice Shah and Mr. Justice Marten.

NAGINDAS CHHABILDAS—ACCUSED—APPLICANT

versus

EMPEROR—RESPONDENT.

Bombay District Municipalities Act (III Bom. of 1901), ss. 113, 122—Bye-laws of Surat City Municipality, Ch. XIV, Bye-law 10 (3), *whether* ultra vires—*Municipality, power of, to charge fees for shop-boards projecting over public street.*

Under section 113 of the Bombay District Municipalities Act it is open to a Municipality to prescribe the extent to which and the conditions under which shop-boards may be allowed to project over public streets. Bye-law 10, sub-clause (3), of Chapter XIV of the Bye-laws framed by the Surat City Municipality, therefore, which provides that projections over public streets may be permitted on payment of a prescribed fee, is not *ultra vires* of the Municipality. [p. 503, col. 2; p. 504, cols. 1 & 2.]

Criminal application for revision from an order passed by the Sessions Judge, Surat, in Criminal Revisional Application No. 33 of 1917, confirming the conviction and sentence passed by the Honorary First Class Magistrate at Surat.

Mr. *N. K. Mehta*, for the Accused.

Mr. *S. S. Patkar* (Government Pleader), for the Crown.

JUDGMENT.

SHAH, J.—The point raised in support of this application is that the putting up of the shop-board by the applicant was duly authorised under sub-section 1 of section 113 and was, therefore, exempt from punishment either under section 122 or under section 113 of the Bombay District Municipalities Act of 1901. It is argued that it was duly authorised under section 113 as it was in accordance with bye-law 8 of Chapter XIV of the Bye-laws of the Surat City Municipality.

The board put up is in accordance with bye-law 8. But the applicant has clearly contravened bye-law 10, sub-clause 3, which requires that the owner shall duly pay in advance the fees prescribed by rules under section 46 (*i*). It is an admitted fact that the prescribed fee was not paid. It is urged, however, that this bye law 10 is not applicable to such a projection, and even if applicable, it is *ultra vires* of the Municipality to levy any fees. The bye-law provides that projections may be permitted only on the conditions which are laid down in the three sub-clauses, and under section 113 it is open to the Municipality to prescribe the extent to which, and the conditions under which, shop-boards may be allowed to project over public streets. The bye-law, therefore, in my opinion, is clearly applicable to the projection such as we have in this case.

I do not see how it is *ultra vires* in view of the power which the Municipality has under the section to prescribe the extent to which and the conditions under which such projection may be allowed. I do not see any reason to think that the power to prescribe the conditions does not include the power to levy fees before the projections are permitted. Section 70 of the Bombay District Municipalities Act was referred to as showing that the power to charge fees was limited in the manner stated in that section. But it seems to me that under the terms of the section when permission is given for putting up any projection, the Municipality may charge a fee for such permission. There is

nothing in the words of the section to justify the applicant's contention that the word "permission" there means "written permission" as contemplated by the first part of section 113, sub-section 1, or that it means permission given in each specific case and not a general permission subject to certain conditions. I feel clear that the fee which is prescribed by bye-law 10 is within the powers conferred on the Municipality by the Bombay District Municipalities Act, which provides that when permission is given for putting up any projection, the Municipality may charge a fee for such permission. Here the permission granted is general subject to the payment of the prescribed fee. I am, therefore, of opinion that the contention that this part of the bye-law is *ultra vires* must be disallowed. No other point has been urged on behalf of the applicant. I would, therefore, discharge the Rule.

MARTEN, J.—We have here the advantage of a clear judgment from the learned Sessions Judge, Mr. Murphy, with which I entirely agree. In the first place it is clear, I think, that the Municipality have purported to prescribe the payment of certain fees as a condition under which the projecting shop-boards are to be allowed under Chapter XIV, bye-law 8. Those conditions are specified in bye-law 10, which begins: "Projections may be permitted only on the following conditions", one of which *viz.*, condition (*iii*) is that the owner shall duly pay in advance certain fees prescribed by rules under section 46 (*i*). Then if one turns to the rules, which are in another lengthy volume, one finds in rule 236 that the annual fees for shop-boards shall be as shown in Schedule F; and at last in Schedule F one discovers that these fees are 8, 6 or 4 annas per running foot according as the public street in question is class 1, 2 or 3.

It was contended before us that the "projections" referred to in bye-law 10 did not include the projecting shop-boards mentioned in bye-law 8. This contention appears to me untenable. Bye-law 10 refers to projections generally, and sub-section 3 incorporates by reference the above rules of the Surat Municipality, and it is clear from these rules and in particular from rule 226 already mentioned that the Municipality require fees for shop-boards. Therefore, by erecting his shop-board without first paying those fees I think the applicant broke the condition which the Municipality purported to impose on such erection.

The next point taken by the applicant is that if bye-law 10 does cover projecting shop-boards, it is *ultra vires* as the Municipality had no power to prescribe the payment of fees as a condition under section 113 of the Act. But when one turns to section 113, one finds that the Municipality may prescribe the extent to which and the conditions under which shop-boards may be allowed to project.

The condition which they have imposed *inter alia* is that certain fees should be paid in advance. In my opinion they are entitled to impose a monetary condition, and this view is borne out by section 70 of the Act. I accordingly think that the Rule should be discharged.

Rule discharged.

MADRAS HIGH COURT.

CRIMINAL REVISION CASES NOS. 711 AND 736 TO 755 OF 1917.

CRIMINAL REVISION PETITIONS NOS. 563 AND 585 TO 604 OF 1917.

February 14, 1918.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Napier.

THATHA PILLAI AND OTHERS—ACCUSED—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Madras Forest Act (V Mad. of 1882), s. 26, scope of—Existing rights, saving of—Conviction without enquiry into rights claimed, legality of.

Section 26 of the Madras Forest Act does not empower the Government to regulate the use of the land which is dealt with in Chapter III to the detriment of any rights existing in individuals and communities. [p. 505, col. 2.]

Rangadu, In re, 42 Ind. Cas. 724; (1917) M. W. N. 682; 22 M. L. T. 211; 6 L. W. 428; 18 Cr. L. J. 996, followed.

Where the residents of a village claim the right of pasturage and the right to cut fuel, a conviction under section 26 without an enquiry into these allegations is illegal. [p. 506, col. 1.]

Petitions, under sections 435 and 439 of the Code of Criminal Procedure, 1898, pray.

ing the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate, Trichinopoly, in Criminal Appeals Nos. 94, etc., of 1916, preferred against the judgment of the Court of the Sub-Magistrate, Manaparai, in Calendar Cases No. 126, etc., of 1916, respectively.

Dr. *S. Swaminadhan*, for the Petitioners.

Mr. *R. Ramanatha Shenai*, for the Government.

ORDER.—The convictions in these cases are under section 26 of the Madras Forest Act and the rules and regulations framed thereunder. The land with reference to which this section has been applied admittedly belonged to the Devastanam and is Inam land. The Zemindar of Kadavur is the manager of the Devastanam. His estate and also the management of the Devastanam have been taken charge of by the Court of Wards under the Madras Court of Wards Act. Then an application was made for the use of the pasturage and of the natural produce of this land being regulated under Chapter III of the Forest Act. This chapter deals with the protection of land at the disposal of Government not included in reserved forests and says: "subject to all rights now legally vested in individuals and communities the Governor in Council may, for any district or portion of a district, make rules to regulate the use of the pasturage or of the natural produce of land at the disposal of Government and not included in a reserved forest. Such rules may, with respect to such land, regulate or prohibit the cutting of grass and pasturing of cattle, and regulate the payments to be made for such cutting or pasturage" (clause *c*).

It is first of all argued that the land, being in the Devastanam and not part of the Zemindari of Kadavur, was not properly included within the scope of section 26 of the Madras Forest Act. But it is found by the Appellate Magistrate, and it is not disputed here, that the land is within the limits of the Kadavur estate, though it is part of the Devastanam Inam. The notifications relate to the entire estate and the Court of Wards took up management of the land in question under those notifications. We do not think, therefore, that this objection has any force.

The second point, which is the more substantial, raises the question whether section 26 contemplates that the Government can, under that section, prohibit the use of land which is dealt with under Chapter III of the Forest Act for pasturage or prevent persons claiming right to cut trees for fuel and doing similar acts from doing so. The section begins by saying that the prohibition or the regulation shall be subject to all rights now legally vested in individuals and communities. In this case it is alleged that the petitioners, who are the villagers living in the vicinity, have a right to graze their cattle and goats on the land in question and also to cut trees for the purpose of fuel and to take the produce of the trees in the forest. If the claim is well founded, it could not be said that under section 26 the Legislature empowered the Government to prohibit these persons from exercising the rights already vested in them. If that were its intention, what the Legislature would have said was that notwithstanding any rights which any person may claim as to pasturage or produce of the land, the Government can prevent and prohibit the use of the land for such purposes. The language of the Legislature seems to us clearly to mean just the reverse. They did not intend to empower the Government to regulate the use of the land which is dealt with under this chapter to the detriment of any rights existing in individuals and communities. This becomes still clearer when we refer to sections 10 and 11 of the Act. Section 10 lays down the procedure with reference to rights claimed in land other than rights of way, pasturage, water course or forest produce. The procedure with regard to dealing with those rights is laid down in section 11. These sections deal with the procedure for reserved forest. Chapter III deals with land not included in reserved forest, and it seems to us that the wording of the section is clear enough to show that as in the case of reserved forest so also with respects to lands not included in reserved forest, the Legislature did not mean to interfere with the existing rights of the people. There is a decision of this Court to the same effect recorded in *Rangadu, In re* (1).

(1) 42 Ind. Cas. 724; (1917) M. W. N. 682; 22 M. L. T. 211; 6 L. W. 428; 18 Cr. L. J. 996.

HARIBHAI DADA *v.* EMPEROR.

The petitioners' claims were put forward before the 2nd class Magistrate who originally tried these cases, but he apparently ignored the question altogether. Then on appeal the Sub-Divisional Magistrate thought that the question had been finally disposed of by the decision of the Collector in another proceeding. The present petitioners were not parties to that proceeding and the Appellate Magistrate in these circumstances ought to have dealt with the question as to the right claimed by the petitioners, before coming to a conclusion on the question whether the acts imputed to them made them liable to the penalties prescribed by the Act. On these grounds, therefore, we set aside the judgment of the Sub-Divisional Magistrate in appeals and remand the appeals to him for disposal according to law. If the parties desire to adduce fresh evidence on this question, they will be at liberty to do so before the Sub-Divisional Magistrate.

Order set aside; Case remanded.

M. C. P.

BOMBAY HIGH COURT.

CRIMINAL APPEAL No. 489 OF 1917.

January 11, 1918.

Present:—Mr. Justice Shah and Mr. Justice Marten.

HARIBHAI DADA—ACCUSED No. 3—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 90, 360, 363—Kidnapping from British India—Consent of person kidnapped—Offence.

A person who kidnaps a girl over twelve years of age from British India with her consent is not guilty of an offence under section 360 of the Penal Code. [p. 503, col. 2; p. 507, col. 2.]

Criminal appeal from conviction and sentence passed by the Sessions Judge, Ahmedabad.

Mr. *S. S. Patkar* (Government Pleader), for the Crown.

JUDGMENT.

SHAH, J.—The appellant, accused No. 3, along with the other accused, was charged in the lower Court with having conspired and kidnapped the girl Pashi, a minor under sixteen years of age, from the guardianship of her father into the Baroda territory in order that she might be seduced to illicit intercourse, under section 366 of the Indian Penal Code. With the other charge we are no longer concerned. All the accused except the appellant were acquitted, and it was definitely found by the trial Judge that Hari had nothing to do with the kidnapping, that is kidnapping from lawful guardianship. It is clear from the evidence relating to the movements of this girl that she first left her father's house on the 25th of January and that she was taken to different places at Napa and Vadtal. She was taken to Asodar by Shankar to Hari's house on the 6th February. Shankar, Haribhai and the girl left Asodar for Baroda and they were arrested in the Baroda territory on the 7th of February. It is not suggested that Hari had anything to do with, and had any knowledge of the movements of, the girl before she was brought to him on the 6th February.

The learned Sessions Judge has convicted the present appellant on the charge of kidnapping Pashi from British India. This girl is found to have been nearly fifteen years old at the date of the offence charged. In order to establish the charge of kidnapping from British India, it is essential for the prosecution to prove that she was conveyed by the appellant beyond the limits of British India without her consent. Having regard to the provisions of section 90 of the Indian Penal Code and to the fact that Pashi was more than twelve years old at the time, she would be competent to give her consent. It is clear from the judgment of the lower Court that under the circumstances it cannot be said that she was conveyed without her consent. All along in her movements from place to place she seems to have been a consenting party and there is absolutely nothing to show that when the party left Asodar, the girl was in the slightest degree unwilling to go to Baroda, *i. e.*, out of British India. The girl is described by the Judge as "obviously a loose girl, discontented with and not inclined to live

with her husband and anxious to find a well-to-do husband of a superior class." Further on, the learned Judge observes that "Pashi may have walked straight over to the house of Shankar or Soma and asked them to fix matters up for her." That is, even as regards her having been taken out of the custody of her father the Judge is not satisfied that the girl was not a consenting party. The consent of Pashi as regards kidnapping from lawful guardianship would not be material, but on the question of kidnapping from British India, her consent would be very material. I am quite satisfied that on the findings of the learned Sessions Judge the charge of kidnapping from British India cannot be sustained.

I, therefore, allow the appeal, set aside the conviction and sentence and direct the accused to be acquitted and discharged.

MARTEN, J.—As we are differing from the learned Sessions Judge, I should like to add this. He says at page 59 as follows:—"The case, therefore, splits up into separate parts. *First*, the kidnapping from lawful guardianship, and *secondly*, the kidnapping from British India, and that being so, there really should have been separate trials of the various offenders as they were connected with distinct offences." Stopping there, I think it is a great pity that the learned Sessions Judge did not take that course, for the conviction of the present accused may well be due to a confusion as to the effect of the Indian Penal Code, arising from the single trial of the various offenders for separate offences. Then at page 62 he goes on: "The next question is as to Haribhai (accused No. 3). There is no question that he had nothing to do with the kidnapping." And then finally the learned Judge at page 63 says: "Disagreeing with the assessors I find Haribhai Dada guilty of the offence charged, *viz.*, of kidnapping Pashi from British India."

Now the offence with which he was charged was what I may call a double-barrelled offence. It was that of kidnapping this girl "from the guardinship of her father into Baroda territory." That included both kinds of kidnapping defined in section 359, *viz.*, kidnapping from British India and kidnapping from lawful guardianship. In the view I take, I think the learned Judge only meant to convict this particular accused of the crime of kidnapping from British India, namely, under section 360, Indian Penal Code. That must be without the consent of the person alleged to be kidnapped. But if one looks at the earlier sections of the Indian Penal Code, namely, section 90 it appears that the consent of a child is only invalidated if the child be under twelve years of age. In the present case the child is over twelve and it is not shown that she was taken out of British India without her consent. The evidence indeed is all the other way, *viz.*, that she consented. The learned Sessions Judge has not dealt with this point in his judgment and I am satisfied that it is fatal to the conviction.

If on the other hand the learned Judge intended to rely on the other kind of kidnapping, *viz.*, kidnapping from legal guardianship under section 361 there are other legal difficulties involved there, and I think that on the facts of the case and on his own finding, the conviction would be improper under that section too. But I am satisfied that he did not intend to convict under section 361.

Under these circumstances I agree with my learned brother that the appeal should be allowed and the conviction set aside.

Appeal allowed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 105 OF 1917.

November 27, 1917.

Present:—Justice Sir William Ayling, KT., and Mr. Justice Phillips.

A. L. MEANGO—COUNTER-PETITIONER—APPELLANT

versus

J. C. BAVIAH—PETITIONER—RESPONDENT.

Penal Code (Act XLV of 1860), s. 193—Civil Procedure Code (Act V of 1908), O. XVIII, r. 5—Deposition not read out in presence and hearing of Judge, admissibility of—Evidence Act (I of 1872), ss. 80, 91.

MEANGO *v.* BAVIAH.

The provisions of Order XVIII, rule 5, Civil Procedure Code, are adequately complied with if the depositions of witnesses are read over to them in a place within the sight of the presiding Judge and from which the witnesses can draw the attention of the Judge to any mistakes or omissions discovered by them. [p. 508, cols. 1 & 2.]

Where, therefore, the deposition of a witness was read out by the Court clerk in a room next to the Court and at a distance of 30 feet from the Judge's seat:

Held, that the deposition was admissible in evidence and complied with the provisions of Order XVIII, rule 5, Civil Procedure Code. [p. 508, col. 2.]

Kamatchinathan Chetty v. *Emperor*, 28 M. 308; 2 Cr. L. J. 756, not followed.

An irregularity in recording a deposition may be considered in determining the value of the document as evidence but it is not a sufficient ground for shutting it out altogether. [p. 509, col. 1.]

Neither section 80 nor section 91 of the Evidence Act renders such documents inadmissible in evidence. If the document is not in all particulars what it purports to be, the presumption permitted by section 80 would be rebutted. [p. 509, col. 1.]

Appeal against the order of the District Court, South Malabar, in Civil Miscellaneous Appeal No. 855 of 1916, preferred against the order of the District Munsif, Anjengo, in Miscellaneous Petition No. 318 of 1916.

Dr. *K. Pandalai*, for the Appellant.

Dr. *S. Swaminadhan*, for the Respondent.

JUDGMENT.

PHILLIPS, J.—This is an application to set aside a sanction to prosecute petitioner-appellant for an offence under section 193, Indian Penal Code; but the only point argued is the admissibility in evidence of petitioner's (appellant's) deposition. This deposition was properly recorded by the District Munsif, but was read over to the witness by a clerk in a room next to the Court room at a distance of 30 feet from the Munsif's seat. There were two clerks sitting between the place where the deposition was read and that where the Munsif sits. Under Order XVIII, rule 5, Civil Procedure Code, a deposition shall be read over in the presence of the Judge and the witness, and the first question that arises is whether the deposition before us can be deemed to have been read over 'in the presence of the Judge.' From the evidence on record it does not appear whether the Munsif could actually see the witness and the clerk while the deposition was being read over ; but I am satisfied that the provisions of the rule would be adequately complied with if the deposition were read over in a place within the sight of the presiding Judge and from which the witness could draw the attention of the Judge to any mistakes or omissions discovered by him. The reading over of the deposition is primarily intended for the purpose of securing a correct record, and in order to secure this, the witness is given an opportunity of drawing attention to mistakes. The presence of the Judge is required in order to ensure that such an opportunity is really afforded to the witness. Under the old Civil Procedure Code of 1882, the deposition had to be read over 'in the presence of the parties or their Pleaders' as well as of the Judge and the witness. According to Boddam, J., in *Kamatchinathan Chetty* v. *Emperor* (1), "the Vakils are required to be present, that they may call the attention of the witness to any statement appearing in the deposition which may or may not require correction." The omission of this safeguard in the new Code leads one to suppose that the Legislature was satisfied that the presence of the Judge was a sufficient safeguard to ensure the correct record of the deposition, for the witness is the best and really the only person who can say that what he had said has been correctly recorded. When, therefore, the deposition has been read over in such a place that the witness can invoke the aid of the Judge to enable him to make any corrections that may be necessary, I think that the requirements of Order XVIII, rule 5, Civil Procedure Code, are satisfied. It is clear to my mind that the Judge is not required to do more than exercise a general supervision over the reading over of the deposition, for in many cases the deposition is interpreted to the witness in a language which the Judge does not understand. I am supported in this view by a judgment of this Court reported as *Muthukumara Reddy, In re* (2) to which my learned brother was a party.

Assuming, however, that it has not been proved that the deposition was read over in the manner and circumstances referred to above, we have to consider whether the deposition is or is not admissible in evidence. Such a deposition was held to be inadmissible in *Kamatchinathan Chetty* v. *Emperor* (1) and also in *Mohendra Nath Misser* v. *Emperor*

(1) 28 M. 308; 2 Cr. L. J. 756.

(2) 9 Ind. Cas. 262; 9 M. L. T. 325; 21 M. L. J. 411; 12 Cr. L. J. 44.

(3), but a different view was taken in *Bogra, In re* (4)

The view taken in *Kamatchinathan Chetty* v. *Emperor* (1) by Boddam, J., was that the document, though purporting to be a deposition, had been read over and signed without the requirements of the law being complied with and was, therefore, not a deposition and should not have been admitted as such. In *Mohendra Nath Misser* v. *Emperor* (3) it was held that "the deposition under section 91 of the Evidence Act was the only evidence admissible in proof of those statements (*i. e.*, the statements in the depositions), and under section 80 of the same Act it is admissible only if it was taken in accordance with law." With all deference I am unable to see any provision in section 80 which declares such a document to be inadmissible in evidence, for section 80 only refers to certain presumptions which a Court shall make when a document purporting to be a deposition taken in accordance with law is produced before it. If it is proved that such deposition is not in all particulars what it purports to be, the presumption would be rebutted; but I can see no authority in section 80 for holding that such a document would be wholly inadmissible in evidence. Under section 91 of the Evidence Act, "in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given of such matter except the document itself." In this case the statement of the witness has been reduced to the form of a document as required by law, and the document itself has been produced. There appears to be nothing in section 91 which prohibits the admission of such a document in evidence merely because some of the formalities prescribed by law have been omitted in recording it. Undoubtedly any irregularities in making the record may be considered in determining the value of the document as evidence; but that is not sufficient ground for shutting it out altogether. This was the view taken by Miller, J., in *Bogra, In re* (4). In *Rakhal Chandra Laha* v. *Emperor* (5) a deposition which was read out in the presence of the Pleader for only one out of 27 accused persons was held to be admissible in evidence in a prosecution for perjury against the deponent, the ground being that it would undoubtedly have been admissible as against the one accused, in whose Pleader's presence it was read over. As, however, it was a deposition in a case against 27 persons, it ought to have been read over in the presence of all under section 360, Criminal Procedure Code, and the omission to do so would apparently invalidate the deposition according to the view in *Kamatchinathan Chetty* v. *Emperor* (1) and in *Mohendra Nath Misser* v. *Emperor* (3). I think, therefore, that the case in *Rakhal Chandra Laha* v. *Emperor* (5) goes to support the view taken by Miller, J., in *Bogra, In re* (4), a view with which I respectfully agree. In another case, *Jyotish Chandra Mukerjee* v. *Emperor* (6), the learned Judges, while referring to certain cases [presumably *Kamatchinathan Chetty* v. *Emperor* (1) and *Mohendra Nath Misser* v. *Emperor* (3)] were careful not to express either assent or dissent and consequently the case is of little value here. I would, therefore, hold that the petitioner's (appellant's) deposition in this case is admissible in evidence and dismiss the appeal.

AYLING, J.—I agree.

M. C. P.

Appeal dismissed.

(3) 12 C. W. N. 845; 8 Cr. L. J. 116.

(4) 7 Ind. Cas. 414; 34 M. 141; 8 M. L. T. 117; (1910) M. W. N. 435; 20 M. L. J. 943; 11 Cr. L. J. 482.

(5) 2 Ind. Cas. 697; 36 C. 808; 9 C. L. J. 690; 13 C. W. N. 942; 10 Cr. L. J. 150.

(6) 4 Ind. Cas. 416; 36 C. 955; 14 C. W. N. 82; 10 Cr. L. J. 581.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 389 OF 1917.

January 11, 1918.

Present:—Mr. Justice Shah and Mr. Justice Marten.

ABAS MIRZA—ACCUSED—APPLICANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 336—Rash or

ABAS MIRZA *v.* EMPEROR.

negligent act endangering human life—Driving motor car without spectacles—Offence.

It is a rash or negligent act for a person to drive a motor car without wearing spectacles if his eyesight is really defective. But an omission to wear spectacles at the time of driving the car in every case where a driver may properly use spectacles would not necessarily render the driver liable under section 336 of the Penal Code. It must depend upon the nature of the defect in the eyesight and the necessity for using spectacles in each case. [p. 510, col. 2; p. 511, col. 1.]

A licensed driver, who was required by his license to wear spectacles when driving a car, was found driving without spectacles. It was found that the defect in his eyesight was not very great, and that it would not appreciably interfere with his efficiency as a driver even though he drove without spectacles:

Held, that he was not guilty of an offence under section 336 of the Penal Code. [p. 511, col. 1.]

Criminal application for revision from convictions and sentence passed by the Acting Chief Presidency Magistrate, Bombay.

Mr. *P. N. Godinho*, for the Applicant.

Mr. *S. S. Patkar* (Government Pleader), for the Crown.

JUDGMENT.

SHAH, J.—In this case the accused was originally charged under section 279 of the Indian Penal Code with driving a motor car on a public way in a manner so rash or negligent as to endanger human life; but the learned Magistrate finds that the evidence shows that the accused was not to blame for the collision which in fact occurred and that the charge under section 279 cannot be sustained. He, however, proceeded against the accused with the charge of doing an act so rashly or negligently as to endanger human life or the personal safety of others under section 336, Indian Penal Code.

The act complained of here is that the accused drove his car without wearing his spectacles which he was required to wear by the license under which he drove the car. The learned Magistrate has come to the conclusion that under the circumstances his omission to wear the spectacles at the time of driving the car was sufficient to endanger human life. From the finding recorded by the trial Magistrate and from the course which the proceedings took before him, it seems to me that to a certain extent he has been unconsciously influenced in his conclusion by the fact that there was a serious accident. But for the purposes of this case, the fact of there having been an accident, for which on the evidence the accused is found not to be responsible, must be left out of consideration. It would clearly be a rash or negligent act for a person to drive a motorcar without wearing spectacles if his eyesight was really defective. But an omission to wear the spectacles at the time of driving the car in every case, where a driver may properly use spectacles, would not necessarily render the driver liable under section 336. It must depend upon the nature of the defect in the eyesight, and the necessity for using spectacles in each case.

In the present case there is the evidence of an occulist which has not been disbelieved by the trial Magistrate. That evidence shows that the defect in the eyesight of the accused is not very much and that it would not appreciably interfere with his efficiency as a driver, even though he drove without spectacles. It is true that the accused was required by his license to use eye-glasses at the time of driving the car. But the circumstance must be considered along with, and in the light of, the medical evidence. Having regard to the evidence, it seems to me that on the facts of this case it is not made out that the present accused, if he drove his car without wearing spectacles, would be acting so rashly or negligently as to endanger human life or the personal safety of others.

On these grounds I am of opinion that the accused is not guilty under section 336 of the Indian Penal Code. In the present case we are not concerned with the effect of the omission on the part of the driver to comply with the condition of his license and I express no opinion as to what effect such omission might or ought to have on the license.

I would set aside the conviction and sentence and direct the fine, if paid, to be refunded.

MARTEN, J.—As we are differing from the learned Acting Chief Presidency Magistrate, I should like to add this. The want of spectacles had nothing whatever to do with the accident. The Magistrate finds that the accused was not resposible for the accident. Secondly, no question about the license arises here. Whether that should be or should not be renewed is a

matter for other people to decide. Nor must it be thought that our decision amounts to this that short sighted people can drive their cars in Bombay without their spectacles. Speaking for myself my opinion is indeed entirely the other way.

Now in the present case we have got to see what is the evidence as to this man's eye sight. The finding of the learned Judge is that an oculist (who was called as a witness by the accused) says that the defect is not very much and that it would not appreciably intefere with his efficiency as driver, even though he drove without spectacles, but the oculist admits that it would make some slight difference if he drove without spectacles. That evidence, in my opinion, is not sufficient to make the conduct of the accused amount to a criminal offence under section 336 of the Indian Penal Code.

Under these circumstances I agree in thinking that the conviction should be set aside and the fine, if paid, refunded.

Rule made absolute.

ALLAHABAD HIGH COURT.

CRIMINAL REFERENCE No. 118 OF 1918.

February 26, 1918.

Present:—Sir Henry Richards, KT, Chief Justice.

RAM SAMBHARI TEWARI—APPLICANT

versus

RAJMAN NAIK AND OTHERS—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 438—Acquittal—Revision by complainant—Reference by Sessions Judge for re-trial to High Court—Delay, effect of.

Eleven persons were tried by a Magistrate of the First Class for offences under section 147 read with section 347 of the Penal Code and were acquitted on the 14th of December 1916. No appeal was preferred by the Government, but the complainant filed a revision in the Court of the Sessions Judge who, observing that the Magistrate had not said in what respect he considered the prosecution story to be exaggerated, held that the case was one which should be re-tried and by his order of reference to the High Court, dated 4th January 1918, recommended that the case should be re-tried:

Held, that as the Government did not appeal, it was inadvisable to open up the matter again having regard to the long lapse of time between the order of acquittal and the order of reference.

Criminal reference made by the Sessions Judge, Gorakhpur.

FACTS.—Eleven persons were charged with and tried of offences under sections 147 and 347 of the Penal Code by a Magistrate, who came to the conclusion that the case against the accused was very doubtful one and that the prosecution story was exaggerated. He accordingly acquitted the accused on 14th December 1916. The Local Government did not appeal against the acquittal, but the complainant filed a revision before the Sessions Judge. The latter, observing that the Magistrate had failed to point out on what ground and in what respect he considered the prosecution evidence to be exaggerated, referred the case to the High Court by his order, dated 4th January 1918, recommending that a re-trial should be ordered.

Mr. *W. Wallach*, for the Opposite Party.

JUDGMENT.—It appears that eleven persons were tried and acquitted for offences under section 147 read with section 347 of the Indian Penal Code. The order of acquittal is dated as far back as the 4th of December 1916. Government did not appeal against the order of acquittal and I think having regard to the long lapse of time that it would be inadvisable to open up the matter now. I accordingly direct that the record be returned.

Record returned.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 406 OF 1917.

January 15, 1918.

Present:—Mr. Justice Shah and Mr. Justice Marten.

In re HUBERT CRAWFORD—APPLICANT.

Criminal Procedure Code (Act V of 1898), s. 514—City of Bombay Police Act (IV Bom. of 1902), ss. 106

HUBERT CRAWFORD, *In re.*

107—*Bonds for appearance before Police—Forfeiture—Applicability of s.* 514 *of Code.*

Bonds taken under sections 106 and 107 of the City of Bombay Police Act for appearance before the Police are not bonds taken under the Code of Criminal Procedure or for appearance before a Court and such bonds cannot, therefore, be dealt with under section 514 of the Code of Criminal Procedure. [p. 512, col. 2.]

Criminal application for revision from an order passed by the Acting Chief Presidency Magistrate, Bombay.

Mr. *P. N. Godinho*, for the Applicant.

Mr. *S. S. Patkar* (Government Pleader), for the Crown.

JUDGMENT.

SHAH, J.—The order, the legality of which we have to consider, relates to two bonds taken under the City of Bombay Police Act of 1902. These bonds were taken under sections 106 and 107 of the Act, whereby one Clegg undertook to appear at a certain Police station on a certain day and on subsequent days as directed, and the applicant before us stood surety for him in respect of both the bonds. The learned Presidency Magistrate has found that Clegg absconded from Bombay and that the bonds were broken. On that footing he has made an order directing a partial forfeiture of both these bonds.

The question of law which arises on this application is whether the Court of the Presidency Magistrate had any jurisdiction to direct these bonds to be forfeited under section 514, Criminal Procedure Code. It is common ground that that is the only section, under which, if at all, the Magistrate would have jurisdiction. It is also common ground that these bonds are not taken under the Code of Criminal Procedure and that they are not "bonds for appearance before a Court." They are bonds taken under the City of Bombay Police Act for appearance before the Police. The question is whether section 514 of the Code applies to such bonds.

The learned Magistrate has come to the conclusion that these bonds can be dealt with by him under section 514. After a careful consideration of the arguments addressed to us, I am of opinion that such bonds cannot be dealt with under section 514. "Whenever it is proved to the satisfaction of the Court by which a bond under this Code has been taken, or of the Court of a Presidency Magistrate or a Magistrate of the First Class, or when the bond is for appearance before a Court, to the satisfaction of such Court, that such bond has been forfeited," the Court can deal with the matter as provided in the section. It is urged on behalf of the Crown that the words "such bond" must be liberally construed so as not to defeat the object of section 514, and that if so construed they would include not only a bond under the Code of Criminal Procedure or the bond for appearance before a Court but also such bonds as we have in the present case. I am in full sympathy with the arguments that the words should be construed as far as possible so as not to defeat the obvious purpose of section 514; but I am unable to interpret these words as including the bonds in question. They are admittedly not bonds under the Code and they are not bonds for appearance before a Court. I do not see how by any straining of the words "such bond" it could be said that the bonds, though not falling under either of the two categories, can still be dealt with under section 514.

It is not necessary for the purpose of this case to express any opinion as to whether the bond "for appearence before a Court" can include within its meaning a bond not taken under the Code. I have assumed for the purpose of this case that a bond though not under the Code, if it be for appearance before a Court, may be within the meaning of the expression used in the second paragraph of sub-section 1 of section 514. Even on that footing I do not see how a bond not taken under the Code and not for appearance before a Court can be treated as being within the scope of the section. It may be, as the learned Magistrate points out, that the intention of the Legislature was to include even such bonds within the scope of section 514; but we are concerned with the meaning of the words used. I am satisfied that the words are not susceptible of the construction put thereon by the Magistrate. If necessary, the section can be amended by the Legislature so as to give power to the Presidency Magistrates to deal with such bonds as we have in the present case.

I am, therefore, of opinion that the Magistrate had no jurisdiction to direct any forfeiture of these bonds and that his order must be set aside as having been made without jurisdiction. Though this application is made by the surety only, having regard to our conclusion we must exercise our powers under section 439, Criminal Procedure Code, and set aside the order not only as regards the present applicant but also as regards Clegg.

I may add that our order will be without prejudice to the rights and remedies, if any, of the Crown in respect of these bonds. The only point that is decided is that the remedy sought in the present proceedings under section 514 is not open to the Crown.

Before leaving this case, I desire to express my disapproval of the reference made to the opinions of the Public Prosecutor and the Advocate-General by the learned Magistrate in his judgment. In my opinion no reference to these opinions should have been allowed by him.

The amount, if paid, must be refunded.

MARTEN, J.—I agree. As regards the intention of the Legislature I think, speaking for myself, that we can only ascertain that intention from the Code itself. With every desire to give a wide construction to the Code, I am quite satisfied that the bonds in question do not fall within section 514. As regards the argument that the words "the bond for appearance before a Court" include a bond taken under the City of Bombay Police Act for appearance before a Court, I agree with what my learned brother has said, *viz.*, that it is unnecessary for us to decide that point, for the bonds in question were not for appearance before a Court. I also agree that no reference should have been made in the learned Magistrate's judgment to certain opinions taken on behalf of the prosecution. The question of jurisdiction was for the Magistrate to decide, and Counsel's opinion, whether correct or not, was irrelevant.

Rule made absolute.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 110 OF 1918.

April 3, 1918.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

BHAGWANA—ACCUSED—APPELLANT

versus

EMPEROR—PROSECUTOR—OPPOSITE-PARTY.

Penal Code (Act XLV of 1860), ss. 457, 380—Criminal Tribes Act (III of 1911), s. 23—Lurking house-trespass—Theft—Walking into open house and stealing articles therefrom—Offence—Sentence.

Accused, who was a member of a criminal tribe and had been twice previously convicted of dacoity finding the door of a house open, walked in and proceeded to steal certain articles therefrom. He removed some of the articles preparatory to taking them away, but before he actually got away the alarm was given and he was caught:

Held, that the accused was not guilty of lurking house-trespass under section 457 of the Penal Code so as to be liable to enhanced punishment under section 23 of the Criminal Tribes Act. [p. 514, col. 1.]

Criminal appeal against an order of the Sessions Judge, Moradabad.

Mr. *S. N. Sinha*, for the Accused.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—The accused has been convicted under section 457 of the Indian Penal Code read with section 23 of the Criminal Tribes Act. The accused beyond all question belongs to a criminal tribe. He has been twice previously convicted of dacoity. From the evidence on the record there can be no doubt that the accused in the present case entered a dwelling-house and proceeded to steal clothes and utensils belonging to certain students. He removed some of the articles preparatory to taking them away, but before he actually got away the alarm was given and he was caught. The learned Sessions Judge was of opinion that under section 23 of the Criminal Tribes Act he had no option except to sentence the accused to transportation for life. Mr. Sinha on behalf of the accused argues that on the facts proved the accused was not guilty of an offence punishable under section 457. He contends that on the assumption that the accused is guilty at all, he is only guilty under section 380. Section 380 is not one of the sections referred to in section 23 of the schedule attached to the Criminal Tribes Act. Section 457 provides that whoever commits "lurking house-trespass by night" or "house-breaking by

night," has committed an offence under that section.

Lurking house-trespass is committed when a person enters premises of the nature described in section 442 having taken precautions to conceal such house-trespass in the manner mentioned in section 443. There does not appear to be any evidence that the accused in the present case took any such precautions. The evidence is that he was found by one of the students who was awakened by the noise in removing the articles. House-breaking is defined by section 445. There does not appear to be any evidence that the accused effected his entrance into the house in any of the six ways mentioned in the section. On the other hand it is quite consistent with the evidence that he found the door open, walked into the house, went upstairs to where the students were sleeping, and commenced to steal. We think under these circumstances the accused could not be properly convicted under section 457, and that his conviction ought to have been under section 380 and therefore the Sessions Judge was not bound to sentence the accused to transportation for life.

The accused is evidently a dangerous man. We have already mentioned that he has been twice previously convicted for dacoity. We alter the conviction from a conviction under section 457 read with section 23 of the Criminal Tribes Act to conviction under section 380 read with section 75 and we reduce the sentence from a sentence of transportation for life to a sentence of ten years' rigorous imprisonment with effect from the date of his original conviction.

Conviction altered.

BOMBAY HIGH COURT.

CRIMINAL APPLICATION FOR REVISION No. 353 OF 1917.

January 24, 1918.

Present:—Mr. Justice Shah and Mr. Justice Marten.

AMBIRSAHEB BALAMIYA PATIL —ACCUSED—APPLICANT

versus

EMPEROR—RESPONDENT.

Forest Act (VII of 1878), ss. 25 (i), 31 (j), r. 3 (a) —Reserved forest—Shooting tiger in reserved forest without license to protect property—Offence.

Under rule 3 (*a*) of the rules made by the Bombay Government under section 25 (*i*) and section 31 (*j*) of the Forest Act, hunting and shooting in a reserved forest are prohibited except under a license to be obtained from the conservator of forests. [p. 515, col. 1.]

Some of accused's cattle were killed by a tiger and with a view to prevent further injury to his property the accused successfully tracked and shot a tiger without a license in a reserved forest, to which the rules made by the Local Government under section 25 (*i*) and section 31 (*j*) of the Forest Act had been duly applied:

Held, that the accused was guilty of an offence under section 25 (*i*) of the Forest Act. [p. 515, col. 1.]

Criminal application for revision from conviction and sentence passed by the Third Class Magistrate, Bhiwandi.

Mr. *W. B. Pradhan*, for the Applicant.

Mr. *S. S. Patkar*, Government Pleader, for the Crown.

JUDGMENT.

SHAH, J.—The accused in this case has been convicted under section 25, clause (*i*), of the Indian Forest Act (VII of 1878). He is found to have successfully tracked and shot a tiger without a license in a reserved forest to which the rules made by the Local Government under section 25 (*i*) and section 31, clause (*j*), have been duly applied.

The case for the accused was that some of his cattle were killed by a tiger and that with a view to prevent further injury to his property he wanted to trace the tiger in the forest. Both the lower Courts have proceeded on the assumption that the accused's cattle were killed by a tiger; and from the arguments before us, it is clear that the accused's cattle were killed by a tiger and that his object in going to the forest and shooting the tiger was to prevent further injury to his property.

In dealing with the question of self-defence, the learned Magistrate in appeal seems to me to have taken a somewhat narrow view of its scope. It may be, as the learned Magistrate points out, that the accused went in search of the tiger and shot the animal, not to avert the attack by the animal on him but probably because he wanted to kill the animal. The point as to whether the accused shot the tiger to avert the attack by the

animal on him or whether he found it, does not seem to me to be of any importance for the purpose of this case. Broadly speaking it is a case in which the accused, with a view to protect his property, went to the forest, tracked and shot the tiger. He did this, however, without a license as required by the rules to which I have referred, and the whole point in the case is whether the prohibition under rule 3 (*a*) against hunting and shooting without a license is absolute. After a careful consideration of the rules, it seems to me that under rule 3 (*a*) hunting and shooting are prohibited except under a license to be obtained from the conservator of forests. Such a license was not obtained.

Whether it is necessary, for the purpose of strict conservation or for the preservation of animals which are becoming rare or for both these purposes, to prohibit hunting and shooting in a reserved forest except under a license, so as to prevent a person from hunting and shooting without a license a tiger or any other wild animal even for the protection of his property or person, is a question which the Local Government have to consider and decide. It is really a question of policy under the Indian Forest Act upon which I express no opinion.

I feel clear, however, that without a license, even under the circumstances under which the accused is found to have acted, he cannot hunt or shoot in a reserved forest to which these rules have been made applicable. I am, therefore, of opinion that the conviction under section 25 (*i*) must be affirmed.

Having regard to the fact that the accused acted in a manner in which a person, whose cattle were killed by a tiger, would naturally act, I think that a nominal sentence would be sufficient in this case. Accordingly I reduce the fine to one rupee and direct the excess, if paid, to be refunded.

I see no reason to disturb the order relating to the skin.

MARTEN, J.—I think the accused here has committed a technical offence for which a nominal penalty of fine is adequate. He committed an offence, namely, that of hunting and shooting in a reserved forest, because he deliberately went into this forest in search of this tiger which he eventually shot. Whether at or about the actual moment of shooting, the tiger attacked him or he attacked the tiger seems to me irrelevant. Personally I rather read the Magistrate's observations as to self-defence to refer to a hypothetical case, where a man is walking in a reserved forest quite innocently though possibly armed with a gun and is then suddenly attacked by a wild animal which he has no license to shoot. Even in such a case the Magistrate raises the doubt whether technically an offence whould not be committed under this Act. But turning to the facts of the present case, I call it a technical offence because this man, *viz.*, the accused, did not go into the forest in the more ordinary sense of hunting and shooting, *viz.*, for sport. He went for the protection of his property, for it appears to be uncontradicted that he had already suffered very serious loss in his cattle and other animals by the attacks of this particular tiger. I do not know how much longer he can reasonably be supposed to go on suffering these losses, and under all the circumstances of the case, I think the justice of the case will be met by reducing the fine to one rupee.

The order as regards the skin of course stands.

Sentence reduced.

ALLAHABAD HIGH COURT.

CRIMINAL MISCELLANEOUS No. 11 OF 1911.

January 30, 1918.

Present:—Justice Sir Edward Knox, KT.

MAGAN LAL—ACCUSED—APPLICANT

versus

GANESH PRASAD—COMPLAINANT—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 526—Penal Code (Act XLV of 1860), s. 211—False charge of offence made with intent to injure—Competent Tribunal—Honorary Magistrate, whether competent—Unnecessary adjournments—Transfer, ground for.

A charge of an offence falling under the second clause of section 211 of the Penal Code should no

be sent for trial or inquiry to an Honorary Magistrate having no experience of criminal trials, and the mere fact of the Magistrate making unnecessary adjournments in the inquiry or trial of such a case is a sufficient ground for the transfer of the case from his Court.

Criminal miscellaneous application for transfer from the Court of an Honorary Magistrate, First Class, Allahabad.

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

Mr. *S. C. Mukerji*, for the Opposite Party.

JUDGMENT.—This is an application presented to this Court under section 526 of the Code of Criminal Procedure. I am asked that the case of Magan Lal *versus* Ganesh Prasad now pending in the Court of Raja Partab Bahadur, Honorary Magistrate, first class, Allahabad, be either directed to be committed for trial to the Court of Session, or transferred for trial to some other competent Magistrate. From the affidavit filed in connection with this application it appears that Magan Lal was tried in the Court of the Joint Magistrate of Allahabad on the complaint of Ganesh Prasad charging Magan Lal with offences under sections 409 and 420 of the Indian Penal Code. Magan Lal was acquitted after trial by the Joint Magistrate. He then obtained sanction from the Joint Magistrate's Court to prosecute Ganesh Prasad for having falsely charged him with offences under sections 409 and 420 of the Indian Penal Code. The case was transferred by the Joint Magistrate of Allahabad to the Court of Raja Partab Bahadur, Honorary Magistrate, first class, Allahabad, and came to his Court on the 21st of August 1917. It has been, therefore, pending for about four months and is still incomplete. The ground urged for transfer or for the order prayed for is *inter alia* that the learned Honorary Magistrate does not know the English language and the applicant deponent is put to trouble and expense in being made to file translations from English judgments into Urdu, and that there have been already several unnecessary adjournments due to the fact that the learned Magistrate begins his sittings between 3 and 4 P. M. A further contention is raised in the affidavit that the Honorary Magistrate has kept the case for trial in his Court, although he has no jurisdiction to try it. I have examined the statement made by the complainant Ganesh Prasad when he first made his complaint. There is no doubt that he did charge Magan Lal with offences under sections 409 and 420 of the Indian Penal Code. It is alleged that that complaint was a false one. If so, it was a false complaint of these specific offences, and was, therefore, a false complaint falling within the second paragraph of section 211 of the Indian Penal Code. Criminal proceedings were instituted upon a complaint of an offence punishable with transportation for life or imprisonment of either description for a term which may extend to ten years. If the complaint was a false one, of course it is clearly to be understood that I commit myself to no opinion of any kind as to whether the charge was true or false, the charge and the criminal proceedings ensuing therefrom were of a very serious nature It is a case which ought to be tried either by a Court of Session or at any rate by a Magistrate of considerable experience, and it is not a case of the kind that should have been sent for trial to an Honorary Magistrate who does not appear to have had much experience in the trial of criminal cases. I say this because on looking to the order-sheet I find adjournments and cross-examinations allowed which are never intended by law and which should never be granted by any Magistrate of experience. I find that the complainant was cross-examined on four different occasions, and this is a mere sample of the kind of procedure which received the sanction of the Honorary Magistrate. The mere fact that the enquiry or so-called trial has lasted for nearly four months calls for the case being removed from the Court of the Honorary Magistrate and tried by some one of experience in these matters. I understand that all the evidence for the prosecution has been taken, and I direct that the case be now committed for trial to the Court of Session on the charge of instituting or causing to be instituted a false charge of offences under sections 409 and 420 of the Indian Penal Code and, therefore, falling within the second clause of section 211 of the Indian Penal Code, a case which is triable by a Court of Session. Let the record be returned.

Record returned.

RAGHUVALU NAICKER *v.* SINGARAM.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 677 OF 1917.

CRIMINAL REVISION PETITION No. 536 OF 1917.

February 14, 1918.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Napier.

RAGHUVALU NAICKER—COMPLAINANT—PETITIONER

versus

SINGARAM AND ANOTHER—ACCUSED—RESPONDENTS.

Criminal Procedure Code Act (V of 1898), ss. 247, 259—Summons case and warrant case tried together—Dismissal of case for default of prosecution, effect of—Procedure—Penal Code (Act XLV of 1860), ss. 352, 504.

On the day fixed for the hearing of a complaint under sections 352 and 504, Indian Penal Code, the complainant was absent and the Magistrate passed the following order: 'Complainant absent. Accused discharged':

Held, that as there was only one case before the Court, the Magistrate must be deemed to have acted under section 259, Criminal Procedure Code, and that the order did not operate as an acquittal of the accused even in respect of the offence under section 352, Indian Penal Code. [p. 518, cols. 1 & 2.]

Where there are two offences complained of, one of which is triable as a summons case and the other as a warrant case, both arising out of the same transaction, the Court cannot separate the two, applying two kinds of procedure, but should adopt the procedure relating to the graver charge, *i. e.*, the warrant case. [p. 518, col. 2.]

Per *Napier, J.*—Unless the Court chooses to separate the two offences and take them up, one as a warrant case and the other as a summons case, the fact that one of the offences complained of and tried by him is punishable by six months' imprisonment or less does not make that part of the trial a summons case. [p. 518, col. 2; p. 519, col. 1]

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the 3rd Presidency Magistrate, George Town, Madras, in Calendar Case No. 15911 of 1917.

FACTS of the case appear from the judgment.

Mr. *R. N. Aiyangar* (for Mr. *M. Narasimham*), for the Petitioner, argued that the lower Court was wrong in treating the order as an acquittal under the lesser charge. Both the offences were to be tried together and the order must be deemed to have been passed with reference to the graver charge. The Magistrate could not, and did not, intend to split up the charges at that stage.

Mr. *W. V. Rangasami Aiyangar*, for the Accused, contended that as it was in the Magistrate's option to try them as two separate charges, it must be presumed that he did so and so far as the offence under section 352 was concerned, there was an acquittal.

The Crown Prosecutor, for the Crown.

ORDER.

ABDUR RAHIM, J.—A complaint was made under sections 352 and 504, Indian Penal Code, before the 2nd Presidency Magistrate. On the date fixed for the case the complainant was absent and the Magistrate discharged the accused. Then a fresh complaint was lodged with reference to the same transaction before the 3rd Presidency Magistrate and he held that so far as the offence under section 352, Indian Penal Code, was concerned, the order of the 2nd Presidency Magistrate operated as an acquittal and that the case should be proceeded with only with reference to the offence under section 504, Indian Penal Code. We are asked to consider whether the order of the 3rd Presidency Magistrate that there has been an acquittal within the meaning of the law with respect to the charge under section 352 by reason of the previous order of the 2nd Presidency Magistrate, is right.

The case relating to an offence under section 352 is a summons case, inasmuch as the punishment for such an offence is not more than 6 months' imprisonment, while the case relating to section 504, Indian Penal Code, is a warrant case, the punishment under this section being more than 6 months' imprisonment. It has been ruled in *Rajnarain Koonwar* v. *Lala Tamoli Raut* (1) that where there are two offences complained of, one of which is triable as a warrant case and the other as a summons case, the proper procedure to be followed is that relating to the greater charge, namely, that of a warrant case. There is no express provision in the Criminal Procedure Code with reference to this matter. The learned Judges of the Calcutta High Court apparently proceeded on a general principle that

(1) 11 C. 91; 5 Ind. Dec. (N. S.) 819

the procedure to be followed should be that laid down with reference to the major charge and not the more summary procedure with reference to the minor offence. Now the Magistrate under section 235 of the Criminal Procedure Code is empowered, where more than one offence has been committed by a person by a series of acts so connected together as to form the same transaction, to try all the offences at one trial or separately. Here the transaction in which the two offences are alleged to have been committed was undoubtedly one and the same and the Magistrate could, therefore, try both the offences at one trial.

Then the question is whether he treated the case before him as a summons case or a warrant case, or as two cases, one a summons case and the other a warrant case. It seems to me that if he wanted to try the two offences together, the case would be one and not two separate cases: and the punishment which could be awarded against the accused in such a case would be more than 6 months' imprisonment and that would bring it within the definition of a warrant case. It has been pointed out by the learned Pleader for the accused that the complainant was absent when the case was taken up and he argues that it was open to the Magistrate at that stage to separate the two charges and try them as two different cases, one a summons case and the other a warrant case, and that we must presume that he did so and, therefore, his order of discharge must be taken to amount to an acquittal with reference to the offence under section 352 But the Magistrate passed only one order, "complainant absent. Accused discharged." If he was, as suggested by the learned Pleader for the accused, treating the matter for trial before him as two separate cases and wanted to deal with the charge under section 352, Indain Penal Code, under section 247 of the Criminal Procedure Code, the proper order for him to pass would have been one of acquittal. But he did not pass any such order. The order he passed was one of discharge, which would be the proper one if he treated the case before him as a warrant case coming under section 259, Criminal Procedure Code, which authorises him, in the absence of the complainant in a warrant case, to discharge the accused if the offence complained of was compoundable. It would *prima facie* be unreasonable to suppose that where there are two charges arising out of the same transaction the Magistrate would think of separating the two, applying thereto two kinds of procedure. There was one transaction in the course of which the two offences are alleged to have been committed and in such a case the proper procedure, ordinarily speaking, is to have one trial; and then, as laid down in *Rajnarain Koonwar* v. *Lala Tamoli Kaut* (1), the case ought to be treated for purposes of procedure to be followed as a warrant case having regard to the graver charge. This rule has been followed in *Rallabandi Sobhanadri, In re* (2) by a learned Judge of this Court sitting singly and also in *Hossein Sardar* v. *Kalu Sardar* (3). It is also mentioned with approval in *Samsudin, In re* (4). I would, therefore, set aside the order of the 3rd Presidency Magistrate in so far as it holds that the order of the 2nd Presidency Magistrate dated the 27th August 1917 amounts to an acquittal of the offence under section 352, Indian Penal Code.

NAPIER, J.—I agree. In my opinion there was no summons case before the 2nd Presidency Magistrate at all. The Magistrate took the complaint on his file, a number was given to it and he was prepared to hear it. The complainant was absent and he passed an order which was undoubtedly intended to be an order under section 259 of the Criminal Procedure Code. It is therefore, clear to me that he was trying the whole case as a warrant case. The definition section does not speak of summons *offences* and warrant *offences* but of summons cases and warrant cases, and has reference to the case before the Court. Where the Code deals with offences it divides them into cognizable and non-cognizable, but where it is dealing with procedure then it speaks not of offences but of cases. I am, therefore, satisfied that, unless the Magistrate chooses to separate the two offences which are

(2) 29 Ind. Cas. 668; 39 M. 503; 2 L. W. 574; 18 M. L. T. 92; (1915) M. W. N. 546; 16 Cr. L. J. 540.
(3) 29 C. 481; 6 C. W. N. 599.
(4) 22 B. 711; 11 Ind. Dec. (N. S.) 1056.

complained of and take them up, one as a warrant case and the other as a summons case, the fact that one of the offences complained of and tried by him in one case is one punishable by 6 months or less does not make that part of the trial a summons case. In this view it seems to me that the Magistrate had no option but to pass an order under section 259 if he decided to dispose of the case and that it was not open to him to apply the procedure which is only applicable where he is in fact trying a summons case, namely, the procedure under section 247. For these reasons I agree with the order proposed by my learned brother.

M. C. P.

Order set aside.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No 873 OF 1917.

February 26, 1918.

Present:—Justice Sir George Knox, KT., and Mr. Justice Walsh.

MAHA RAM AND OTHERS—APPELLANTS

versus

EMPEROR—OPPOSITE PARTY.

Christian Marriage Act (XV of 1872), ss. 3, 68—'Professing Christian religion', meaning of—Act, scope of—S 68, applicability of—Christian marrying according to Hindu rites—Offence—Interpretation of Statutes—Estoppel, doctrine of, whether applies to Criminal Law.

Per *Knox, J.*—The Christian Marriage Act has to be so construed that no case be held to fall within it which does not fall both within the reasonable meaning of its terms and within the spirit and scope of the enactment. No violence must be done to its language in order to bring people within it, but rather care must be taken that no one is brought within it who is not within its express language. [p. 520, col. 1.]

It is not competent to a Court to extend the words of an enactment by construction. [p. 520, col. 1.]

The interpretation to be placed upon the words of section 68 of the Christian Marriage Act must be one which harmonises with the context and promotes in the fullest manner the policy and object of the Legislature. [p. 520, cols. 1 & 2.]

The word 'means' in section 3 of the Christian Marriage Act is an inclusive term and, therefore, no one except a person who professes the Christian religion, comes within the purview of section 68 of the Act. [p. 520, col. 2; p. 521, col. 1.]

A person is not a 'person professing the Christian religion' within the meaning of Act XV of 1872, simply because he is baptised as an infant, when he has no possibility of saying to the world what is the faith to which he belongs, nor can any importance be attached to the fact that he attends a Christian school. The dressing as a Christian, especially in the *Bhangi* class, is not conclusive on the point either. [p. 522, cols. 1 & 2.]

A person cannot be said to profess the Christian religion if at the time of his marriage he performs *devi ka puja*. [p. 522, col. 2.]

Quære.—Whether section 68 of Act XV of 1872 was intended to penalise marriages other than those intended to be or purporting to be marriages under the Act. [p. 522, col. 2.]

Per *Walsh, J.*—A person, who on the eve of his marriage resists all pressure and persuasion to be married as a Christian by a Christian ceremony and who, having by birth and connection other religious associations, deliberately decides to marry a sweeper according to sweeper rites and does public worship to Hindu gods in the presence of his relatives and friends, is not 'a person professing the Christian religion' within the meaning of section 3 of the Christian Marriage Act. [p. 522, col. 2.]

The principle of estoppel has no place in the criminal law and the idea of a Christian by estoppel is a contradiction in terms. [p. 523, col. 1.]

The object of Act XV of 1872 is not to prevent people marrying as they wish, but to enable them to protect themselves and their posterity by a lawful and binding marriage if they wish to be married as Christians. [p. 523, col.1]

There is no express prohibition preventing a professing Christian from doing violence to his faith and marrying a non-Christian by a non-Christian ceremony. [p 523, col. 2.]

Section 68 of the Christian Marriage Act does not make it criminal for a professing Christian to marry by a ceremony which is void under section 4 of the Act. [p 523, col. 2.]

It refers to a class of persons who solemnize or profess to solemnise a Christian marriage under the Act not being authorized by section 5 to do so. [p. 524, col. 1.]

Criminal appeal from the order of the Additional Sessions Judge, Mainpuri, dated the 17th September 1917.

Messrs. *Nihal Chand* and *Brleshwari Prasad*, for the Appellants.

Messrs. *A. E. Ryves* (Government Advocate) and *R. K. Sorabji*, for the Crown.

JUDGMENT.

KNOX, J.—Maha Ram, who described himself as son of Kallu, by caste a sweeper, Mangli son of Sunder, sweeper, and Bachhan son of Laiq, sweeper, have been convicted of an offence under section 68 of Act No. XV of 1872. In the case of Maha Ram section 109 of the Indian Penal Code is to be read with section 68 of Act No. XV of 1872.

The case for the prosecution is that Maha Ram is a Christian; that on the 3rd of

June 1917 he was married to the daughter of one Shib Lal a *Bhangi* and that Bachhan and Mangli were "Mans" or so-called priests of the sweeper class who solemnised the marriage according to *Bhangi* rites. The assessors gave it as their opinion that Maha Ram was not a Christian and that therefore no offence under section 68 of Act No. XV of 1872 had been committed. The learned Sessions Judge, however, was of a different opinion. He found the accused persons guilty and sentenced them each to undergo rigorous imprisonment for a term of one year. The appellants have been represented in this Court by learned Counsel. The contention on behalf of the appellants is that section 68 of the Christian Marriage Act does not apply; that Maha Ram was not a Christian at the time of his marriage; and that it is not proved that Bachhan and Mangli solemnised the marriage. The first point, therefore, that arises for consideration is whether Maha Ram was at the time of the marriage a Christian.

Act No. XV of 1872 (and specially the section concerned, a section imposing what may amount to a very severe punishment) has, under the well-known rules for construction in such cases, to be so construed that no case be held to fall within it which does not fall both within the reasonable meaning of its terms and within the spirit and scope of the enactment. No violence must be done to its language in order to bring people within it, but rather care must be taken that no one is brought within it who is not within its express language: *London County Council* v. *Aylesbury Dairy Company* (1). As Abbott, C. J., pointed out in *Proctor* v. *Manwaring* (2), it is not competent to a Court to extend the words by construction.

Now Act No. XV of 1872 was an Act to consolidate and amend the law relating to the solemnisation in India of the marriages of Christians. This was the legislative intent, and it will have to be seen that the interpretation placed upon the words in this section is one which harmonises with the context and promotes in the fullest manner the policy and object of the Legislature.

The term "Christian" is interpreted in section 3 of the Act and runs as follows: "The expression '*Christians*' means persons professing the Christian religion." The use of the word "means" in this passage shows that the definition is a hard and fast definition and that no other meaning can be assigned to the expression than is put down in the definition: *Gough* v. *Gough* (3) and *Bristol Trams & Carriage Co.* v. *Bristol Corporation* (4). In several sections of the Act, as for instance, sections 23, 37, etc. another term is used, namely, "*Native Christians*," also there is a part of the Act which is entitled "Marriage of Native Christians" and which extends from section 60 to section 65 of Act No. XV of 1872.

Section 3 interprets the expression "Native Christian." The meaning given to this latter expression is different from the meaning given by the Act to the expression "Christian". It includes the Christian descendants of natives of India converted to Christianity as well as such converts. If the Legislature had contemplated applying section 68 to a Christian, *i. e.*, a person professing the Christian religion and had wished to comprehend within it a Christian descendant of a native of India, it would have been easy to provide for this in section 68. That no such provision was made confines section 68 strictly to persons who at the time of marriage were persons professing the Christian religion. It is important to notice this, as occasionally in the argument on behalf of the prosecution an attempt was made to contend that section 68 applied not only to a Christian but also to a Native Christian. I am unable to accept this contention and I hold that the issue which I have to decide is whether Maha Ram at the time when he was married to the daughter of Shib Lal was or was not a person professing the Christian religion. Again I repeat the word "means" which is to be found in section 3 is an

(1) (1898) 1 Q. B. 106; 67 L. J. Q. B. 24; 77 L. T. 440; 61 J. P. 759.
(2) (1819) 3 B. & Ald. 145 at p. 148; 106 E. R. 616.
(3) (1891) 2 Q. B. 665; 60 L. J. Q. B. 726; 65 L. T. 110; 39 W. R. 593; 55 J. P. 807.
(4) (1890) 59 L. J. Q. B. 441 at p. 449; 25 Q. B. D. 427; 63 L. T. 177; 38 W. R. 693; 55 J. P. 53,

inclusive term and, therefore, no one except a person who professes the Christian religion comes within the purview of section 68.

This drives me back upon the necessity of deciding who is a person who professes the Christian religion.

I have not been referred to, nor have I been able to find, any precedent which lays down clearly what meaning is to be attached to the words "profession of Christianity".

Murray in the Oxford Dictionary, Volume VII (1909), interprets it thus:—

"To affirm or declare one's faith in or an allegiance to; to acknowledge or formally recognise as an object of faith or belief (a religion, principle, rule of action, God, Christ, a saint, etc.")

In the case before us we have not to deal with a person of an immature age or one who for any reason is unable to give a reasonable account of the faith that he holds, *e. g.*, an orphan of tender years in a school, etc. For several years Maha Ram has been a grown up lad mixing in village in school life. There must have been many opportunities for observing and noting what he acknowledged or formally recognised as an object of faith or belief, and I should expect to have been referred to abundant evidence on this point. He is the son of one Kallu.

Regarding Kallu the evidence is that he was elected to the position of elder in the Presbyterian Church; that he was ordained by the Presbytery; that he can under certain circumstances administer sacraments; that he is a moderator every year; that he has been confirmed; that he sits upon session as *sir punch* of a local church; that he was an officiating elder up to and after the marriage of Maha Ram; that he was an outspoken preacher; that he prayed and preached Christianity; that he taught Christianity in his own village and in adjoining villages; that on one occasion when a Thanedar said he would not believe Kallu to be a Christian unless he prayed, Kallu offered up prayers in public. All this is strong *prima facie* evidence of his having been a person who professed the Christian religion.

The same might be said of evidence given regarding Bachhan and Mangli. It does go into as many details, but it gives specific instances where these men "professed" the Christian religion. I have searched in vain for similar definite and specific information in the case of Maha Ram. There is evidence which points the other way, for whatever it is worth. It seems to me of very little value and so I do not go into it.

The evidence upon this point given by the Crown consists of evidence given by;—

(1) The Rev. A. W. Moore, a Minister of the Presbyterian Church and a Missionary in charge of the Mission at Mainpuri;

(2) Isa Das, the own brother of Maha Ram;

(3) Sunder, who says that he became a Christian some five years ago;

(4) Behari;

(5) The Rev. W. T. Mitchell, Missionary at Mainpuri;

(6) Madan Lal, a petition-writer.

The evidence of the Rev. A. W. Moore is to the effect that Maha Ram is a Christian and that Bachhan and Mangli are also Christians. When cross-examined as to the meaning of this word Mr. Moore says: "We call a man Christian though not confirmed or professing the Christian religion;" further on, while saying that Bachhan and Mangli had both to his knowledge professed Christianity, he does not make the same statement regarding Maha Ram. All that he says about Maha Ram is that his name was entered in the Baptismal Register, which sacrament was apparently administered at the time when Maha Ram was a babe 3 years old, that he never up to the time of his marriage told the witness that he was not a Christian, and that though he has seen him since his marriage he has not denied that he is a Christian. When the witness on one occasion said to him that judging by the clothes he wore no one would take him for a Hindu, he laughed and said "no". The witness got Maha Ram entered in the Industrial School at Farrukhabad to learn carpentry. He was at the school up to within 2 or 3 days of the wedding. The school is for Christian boys only and witness sent him there as a Christian. This is all upon the point. It does not appear then from the evidence of this witness that Maha Ram ever took part in Church ceremonies such as prayers and the like.

The next evidence in point of importance is that of Rev. W. T. Mitchell. He baptised Maha Ram when he was 3 years old. In his examination-in-chief this witness says that Maha Ram when he was in the school

at Mainpuri professed to be a Christian ; that he took part in church ritual a little before March 1915, but the witness does not specify what part or what particular ritual. In cross-examination this witness says that while all the brothers and sisters of Maha Ram had been baptized they have, with the exception of one brother the witness Isa Das, been married according to *Bhangi* rites. They have not strictly adhered to the tenets of Christianity.

Isa Das the brother of Maha Ram gave it as his deposition that Maha Ram is a Christian. He never knew that Maha Ram had renounced Christianity. In cross-examination he had to admit that he lived apart from Maha Ram and that one of his sisters was married according to *Bhangi* rites.

The rest of the evidence for the Crown is of little importance. It is, however, abundantly apparent from it that Maha Ram had given it out that he intended to have his marriage solemnised according to *Bhangi* rites. Much attempt was made to dissuade him and his father from doing this, but the persuations were in vain and it appears from the evidence of Mr. Moore that in a marriage solemnised according to *Bhangi* rites idolatry takes place and *devi ka puja* or the worship of the goddess *devi* is gone through.

In brief then it would appear from the above evidence that no distinct "profession" of the Christian religion is attributed to Maha Ram beyond the fact that he dressed as a Christian, that when he was at the school at Fatehgarh he wrote one or more letters in which he called himself *Mahbub Masih*. He had never been admitted to sacrament and according to the witness Moore such admission depends upon a confession of faith. This Maha Ram has never been shown to have made. His brothers and sisters with the exception of Isa Das are all persons who have been married with *Bhangi* rites and at such a marriage an open profession of idolatry is made before witnesses.

I am not prepared to hold that a person is a person professing the Christian religion within the meaning of Act XV of 1872 simply because he is baptised as an infant, when he has no possibility of saying to the world what is the faith to which he belongs, nor do I attach any particular value to the fact that he attends a Christian school. The learned Counsel for the Crown wished me to hold that a person who took the advantages supplied by a Christian school was estopped by his conduct from professing that he was not a Christian. The dressing as a Christian seems also to me very far from being conclusive on this point especially in a class of persons who belong to the *Bhangi* class. The furthest point urged in this direction by the prosecution is perhaps the writing of letters under the title of *Mahbub Masih*; but no letter was produced nor was it shown that letters so written were at all of a public nature. On the other hand we have undoubtedly a profession in the case of his performing *devi ka puja* at the time of his marriage. That act was undoubtedly a profession, an act entirely inconsistent with I might add repugnant to, the view that the person performing it was a person professing the Christian religion I am not satisfied, therefore, that at the time when this marriage was solemnised Maha Ram was a Christian.

Holding as I do that Maha Ram was not a Christian at the time of this marriage, it follows that no offence under the Act was committed on the 3rd of June 1917, either by the so called principals Managli and Bachhan or by the abettor Maha Ram.

I do not consider it necessary to go into the question whether section 68 of Act No. XV of 1872 was intended to penalise marriages other than those intended to be or purporting to be marriages under the Indian Christian Marriage Act, 1872. It seems extremely doubtful whether it was so, but as I have said before the question does not arise for decision in this case.

WALSH, J.—I entirely agree. I should hold, apart altogether from the general history of Maha Ram to which my brother has referred, that when a person on the eve of his marriage resists all pressure and persuasion to be married as a Christian by a Christian ceremony, and, having by birth and connection other religious associations, deliberately decides to marry a sweeper, according to sweeper rites, and does public worship to Hindu gods in the presence of his relations and friends, he is not "a person professing the Christian religion."

Mr. Sorabji contended that Maha Ram was "estopped" from denying his Christianity. Apart from the fact that the principle of estoppel has no place in the criminal law, the idea of a "Christian by estoppel' is a contradiction in terms.

The wider question, as to the real ambit of section 68 of the Indian Christian Marriage Act of 1872, is really involved in what we have decided and I propose to state my views about it for the following reasons. The case for the prosecution was argued mainly upon that ground; the learned Sessions Judge who decided this case obviously did not like it, but felt himself bound to follow the decision in *Kolandai Velu* v. *Dequidt* (5); there has already been a division of judicial opinion on the subject; the question is one of public importance; I entertain no doubt upon it, and I think that prosecutions like the present should be discouraged.

It is important to consider the scope and object of this legislation. It is a consolidating and amending Act, replacing the English Acts of 1818 and 1851 relating to marriages in India, and the Indian Acts of 1852, 1865 and 1866 dealing with the same subject. These were enabling Statutes providing special conditions appropriate to the special circumstances and difficulties which are likely from time to time to confront those in India who wish to be married by Christian marriage. The history of the legislation shows that doubts had arisen as to the validity of certain marriages, and it was clearly intended to facilitate such marriages and to validate them and at the same time to guard them by strict requirements. The legislation is not unlike the Foreign Marriages Act in England. The object of the Act is not to prevent people marrying as they wish, but to enable them to protect themselves and their posterity by a lawful and binding marriage if they wish to be married as Christians. The Act is to be called the Indian Christian Marriage Act, and, in my opinion, it deals with Christian marriages and Christian marriages alone. In future such marriages can only be lawfully effected under this Act. If they are not solemnized by one of the persons described in section 5, they are made void by section 4. The Act does not prohibit even a professing Christian from marrying otherwise than under the Act if he wishes to do so.

We, therefore, start with this that there is no express prohibition preventing a professing Christian from doing violence to his faith and marrying a non-Christian by a non-Christian ceremony. His marriage may not be valid by English Law as a Christian marriage in India, but it is not forbidden to him. It would be a startling result of this Act, if such a person being free to choose and not prohibited from marrying otherwise than by a Christian marriage, should find himself liable to transportation for abetting the person who marries him.

An analysis of Part VII of the Act, which deals with penalties, shows that such penalties are in the main directed against the offence of either one party or the other, or the officiating celebrant, or the official who may lawfully authorize the celebrant, wilfully and falsely doing some act in pretended pursuance of the Statute which probably would, and certainly might, render the whole proceeding invalid. Omitting section 68 for the moment, every other offence dealt with is an act done which the Act requires to be done, and which is done either by a person lawfully authorized but by unlawful means, or by lawful means by an unauthorised person.

Turning to section 68 it is to be noted that the section does not make it criminal for a professing Christian to marry by a ceremony which is void under section 4.

It is confined solely to the persons who solemnize the marriage, and the Act makes it criminal for a person to solemnize a marriage who is not authorized by section 5 to do so. But section 5 only authorizes persons to solemnize Christian marriages, and nobody can solemnize Christian marriages in India who is not authorized by that section. Section 5 itself uses the word "Marriages" in the widest possible

(5) 41 Ind. Cas. 664; 40 M. 1030; 33 M. L. J. 113; 6 L. W. 126; 22 M. L. T. 163; (1917) M. W. N. 589; 18 Cr. L. J. 840 (F. B.).

sense. "Marriages", it enacts, "may be solemnized in India," by certain specified persons. But this does not mean that no other marriages may be solemnized in India. That would be an impossible contention. It must, therefore, mean "Marriages under this Act," or in other words "Christian marriages". I read section 68 therefore as referring to a class of persons, namely, those who solemnize or profess to solemnize a Christian marriage under this Act, not being authorized by section 5 to do so. I cannot believe that the Legislature could have intended to sweep into the net of the criminal law, through an indirect piece of legislation by reference, not only every professing Christian who chooses not to be married as a Christian, but every non-Christian whom such persons might marry, and every non-Christian who took part in the solemnisation or celebration. This would be contrary to the ordinary mode of interpretation of a Statute, and would produce far-reaching and almost ludicrous results. I do not think the question turns upon the word "solemnize" so much as upon the object and scope of the Act. The case of *Queen-Empress* v. *Paul* (6) decided in 1896 turned on the word "solemnize". The Sessions Judge had acquitted on the ground that the part taken by the Hindu priest did not amount to solemnisation. He seems to me to have been feeling for a way of evading the construction of the Act now contended for and to have seized on the word "solemnisation". The Appellate Court disagreed, but I think their minds were diverted from the real difficulty. They went on to hold that the contracting parties themselves ought to have been convicted, of abetment. As I have said, this is a startling result, and satisfies me that there must be a fallacy in the reasoning which reaches it. I have carefully considered the recent case of *Kolandai Velu* v. *Dequidt* (5) decided by the Chief Justice and two Judges on a reference by Mr. Justice Napier. I cannot agree with it. I see no answer to the reasoning in Mr. Justice Napier's referring order, while the Chief Justice slips into an apparent error. "Section 68," he says "merely provides a penalty for solemnizing or professing to solemnize such a marriage contrary to the provisions of the Act." This is not so. It provides a penalty for any person who does under section 5 what he is not authorized to do, namely, solemnize a Christian marriage.

Mr. Sorabji urged that the intention of the Legislature was clear. They did not want the country flooded with void marriages with all the incidental evils as to illegitimate children and questions of property and inheritance. This result would be equally produced by a state of concubinage not regularized by any form of marriage, and the interpretation contended for might be said rather to encourage concubinage. On the other hand, as was pointed out by the Government Advocate who appeared at our request so that the view of Government might be presented to us, the Madras High Court in 1910 held that such a marriage as the present may be valid by Hindu Law if a custom is established governing such marriages. See *Muthusami Mudaliar* v. *Masilamani* (7). In that case the bride was a Roman Catholic. She removed the cross from her neck, and her forehead was smeared with holy ashes by a Brahman priest The trial Court spoke of "the prevalance of the practice of Hindus marrying Christian girls according to Hindu rites and such girls after their marriage following the Hindu religion" The validity of the marriage was upheld by the Madras High Court. This seems to me an additional ground for differing from the decision of the so-called Madras Full Bench in *Kolandai Velu* v. *Dequidt* (5). The result seems that, at present according to the law in Madras, a valid Hindu marriage may be a criminal offence, both on the part of the principals and on the part of those who celebrate it. I cannot accept this consequence, which illustrates very forcibly the importance of holding to the principle which my brother Knox has reiterated, of not straining a criminal enactment beyond what is included in its express terms.

BY THE COURT.—We admit this appeal. We find Mangli and Bachhan not guilty of the offence charged, *i. e.*, an offence under section 68 of Act No XV of 1872, and Maha Ram of abetment of the aforesaid act and direct that they be released. We understand they were permitted to give bail; if they did give bail, the bail-bonds will be discharged.

Appeal allowed.

(6) 20 M. 12; 1 Weir 820; 7 Ind. Dec. (N S.) 9.

(7) 5 Ind. Cas. 42; 33 M. 342; 7 M. L. T. 17; 20 M. L. J. 49.

AHAD SHAH *v.* EMPEROR.

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 1335 OF 1917.

March 15, 1918.

Present:—Sir Henry Rattigan, KT., Chief Judge, and Mr. Justice Wilberforce.

AHAD SHAH—PETITIONER

versus

EMPEROR—RESPONDENT.

Press and Registration of Books Act (XXV of 1867), s. 6—Refusal of District Magistrate to authenticate declaration—Proceedings, whether judicial—Revision—High Court, power of interference of.

A District Magistrate, in acting or purporting to act under section 6 of Act XXV of 1867, cannot be said to exercise jurisdiction as a Court, Criminal or Civil, nor can his proceedings be said to be in any sense judicial. [p. 527, col. 2.]

Where, therefore, a District Magistrate refused to authenticate a declaration under section 6 of the Act:

Held, that the proceedings of the Magistrate were purely ministerial and the Chief Court had no power to interfere with his proceedings. [p. 527, col. 2.]

Annie Besant v. *Emperor*, 37 Ind. Cas. 607; 39 M. 1164; (1916) 2 M. W. N. 497; 4 L. W. 625; 32 M. L. J. 151; 18 Cr. L. J. 239, followed.

Petition, under sections 435 and 439 of the Criminal Procedure Code, for revision of the order of the District Magistrate, Lahore, dated the 7th August 1917, refusing to accept the declaration made by the petitioner under sections 5 and 6 of the Press and Registration of Books Act of 1867.

FACTS appear from the judgment.

The Hon'ble Mr. *Fazl-i-Husain* (with him Mr. *Ghulam Rasul*), for the Petitioner, said the *Observer* Press was originally started at Ludhiana in 1894 and Khwaja Ahad Shah was keeper of the press from the very beginning. In 1895 the press was removed to Lahore and Khwaja Ahad Shah continued to be the keeper, but the printer was another man who was also the manager. In 1917, the services of this manager were dispensed with. Section 3 of Act I of 1910 provided that if the keeper of a press became the printer, it was not necessary for him to deposit a security. Khwaja Ahad Shah, in making the recent declaration before the District Magistrate of Lahore described himself as keeper of the press and Counsel contended that under Act XXV of 1867 the Magistrate had no business to refuse to authenticate his declaration.

Counsel proceeding, said the Magistrate's function was a 'judicial' one.

[RATTIGAN, C. J., asked if Counsel had any authority on the point. So far as was apparent, the Act itself did not say so specifically.]

That might be so, but was it likely that the Legislature should have intended that a valuable right vesting in the keeper of the press should be taken away by the executive, and there should be no authority to look into their action?

[RATTIGAN, C. J.—The question was whether the High Court had any jurisdiction.]

Act XXV of 1867 having made a provision that a "Magistrate" shall authenticate a declaration, would the Legislature leave the matter to his pleasure? The later Acts had not left the control entirely in the hands of the executive. Was it likely that as far back as 1867 the Legislature should have omitted to make any such provision?

[RATTIGAN, C. J.—The question was one of fact. There was the Seditious Meetings Prevention Act, for instance, under which power was vested in the District Magistrate to prohibit meetings and there was no provision to enable the High Court to revise that order.]

The penalty came only under section 6 of that Act, where a judicial check was provided.

[RATTIGAN, C. J.—But if a meeting was stopped the Court could not interfere.]

[Mr. *Petman*, for the Crown, said the Act vested the authorityin the District Magistrate, a Magistrate of the First Class and the Commissioner of Police.]

Mr. *Fazl-i-Husain* said the Magistrate was a judicial officer. His only doubt was regarding the Commissioner of Police.

Mr. *Petman*.—The Magistrate was the equivalent in the mofussil of the Commissioner of Police who acted in the Presidency Towns.

[RATTIGAN, C. J.—That was exactly the point—whether the Court had the power to revise the order or must leave it to the executive authorities.]

Mr. *Petman*.—The Court had no jurisdiction.

Mr. *Fazl-i-Husain* said he was afraid it was rather the executive way of looking at the matter. If that was so, the executive could close down every press.

[RATTIGAN, C. J.—That might be so in theory, but in practice it was almost unthinkable that the executive would take the

responsibility of shutting down every press.]

Counsel said it was a very important point.

[RATTIGAN, C. J.—There were no authorities on the point.]

There were.

[RATTIGAN, C. J., said the point Counsel took up was that the word 'Magistrate' imported that the proceedings were judicial.]

That was so. What he urged was that here the enactment gave no discretion to the Magistrate but was imperative that the Magistrate "shall" authenticate the declaration.

[RATTIGAN, C. J.—But the question was whether this Court had jurisdiction to interfere in this case or not. The difficulty was there were no authorities on the point.]

[Mr. *Petman* said the Court had no jurisdiction and the case could not go on.

There were no direct authorities but there were some which had a bearing on the matter.

Counsel said the question was whether the function to be exercised by the Magistrate was a judicial or an executive one. The test as to whether the proceedings were judicial was laid down in *Chanan* v. *Emperor* (1), where it was held that "judicial proceedings" were proceedings in which evidence might be legally taken on oath.

Counsel referred to the proceedings then going on in Madras in connection with the "New India" newspaper, where Mr. Telang who was alleged to have severed his connection with the journal as its printer had been summoned to make an affidavit.

[RATTIGAN, C. J.—The action taken in Madras was not binding on the Punjab Chief Court.]

This was true but their Lordships could consider the fact.

Counsel next referred to *Ilam Din* v. *King-Emperor* (2), wherein it was held that sections 435, Criminal Procedure Code, did not limit the revisional jurisdiction of the Chief Court to judicial proceedings, so in the present proceedings the Court had power to revise the order of the District Magistrate of Lahore as it was the order of a 'Magistrate.'

(1) 5 Ind. Cas. 257; 1 P. R. 1910 Cr.; 3 P. W. R. 1910 Cr.; 161 P. L. R. 1910; 11 Cr. L. J. 90.

(2) 9 P. R. 1908 Cr.; 29 P. W. R. 1908 Cr.; 8 Cr. L. J. 260.

Counsel next cited *Queen-Empress* v. *Tulja* (3), wherein it was held that an inquiry was judicial if the object was to determine a jural relation. The very fact of authentication by a Magistrate created a jural tie between him and the community, as the very fact of authentication made the declarant *prima facie* liable to the community for all that appeared in his paper. Counsel said there were two parties between whom the matter was to be settled, the keeper of the press and the State.

Mr. *Petman*, Government Advocate, for the Crown, said the history of the case was interesting and had an important bearing on the matter. The printer was one Nizam-ud-Din, who left the press. Then Barkat Ali, Editor of the paper, applied for declaration and he was required to give security. It was to get over this that Ahad Shah came forward to say:] "I am the printer." He had always lived at Ludhiana. He knew nothing of printing and did not know the language in which the paper was printed.

[Mr. *Fazl-i-Husain*.—Mr. Petman was going on the merits.]

Mr. *Petman* said that the merits had a bearing.

[Mr. *Fazl-i-Husain*.—Mr. Petman could not go beyond the file.]

The facts could be easily proved. The record in the Deputy Commissioner's Court would bear him out.

[Mr. *Fazl-i-Husain*.—Let that record be brought in by all means but reference could not be made to it without putting it in.]

He asked if Mr. Petman admitted the jurisdiction of the Chief Court.]

[RATTIGAN, C. J., asked if the Government Advocate admitted the jurisdiction.]

Mr. *Petman* said there was no question regarding the exercise of functions by the Officiating District Magistrate of Lahore, but he did not admit the jurisdiction of the Chief Court. The case-law not exactly on this point but having a bearing on it was to be found collected under section 435 in Sohoni's Criminal Law. The act of authentication was merely an executive or ministerial function which the Government had vested in an officer, who thus exercised civil functions and not magisterial. For instance, a Magistrate might be authorised to issue dog licenses, but here he had nothing

(3) 12 B. 35; 6 Ind. Dec. (N. S.) 509.

to decide. It was not a judicial function at all. The applicant made no attempt to go to the Commissoner or the Lieutenant-Governor.

Mr. *Fazl-i-Husain*, in replying, said Mr. Petman had contended that the authentication of the declaration was merely a civil function. Section 7 showed that the declaration was to be kept in the custody of the Court and a copy thereof was to be furnished when required with the stamp of the Court. The Magistrate's position as 'Court' was recognized by the Act itself.

[RATTIGAN, C. J. said the Act provided that one copy of the original was to be kept by the High Court or the principal Court of civil jurisdiction and another by the Magistrate.]

He did not think either the Chief Court or the District Judge's Court kept these copies. Besides the copy was to be authenticated with the official seal of the Court. What did it mean, he asked, but that the seal was the seal of the Magistrate as such ?

Counsel said he wanted to explain why they did not go up to the Commissioner or the Lieutenant-Governor. The reason was that they then believed, as they still did, that it was not an executive matter at all; otherwise they would have had no hesitation to go up to those authorities.

[RATTIGAN, C. J.—We understand it was because you believed that the Magistrate was exercising judicial functions and that consequently the High Court had power to revise.]

Mr. *Fazl-i-Husain* said it was so.

[RATTIGAN, C. J., asked Counsel to leave the difficult point to them for decision.]

JUDGMENT.—This is an application for revision of the order of the District Magistrate, Lahore, dated 7th August 1917, refusing to accept a declaration by Khwaja Ahad Shah, which was tendered by him to the District Magistrate under section 4 of Act XXV of 1867.

In the grounds for revision it is stated that on the 20th June 1917 the petitioner made and subscribed a declaration as the printer and publisher of the "Observer" periodical, Lahore, and that the District Magistrate acted in contravention of the express provisions of section 6 of Act XXV of 1867 by refusing to accept a declaration which under that section he was bound to authenticate by his signature and official seal.

It is objected that this Court has no power to revise the said order, inasmuch as it was one passed by an executive officer in his executive capacity. In our opinion this objection must prevail. It cannot be said that the District Magistrate in acting or purporting to act under section 6 of the Act was exercising jurisdiction as a Court, criminal or civil, or that his proceedings were in any sense judicial. It may be that under section 6 of the Act the Magistrate has no power to refuse to accept a declaration made and subscribed in the manner provided by sections 4 and 5, but if his proceedings were merely ministerial and not judicial, the fact that he acted in excess of his jurisdiction or that he wrongly refused to exercise powers which he was bound to exercise upon application made to him, would not give this Court power to interfere with his proceedings. Our conclusions are supported by the judgments delivered by the learned Judges of the Madras High Court in *Annie Besant* v. *Emperor* (4). We accordingly hold that we have no jurisdiction to entertain thie petition which is, therefore, rejected.

Petition rejected.

(4) 37 Ind. Cas. 607; 39 M. 1164; (1916) 2 M. W. N. 497; 4 L. W. 625; 32 M. L. J. 151; 18 Cr. L. J. 239.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 733 OF 1917.

(CRIMINAL REVISION PETITION NO. 583 OF 1917).

February 26, 1918.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Napier.

In re ANNASAMI NADAVAN AND OTHERS —ACCUSED—PETITIONERS.

Criminal Procedure Code (Act V of 1898), ss. 408, 413—Joint trial of several accused—Sentences, varying, award of—Appeal by persons sentenced to appealable terms—Right of representation of accused sentenced to non-appealable terms.

In an appeal under section 408 of the Criminal Procedure Code by some of the accused who are awarded appealable sentences in a trial in which the other accused are awarded non-appealable sentences, it is not competent to the latter to have

ANNASAMI NADAVAN, *In re.*

their case examined as if an appeal lay in their case as well.

Venkatakrishnayya, In re, 39 Ind. Cas. 294; 31 M. L. J. 837; 40 M. 591; 18 Cr. L. J. 454 and *Uruma Mudali, In re*, 23 Ind. Cas. 739; 16 M. L. T. 33; 15 Cr. L. J. 371, followed.

Petition, under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of Session of the Trichinopoly Division, passed in the Criminal Appeal preferred against the judgment of the Court of the Sub-Divisional Magistrate, Trichinopoly, in C. V. No. 94 of 1917.

FACTS appear from the judgment.

Mr. *E. L. Thornton*, for the Petitioner, argued that though there was no right of appeal for his client under section 413, Criminal Procedure Code, yet the effect of the Appellate Court's decision in the case of the co-accused who were convicted of the same offence and were given an appealable sentence should enure for his benefit as well. Petitioner had a right that the evidence against him should be examined. The argument was sought to be supported on the analogy of proviso (*b*) to section 408.

Mr. *P. R. Narayanasami Ayyar*, for the Public Prosecutor, for the Crown, argued that the language of section 413 was express and mandatory and debarred a right of appeal in cases covered by it.

ORDER.—The first contention of Mr. Thornton is that, though in this case the sentences of the petitioners are such that no appeal would lie in their behalf, by reason of the fact that they were tried with some other persons who received appealable sentences and preferred an appeal therefrom to the Sessions Judge, he was bound to examine the case of the petitioners also, as if an appeal lay in their case as well. We do not think that there is any support in the Criminal Procedure Code for such a contention. Section 408 says that when a person has been convicted by a First Class Magistrate, he may appeal to the Court of Session, but section 413 lays down that there shall be no appeal by such a person if the sentence passed is imprisonment not exceeding one month or a fine not exceeding Rs. 50. Mr. Thornton's argument is based upon proviso (*b*) to section 408 which says "when in any case an Assistant Sessions Judge or a Magistrate specially empowered under section 30 passes any sentence of imprisonment for a term exceeding four years, or any sentence of transportation, the appeal shall lie to the High Court." It is contended that in such a case an appeal would lie not only on behalf of the persons who have received the sentences mentioned in proviso (*c*), but also on behalf of other persons who were tried along with them, though the sentence passed in their case might be less than that specified in the proviso. We are not at all satisfied that this is what is meant by the proviso. But supposing it is, we do not see how it bears out the proposition put forward in this case. The language of section 413 is express and perfectly clear to show that in the cases covered by it, there shall be no appeal, and the first paragraph of section 408 which specifies the Courts to which the appeals of certain convicted persons will lie does not speak of any 'case', but of the persons convicted. No ruling of this Court or of any other High Court has been cited to us which bears out the contention on behalf of the petitioners. On the other hand there are rulings of this Court reported as *Venkatakrishnayya, In re* (1) and *In re Uruma Mudali* (2), which support the contrary proposition. The interpretation of the law in those cases is also in accordance with the practice of this Court, and so far as we are aware of the other High Courts as well. See *Reg.* v. *Muliya Nana* (3) and *Reg.* v. *Kalubhai Meghabhai* (4), which are referred to in *Venkatakrishnayya, In re* (1).

The only other contention raised before us relates to the sentences of the accused Nos. 3 and 9. They have been sentenced to rigorous imprisonment for a month each of the offences of which they were found guilty, namely, criminal trespass, rioting and hurt. We are unable to say that the sentences are too severe. The petition is dismissed. The accused, if on bail, will surrender to their bail and serve out the remaining portions of their sentences.

M. C. P.

Petition dismissed.

(1) 39 Ind. Cas. 294; 31 M. L. J. 837; 40 M. 591; 18 Cr. L. J. 454.

(2) 23 Ind. Cas. 739; 16 M. L. T. 33; 15 Cr. L. J. 371.

(3) 5 B. H. C. R. 24 Cr.

(4) 7 B. H. C. R. 35 Cr.

MITHAN LAL *v.* CHHAJJU SINGH.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 757 OF 1916.

March 6, 1918.

Present:—Mr. Justice Tudball and Mr. Justice Abdul Raoof.

MITHAN LAL—PLAINTIFF—APPELLANT

versus

CHHAJJU SINGH—DEFENDANT—RESPONDENT.

Mortgage, usufructuary—Lease given by mortgagor—Sale of equity of redemption—Ex-proprietary rights—Rent, liability to pay—Agra Tenancy Act (II of 1901), s. 10—U. P. Land Revenue Act (III of 1901), s. 36.

The defendant gave a usufructuary mortgage of his *zemindari* to the plaintiff, who on the same date gave a lease of the same, to last during the term of the mortgage, to the defendant, who remained in possession as *thekadar* paying rent to the plaintiff under the lease. The rent having fallen into arrears, the plaintiff sued defendant, obtained a decree and caused the equity of redemption to be sold in execution. The plaintiff's mortgage was notified at the time of sale. No application for mutation of names was made and the record stood as it was at the date of the mortgage. The plaintiff again sued the defendant for arrears of rent for a period partly prior and partly subsequent to the date of the sale of the equity of redemption. The defendant denied his liability for the latter period on the ground that as his equity of redemption had been sold, he had become an ex-proprietary tenant and that as no rent had been fixed by the Collector under section 36 of the U. P. Land Revenue Act, he was not liable to pay any rent in respect of that period:

Held, that so long as the mortgage subsisted, the defendant was a *thekadar* under his lease and as such liable to pay the rent stipulated for in the lease, whether or not he also became an ex-proprietary tenant of the *zemindari*. [p. 530, col. 1.]

Second appeal from a decree of the District Judge, Meerut, modifying that of the Assistant Collector, First Class, Bulandshahr.

Mr. *Sital Prasad Ghosh* (with him Mr. *Uma Shankar Bajpai*), for the Appellant.

Mr. *Haribans Sahai*, for the Respondent.

JUDGMENT.—This is a plaintiff's appeal. The facts out of which it has arisen are briefly as follows:—The defendant was the owner of a certain *zemindari* share, the area of which was some 13 *bighas* odd. On the 23rd of July 1908, he gave a usufructuary mortgage of this *zemindari* to the plaintiff. On the same date the plaintiff gave him a lease of the same *zemindari* share on payment of a sum of Rs. 70 14-0 per annum *plus* Rs. 23-11-0 Government demand, e'c. The defendant remained in possession as *thekadar* paying his rent to the plaintiff under the lease. On the 26th of June 1912, the plaintiff sued him on the basis of that agreement for arrears of rent and obtained a decree and in execution of his decree for the arrears of rent due under the lease, he attached and put to sale the defendant's equity of redemption. This was sold on the 20th of March 1913, and was purchased by one Bhuttu Mal. At the time of the sale the plaintiff's mortgage and one other mortgage were also notified. The price paid for the property at the sale was Rs. 40. Bhuttu Mal did not apply for mutation of names and the Government record still stands as it was on the date of the original mortgage. The plaintiff has now, on the basis of the lease, sued his *thekadar*, the defendant, for the rent for a period which commenced prior to the 20th of March 1913 and runs up to a date subsequent to that date. The defendant in his written statement merely pleaded that he was liable for the rent up to the 20th of March 1913, but that for the period subsequent to that he was no longer liable under the lease because his equity of redemption had been sold and purchased by Bhuttu Mal. The Court of first instance in the course of its judgment made the remark that "the mortgagor's right to redeem had been put to auction by the plaintiff-decree-holder who *had purchased it for Bhuttu Mal* on the 20th of March 1913." It is quite clear that the defendant had nowhere pleaded that Bhuttu Mal was the *benamidar* of the plaintiff or that Buttu Mal had purchased the property for and on behalf of the plaintiff. There was no issue on this point. There was no allegation or denial, no evidence and no finding. The Court of first instance held that the purchase by Bhuttu Mal of the defendant's equity of redemption did not affect the case at all, that the lease subsisted and that the defendant was liable under the lease. It accordingly decreed the suit. The lower Appellate Court on the defendant's appeal has held that after the 20th of March 1913 the defendant became the ex-proprietary tenant of the land because the equity of redemption had been sold; that he was entitled to take up his position as an ex-proprietary tenant and as no rent had been fixed, he was not liable to pay any rent for the period subsequent to the 20th of March 1913. The plaintiff appeals.

It is quite clear to us that the Judge of the Court below has misunderstood the nature of the plaintiff's claim. It is based on the *theka*

which was given to the defendant on the 23rd of July 1908. We will assume that the defendant is the ex-proprietary tenant of the land. He is equally a *thekadar* under the contract of the 23rd of July 1908. If the period of that contract has come to an end, then of course the plaintiff's claim must fail, because the *theka* no longer subsists, but so long as the *theka* subsists the plaintiff is entitled to recover from his *thekadar* the rent which the latter has agreed to pay. He may, as an ex-proprietary tenant, be a tenant of the land under himself as *thekadar*. If the *theka* had been given to an outside person, there is no question that so long as it subsists the *thekadar* would be liable for the rent. The lower Court in its judgment has stated that Bhuttu Mal *appears* to have been a *benamidar* for the plaintiff. It has, however, come to no decision on the point, nor could it do so, for the simple reason that the issue had not been raised, no evidence taken upon it, and there had been no decision on it. The point would have been material if it had been raised, because the lease was to subsist only so long as the mortgage subsisted. If the defendant had pleaded and had proved to the Court that the mortgage had come to an end, then the plaintiff's claim would have failed, but he is not allowed to raise a question of fact in second appeal on which there were no pleadings, on which there was no issues and to which no evidence was directed. The case must be decided on the assumption, right or wrong, that the mortgage still subsists and that Bhuttu Mal is the owner of the equity of redemption which was purchased in his name. This being so, the lease must still subsist and whether the defendant be or be not the ex-proprietary tenant of the land, he is liable as *thekadar* to his lessor. In this view we must allow the appeal, set aside the decree of the lower Appellate Court and restore that of the Court of first instance. The plaintiff will have his costs in all Courts. The Court of first instance granted the plaintiff a decree for what it has called "usual interest." This interest will run from the date of the suit up to the date of realization, and at the rate of 6 per cent. per annum simple.

Appeal allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEALS NOS. 2921 AND 2922 OF 1916.

July 12, 1917.

Present:—Mr. Justice Leslie Jones.

HOTU RAM AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

SUKHA RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom — Alienation by widow — Necessity—Husband's debts—Debts incurred by widow for maintenance—Anticipation of immediate wants.

A widow is justified in alienating property to pay her deceased husband's creditors and to raise money for her maintenance. The alienee is not bound to see to the application of the money. [p. 530, col. 2; p. 531, col. 1.]

Second appeal from the decree of the District Judge, Mianwali, dated the 27th July 1916, affirming that of the Subordinate Judge, 2nd Class, Bhakkar, dated the 29th October 1915, decreeing the suit.

The Hon'ble Pandit *Sheo Narain*, for the Appellants.

Bhagat *Gobind Das*, for the Respondents.

JUDGMENT.—This judgment deals with Civil Appeals Nos. 2921 and 2922 of 1916. The District Judge has dismissed suits by the uncles of one Hukam Chand deceased, challenging a sale and a mortgage by his widow for Rs. 200 and Rs. 600 respectively.

Hukam Chand died in April 1910 and the plaintiffs seized such parts of his property as was not mortgaged. It has been found as a fact that the widow, who had three female dependants, had nothing to live upon and that she was not assisted by her husband's reversioners.

In the deed of sale of a tumbledown house which was effected on 27th September 1911, the necessity alleged was that of paying certain of Hukam Chand's creditors. The plaintiffs say that they paid some of those debts, but they did not show that they had paid any of them by 27th September 1911, and the creditors may well have been pressing the widow. The debts certainly existed. The alienee was not bound to see to the application of his money, and the alienation was nonetheless for necessity if the widow found that she had to apply the sum of Rs. 200 to defray the expendi-

ture on bare livelihood of herself and her dependants.

In the mortgage which is dated 10th March 1913, she recited the fact that the sum borrowed, Rs. 600, was required to pay a bill which she had already run up with the alienee and for her expenses of living and was, if she did not require quite the whole sum borrowed, to defray debts already incurred; it is obviously impossible to sell immoveable property piecemeal month by month to pay current bills. The bulk of the money must have been already required, and if there was any anticipation it was for immediate wants. I do not think that there is any question of principle involved in these cases, and it appears to me that there is no real ground for second appeal. *Fateh Singh* v. *Nanak Chand* (1), which is quoted by Counsel for the appellants with regard to the sale, is not a parallel case.

The appeals are dismissed with costs.

Appeals dismissed.

(1) 9 Ind. Cas. 927; 20 P. W. R. 1911.

ALLAHABAD HIGH COURT.

EXECUTION SECOND APPEAL No. 772 OF 1917.

January 28, 1918.

Present:—Mr. Justice Tudball.

SUNDER LAL—DECREE-HOLDER—APPELLANT

versus

BANARSI DAS AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 181, 182—*Execution—Decree satisfied by attachment and execution of another decree in judgment-debtor's favour—Decree set aside on appeal—Refund of amount realised—Application for execution—Limitation.*

Appellant obtained a decree for costs against respondent. In execution of that decree appellant attached and executed a decree obtained by the respondent against a third person. The latter decree was, however, set aside on appeal, and appellant had to refund the money realised by him in execution of that decree. The appellant then made a fresh application for execution of his own decree more than three years after his last application:

Held, (1) that the application being in form and in substance one for execution of a decree, Article 181 of Schedule I of the Limitation Act had no application to it; [p. 532, col. 1.]

(2) that the application was governed by Article 182 of Schedule I of the Limitation Act and, having been made more than three years after the date of the last application, was barred by limitation. [p. 532, col. 1.]

Execution second appeal from a decree of the District Judge, Agra, dated the 27th March 1917.

Mr. *Mohan Lal Sandal*, for the Appellant.

JUDGMENT.—All the facts except one or two are clearly set out in the judgment of the Court below. On the 16th of May 1910 the appellant obtained a decree for costs against Banarsi Das in the Court of the Subordinate Judge of Agra. Banarsi Das who was the plaintiff in that suit appealed to the High Court and his appeal was dismissed on the 28th of October 1912, costs being awarded to the respondents therein of whom the present appellant was one. Separate costs were allowed to him. On the 9th of August 1910 he applied for execution of the first Court's decree by the arrest of his judgment-debtor. The application fell through. On the 15th of December 1911 he applied for execution by attachment of a decree which Banarsi Das had obtained against certain other persons. The decree was duly attached and on the 13th of March 1912 the application for execution was filed. The appellant then proceeded to execute the decree which he had attached as against Banarsi Das' judgment-debtors. The property was sold, the decree was satisfied and the present appellant also remained satisfied. But unfortunately for him the decree which he had executed against Banarsi Das' judgment-debtors was pending in appeal and it was finally set aside and the appellant had to refund the money, which he did on the 27th of September 1915. In the meantime, as will be evident from the date of the decision of the High Court on appeal, Banarsi Das' appeal had been dismissed and appellant had been awarded the costs of that appeal also. On the 11th of January 1913 he had applied for execution of the decree of the High Court awarding him costs, and that application was struck off on the 14th of January 1913 after one other decree in some other case had been attached thereunder. Having had to refund the money that he had recovered towards the satisfaction of the decree of the Subordinate Judge, the appellant on the 13th of February 1916 made the present ap-

plication for execution to the Subordinate Judge of Muttra. He sought not the attachment of any property but the arrest of the judgment-debtor. The Courts below have held that the application is barred under Article 182 of the Limitation Act and the applicant has come here.

Prima facie the application is an application for execution of a certain decree and it is under Article 182 *prima facie* barred by time, even if we take into consideration the application of the 11th of January 1913. On examination of the present application I see that it was actually filed in the Court of the Subordinate Judge of Agra on the 12th of January 1913, that is, one day out of time. The Court at Agra had no jurisdiction and the applicant had to go on to the Court at Muttra. It is alleged that Article 181, which is a general Article for applications to which no period of limitation is provided, should be applied to the facts of the present case. It is pointed out with some earnestness that the appellant was up to the 27th of September 1915 in possession of the money and did not need to apply for any further execution and that it is the refund of the money which has given him a fresh ground for application for execution, and I am asked to apply Article 181 to the special circumstances of this case. Much as I should like to be able to help the appellant, I do not see how I can avoid the clear and distinct language of the Limitation Act. Article 182 lays down a period of three years for an application for the execution of a decree. In form and in substance the present application is an application for execution of the decree, and Article 181, in my opinion, cannot possibly be applied. Section 5 of the Limitation Act also does not apply, and I cannot admit the application out of time under that section. To some extent the appellant is also to blame, for if he had come into Court with an application for execution immediately after he had refunded the money, it would have been well within time as that would have been within three years from the application of the 11th of January 1913. He has been negligent and I am afraid must take the result of his own acts. The appeal, therefore, fails and is dismissed. As the opposite party does not appear, I pass no order as to costs in this appeal.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 867 OF 1916.

April 5, 1918.

Present :—Mr. Justice Fletcher and Justice Sir Syed Shamsul Huda, Kt.

SRISH CHANDRA RAY AND OTHERS—DEFENDANTS—APPELLANTS

versus

JADUNATH KUNDU AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII B. C. of 1885), s. 67—Landlord and tenant—Interest on rent, date of accrual of.

Under the Bengal Tenancy Act interest on rent accrues, not from the expiration of the dates on which the instalments are payable according to the *kists* stipulated in the contract of lease, but from the expiration of the quarters of the agricultural year in which the instalments fall due. [p. 533, col. 2.]

Appeal against the decree of the Subordinate Judge, 1st Court, Pabna, dated the 21st February 1916, affirming that of the Munsif, 2nd Court, Serajganj, dated the 29th May 1915.

FACTS appear from the judgment.

Babu *Surendra Chandra Sen*, for the Appellants.—The tenders of rent through the post office might have been made without including any interest at the expiration of the due dates of the *kists*, but they were made within the quarter of the agricultural year in which they fell due. Section 67 of the Bengal Tenancy Act provides that interest shall be reckoned only after the expiration of the last date of the quarter of the agricultural year in which the rent is due. On the basis of this section no interest can be claimed by the landlord on the tendered rents, though they reached him after the dates of the *kists* stipulated in the contract. So the tenders were valid tenders and stopped the running of interest. The lower Court was, therefore, wrong in allowing damages which can be given only in lieu of interest, and in this case no interest was due.

Babu *Mohini Mohan Chakravarty*, for the Respondents, submitted that as the tenders were made after the expiration of the due dates and as they were made

without including any interest, the lower Appellate Court was right in allowing damages.

Babu *Surendra Chandra Sen*, in reply.

JUDGMENT.

FLETCHER, J.—This is an appeal by the defendants against the decision of the learned Subordinate Judge of Pabna, dated the 21st February 1916, affirming the decision of the Munsif of Serajganj. The plaintiffs brought the suit to recover rent in arrears for the years 1317, 1318 and 1319 B. S. The amount sued for rent and cesses was Rs. 429-0-9. Rs. 104-4-0 was also claimed for damages under the provisions of the Bengal Tenancy Act. The claim with regard to the rent and cesses for the year 1317 has been decreed in favour of the plaintiffs and no question has been raised in this appeal with regard to that. Therefore, the judgment appealed against with regard to the arrears of rent for 1317 must stand. The question arises with reference to the years 1318 and 1319. It is common case between both the parties that the rent in this case is payable by five *kists*; namely, 10th *Assar*, 10th *Bhadra*, 10th *Aswin*, 25th *Agrahayan* and 25th *Falgun*. Now, the damages that have been claimed in this case are damages which the plaintiffs are entitled to and they say they are entitled to under the provisions of section 68 of the Bengal Tenancy Act, which provides that "if, in any suit brought for the recovery of arrears of rent, it appears to the Court that the defendant has without reasonable or probable cause neglected or refused to pay the amount of rent due by him, the Court may award to the plaintiff, in addition to the amount decreed for rent and costs, such damages not exceeding twenty-five percentum on the amount of rent decreed, as it thinks fit." In this case, it is common fact that the rent was tendered by money order, and the reason which the learned Judge considered made those tenders bad was that the tenders did not include interest as from the dates on which the rent became due, namely, the respective dates fixed for the payment of the rent. On what dates the rent was actually tendered through money order, does not appear from the judgments of the Courts below. But we have been handed a table which is stated to have been made from a perusal of the record. Whether that table is accurate or not we are not in a position to say. This is not a case of any contract in writing proved. The interest that the plaintiffs can claim is under and by virtue of the provisions of section 67 of the Bengal Tenancy Act, and that section does not provide that arrears of rent shall bear interest from the date on which the rent becomes due, but from the expiration of the quarter of the agricultural year in which the instalment falls due. It depends on what dates the tenders were made by money order. If the tender was made before the date mentioned in section 67, then no interest was due on the arrears of rent; but if it was made after that date, then interest was due and whether that was a good tender would depend on a consideration of those facts. If the tender was made before the time from which by virtue of section 67 interest commences to run, then it can hardly be said, the tenants having tendered the whole amounts of the *kists* due, that they under the provisions of section 68 had without reasonable or probable cause neglected or refused to pay the amounts. I think in this case the learned Judge of the lower Appellate Court has not considered the facts relating to the tender with reference to section 67 of the Bengal Tenancy Act. In that view, the case must go back to the learned Judge of the lower Appellate Court for him to re-hear the appeal, after taking into consideration what was the date of the tender which was refused by the plaintiffs. This remand only relates to the claim for the years 1318 and 1319, the appeal as regards the claim for 1317 is dismissed. The learned Judge of the lower Appellate Court will also find whether on the date of the tender interest, having regard to the provisions of section 67 of the Bengal Tenancy Act, had commenced to run so that the tender was or was not a good tender by reason of its not having included any interest. The case must, therefore, go back to have the appeal, save and except as regards the claim for 1317, re-heard by the learned Judge of the lower Appellate Court. Costs will abide the

result of the re-hearing by the learned Judge of the lower Appellate Court.

SHAMSUL HUDA, J.—I agree.

Case remanded.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1219 OF 1916.

February 20, 1918.

Present:—Justice Sir George Knox, KT.

Musammat AJNASI KUAR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

PAYAG SINGH—DEFENDANT—RESPONDENT.

Agra Tenancy Act (II of 1901), ss. 156, 158—Suit for assessment of rent, whether falls under s. 156—Jurisdiction of Revenue Courts—Interpretation of Statutes—Headings of chapters, value of.

In a suit under section 156 of the Agra Tenancy Act for the assessment of rent of certain land in the occupancy tenancy of the defendant who had refused to pay rent, the lower Appellate Court held that the plaintiff was not entitled to any remedy under Chapter X of the Agra Tenancy Act, on the ground that the chapter was headed "Resumption of rent-free grants:"

Held, (1) that reliance could not be placed upon the "headings" of chapters or descriptions given of sections in the margin of the same, especially in the case of the Agra Tenancy Act, which could not be said to be a model of good drafting; [p. 534, col. 2.]

(2) that the suit did not fall outside the scope of section 156 of the Agra Tenancy Act. [p. 534, col. 2.]

Second appeal from a decree of the District Judge, Benares, dated the 2nd May 1916.

Mr. *M. L. Agarwala*, for the Appellants.

Mr. *Durga Charan Banerji*, for the Respondent.

JUDGMENT.—This second appeal arises out of a suit brought by *Musammat* Ajnasi Kuar and another against Payag Singh. In the plaint which *Musammat* Ajnasi Kuar filed in the Revenue Court she described her suit as a suit for assessment of rent under section 150/156 of Act No. II of 1901, or assessment of revenue under section 150/158 of Act No. II of 1901. She goes on to say that until the last Settlement the defendant was in possession of the land in dispute as a tenant by paying rent to the plaintiffs' ancestor and to the plaintiffs. He was in possession as an occupancy tenant. At the last Settlement the name of the defendant was, by mistake, entered as the purchaser of *shankalp* property. Since that date or thereabouts the defendant on the strength of the wrong entry has denied responsibility for paying rent and the plaintiffs pray that a rent of Rs. 26-2-0 a year or as much as the Court may deem proper be assessed on the land in dispute under section 150/156. She also prayed for an alternative relief, she asked that revenue might be assessed on the plots of land in dispute under section 150/156 of Act No. II of 1901. There can be no doubt that what the plaintiff intended and aimed at was relief to be granted her under section 156 or section 158 of Act No. II of 1901. In the written statement the defendant, as his written statement shows, fully realized this and contended that the suit under section 150/156 was not cognizable by the Revenue Court. He set up other allegations, such as that he was Zamindar in proprietary possession of the property in dispute; that the plaintiff had admitted the defendant was in possession free from payment of rent, etc. The Court of first instance came to the conclusion that the defendant was an occupancy tenant and fixed Rs. 20 per year as the rent of the holding in suit.

The matter went in appeal to the District Judge of Benares and before that Court several pleas were taken. Among them was a plea to the effect that Chapter X of the Rent Act was not applicable. The lower Appellate Court took up this plea and held that the plaintiff was not entitled to any remedy under Chapter X of the Tenancy Act and refused to decide any issue arising between the parties. Its main reason for arriving at this conclusion is that section 156 of Act No. II of 1901 comes within a chapter which is headed "Resumption of rent-free grants". This Court has elsewhere pointed out that reliance cannot be placed upon the "headings" of chapters or descriptions given of sections in the margin of the same. I think this applies with peculiar force to such headings, etc., in an Act such as Local Act No. II of 1901, which cannot be held to be a model of good drafting. The matter in dispute had been clearly put and clearly met and does not seem to be beyond the provisions of section 156 as they stand in the Act. The subject-matter of the suit was land not liable to resumption under section 154 or land to which the provisions of section 158 applied. The

issue was, whether it was liable to assessment of rent or not? I set aside the finding of the lower Appellate Court on the preliminary point and return the case to the lower Appellate Court with directions to re-admit the appeal upon the list of pending appeals and dispose of it according to law. Costs will follow the event.

Case remanded.

MADRAS HIGH COURT.

CIVIL APPEALS NOS. 212 AND 277 OF 1916.

December 21, 1917.

Present:—Justice Sir William Ayling, KT., and Mr. Justice Seshagiri Aiyar.

IN NO. 212 OF 1916

NATESA IYER—DEFENDANT No. 1—APPELLANT

versus

SUBRAMANIA IYER AND OTHERS PLAINTIFF AND DEFENDANTS NOS. 2 AND 3—RESPONDENTS.

IN NO. 277 OF 1916

SUBRAMANIA IYER—PLAINTIFF—APPELLANT

versus

NATESA IYER AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Partition by father without consent of sons, validity of—Devise of father's share to one son—Right of other sons to claim division by metes and bounds—Registration Act (XVI of 1908), s. 35—Registration of partition deed, effect of.

Under Hindu Law a father can effect a partition between himself and his sons with or without their consent. [p. 537, col. 1.]

Kandasami v. *Doraisami Ayyar*, 2 M. 317; 5 Ind. Jur. 352; 1 Ind. Dec. (N. S.) 49!; *Muruyayya* v. *Palaniyandi*, 36 Ind. Cas 507; 31 M. L. J. 147; (1916)2 M.W N. 284, *Aiyavier* v. *Subramania Iyer*, 40 Ind. Cas. 205; 32 M. L. J. 439; 6 L. W. 22, followed.

When a Hindu father effects a division with the consent of one of his sons, the other sons dissenting, he must be deemed to have effected the partition in exercise of his power as father. [p. 537, col. 2.]

Where the father in such a case registers the partition deed under section 35 of the Registration Act and afterwards devises the items that fall to his share to one of his sons, the other sons cannot claim a division by metes and bounds but must accept the items allotted to them. [p. 537, col. 2.]

Such a deed of partition is receivable in evidence as evidencing a contract by some only of the intended executants who signed the deed, and it can be looked into to ascertain the intention of the executants. [p. 536, col. 1.]

A testamentary disposition of specific properties cannot be utilized for proving the bequest of the share to be allotted to the deceased, in case it is found that the testator was not entitled to the specific properties but only to a share as a tenant-in-common. [p. 537, col. 1.]

Appeals against the decree of the Court of the Subordinate Judge, Kumbakonam, in Original Suit No. 33 of 1914.

Mr. *G. S. Ramachandra Aiyar*, for the Appellant in No. 277 of 1916.

Mr. *T. V. Muthu'rishna Aiyar*, for Respondent No. 1.

Mr. *S. R. Muthusawmy Aiyar*, for Respondent No. 2.

These appeals and the memorandum of objections filed by the 2nd respondent in Appeal No. 277 of 1916 coming on for hearing on the 6th and 7th August 1917 and the case having stood over for consideration till the 13th August 1917, the Court delivered the following

JUDGMENT.—The plaintiff, the 1st and 2nd defendants are the sons of one Mahalinga Sivan. The father and sons entered into a partition of their properties in the year 1911 and signed a deed in that behalf. When it was sought to register it, the first defendant refused to consent to the registration on the ground that some of the schedules to the deed were inserted without his knowledge. Thereupon, the father and the plaintiff applied for registration under section 35 of the Registration Act, and the document was registered. The father died subsequently, having subsequent to the registration made a Will of the properties allotted to him in the partition deed in favour of the 1st defendant.

In the present suit the plaintiff alleges that the deed of partition is void and of no effect, that the Will of the father is inoperative, and that he is entitled to his share on the footing that the family is undivided.

The Subordinate Judge held that the parties became divided in status by the deed of partition. There are two appeals before us; one by the plaintiff contesting the finding as to division and claiming a share in certain moveables, and the other by the 1st defendant disputing the conclusion of the Subordinate Judge that certain properties were not his self-acquisitions.

The appeal of the plaintiff was argued first, as the points raised went to the root

of the case. Mr. G. S. Ramachandra Aiyar in an exhaustive argument contended that the partition deed, Exhibit B, did not effect a severance of status. His chief contention was that the document *quoad* the immoveable property was not receivable in evidence. In answer to the suggestion that the document contained a declaration of intention by his client and the father that they resolved to get themselves separated form the 1st defendant, the learned Vakil argued that as the document was intended to express a declaration consented to by all the parties, it was ineffective to evidence a unilateral declaration; and he cited *Si asami Chetti* v. *Sevugan Chetti* (1) in support of his position. As pointed out in *Ullattil Kalathil Nethiri Menon* v. *Mullapulli Gopalan Nair* (2), there is no irrebuttable presumption that a document intended to be executed by more than one person should not be construed as evidencing a contract by some only of the intended executants who have signed the deed. In the present case, despite the disclaimer by the 1st defendant, the plaintiff and his father insisted on giving effect to the arrangement to which they were parties. We are unable to hold, therefore, that the document cannot be looked into to ascertain the intention of the executants. In this view it is unnecessary to consider how far the decisions of this Court in *Pothi Naicken* v. *Nagama Naicker* (3) and *Ayyakutti Mankondan* v. *Periasami Koundan* (4) are reconcilable with the pronouncement of the Judicial Committee in *Girja Bai* v. *Sadashiv Dhundiraj* (5). In the latter case, the Privy Council seems to suggest that although an unregistered deed of partition may not serve to operate as a conveyance of the shares allotted, it would be evidence of a severance of status. The case before us is stronger than the one before the Judicial Committee, where the document was registered at the instance of two of the executants. Under section 35 of the Registration Act, such registration is sufficient to affect the interest of the consenting parties. In the Registration Act of 1877, there was a prohibition in general terms against the registration of a document where the executants denied execution. It was contended, under that Act, that if any one of the executants denied execution the document should not be registered at all. In *Muhammad Ewaz* v. *Brij Lal* (6) to which our attention was drawn by the learned Vakil for the respondent, the Privy Council referred to section 24 of the Act as indicating that the document may be registered at different times, and held that the words in the Registration Act should be read distributively and that so far as the parties asking for registration are concerned, they are entitled to it although others may not consent to it. Since this decision was passed, the Legislature amended section 35 by inserting the words "as to the person so denying appearing or dead." Thus Legislative sanction has been given to the pronouncement in *Muhammad Ewaz* v. *Brij Lal* (6).

Mr. Ramachandra Aiyar put forward an ingenious contention that although the Registering Officer was bound to register the deed, it was a nullity *quoad* the property comprised in it was concerned. His argument was that as the origin of the document was in consent, its partial registration was not capable of carrying out any division between the parties. We are unable to agree with him. If we accept his contention, we must hold that the Legislature introduced a provision which is not only ineffective, but may easily prove mischievous. *Muhammad Ewaz* v. *Brij Lal* (6) itself points out that the document is receivable in evidence under section 49 of the Registration Act.

This conclusion would have been enough to dispose of the appeal, had the case not been complicated by the specific bequest made by the father to the 1st defendant. The father regarded himself as divided from his sons in respect of the specific properties allotted to him in the schedule

(1) 25 M. 389; 12 M. L. J. 17.

(2) 30 Ind. Cas. 703; 39 M. 597; 2 L. W. 714; 29 M. L. J. 291; (19 5) M. W. N. 586; 18 M. L. T. 220.

(3) 32 Ind. Cas 486; 30 M. L. J. 62; 19 M. L. T. 50; 3 L. W. 115; (19 6) 1 M. W. N. 79.

(4) 31 Ind. Cas. 615; 30 M. L. J. 404; 2 L. W. 1184.

(5) 37 Ind. Cas. 321; 43 C. 1033; 20 C. W. N. 1085; 14 A. L. J. 822; 20 M. L. T. 78; 12 N. L. R. 113; (1916) 2 M. W. N. 65; 18 Bom. L. R. 621; 4 L. W. 114; 24 C. L. J. 267; 31 M. L. J. 455; 43 I. A. 151 (P. C.).

(6) 4 I. A. 166; 1 A. 465; 3 Sar. P. C. J. 735; 3 Suth. P. C. J. 438; 1 Ind. Dec. (N. S.) 320.

and willed them away in favour of the 1st defendant. Although Mr. Ramachandra Aiyar did not seriously contest the suggestion that this Will may be taken as operating upon the share of the father and not on the specific properties, we are not prepared, as at present advised, to assent to the proposition that a testamentary disposition of specific properties may be utilised for proving the bequest of the share to be allotted to the deceased, in case it is found that the testator is not entitled to the specific properties, but only to a share as a tenant-in-common. The analogy of a mortgage of specific properties attaching to the share of a co-parcener ascertained in partition was referred to, but we do not like to rest the present case upon that analogy. Therefore, although we have come to the conclusion that the father and sons became tenants-in-common from the date of the registration of Exhibit B, we think that unless there was an allotment of shares, the plaintiff will be entitled to have his share given to him by a division by metes and bounds. But, we think, that step has become unnecessary, in view of the consideration which we shall presently set out.

It is settled law now that a father can effect a partition between himself and his sons with or without their consent. *Kandasami* v. *Doraisami Ayyar* (7), which enunciates this rule of Hindu Law, has been accepted in *Murugayya* v. *Palaniyandi* (8) and in *Aiyavier* v. *Subramania Iyer* (9). What happened in the present case amounts to the effecting of a division by the father between himself and his sons by the exercise of the powers conferred on him. No doubt, originally the partition was intended to be by consent, but when the father found that one of his sons was recalcitrant, he insisted on the partition being given effect to and asked the Registrar to register it. This is tantamount to imposing his will on his sons with a view to effect a division of the ancestral properties. Mr. Ramachandra Aiyar contended that as the father did not expressly declare that he was exercising his prerogative, it would be reading a great deal too much into his conduct, if we hold that the partition was brought about by his superior will against the protest of the 1st defendant. We see no force in this contention. The Judicial Committee pointed out in *Bijraj Nopani* v. *Sreemutty Pura Sundari Dasee* (10) that where an act is done which is not wholly valid upon the capacity expressly named, but is justifiable upon a latent capacity which was not specifically referred to the transaction would be upheld as having been brought about in the latter capacity. Applying that principle, we must hold that when the father notwithstanding the demur of the 1st defendant insisted on the registration of the partition deed, he exercised the power given to him by the Hindu Law to effect a partition against the will of his sons.

In this view, the properties willed away by the father rightly vested in the 1st defendant, and the plaintiff can be compelled to accept the properties allotted to him. The fact that he was a consenting party to the registration makes his position worse. We, therefore, hold that the plaintiff is not entitled to claim a division by metes and bounds.

We now proceed to deal with the appeals in so far as they deal with specific items.

As regards ground 13 we see no reason to differ from the Subordinate Judge; there is a clause in the partition deed that properties *bona fide* omitted should not be claimed by the parties thereto. The plaintiff has alleged no ground of surprise or fraud; consequently he is not entitled to the property covered by this ground of appeal. Ground No. 15 refers to the omission of the 1st defendant to collect the full amount of a certain debt. It is not argued that the 1st defendant acted maliciously. He seems to have acted in the best interest of the family, and we think the Subordinate Judge is right in refusing to give plaintiff any decree against the 1st defendant in this respect. As regards ground No. 23 it is to be noticed that the claim

(7) 2 M. 317; 5 Ind. Jur. 352; 1 Ind. Dec. (N. S.) 491.

(8) 36 Ind. Cas. 507; 31 M. L. J. 147; (1916) 2 M. W. N. 284.

(9) 40 Ind. Cas. 205; 32 M. L. J. 439; 6 L. W. 22.

(10) 24 Ind. Cas. 296; 42 C. 56; 27 M. L. J. 93; 1 L. W. 555; 18 C. W. N. 1363; (1914) M. W. N. 679; 16 M. L. T. 338; 12 A. L. J. 1185; 16 Bom. L. R. 796; 20 C. L. J. 368 (P. C.).

was made in the plaint (see Schedule E to the plaint). A sum of Rs. 1,200 was set apart to be spent by the father in taking proceedings to collect outstandings. The plaintiff is entitled to any sum that may remain unspent out of the said Rs. 1,200. There must be an enquiry by the Subordinate Judge as to how much of the Rs. 1,200 was utilised by the father for taking proceedings against debtors. As regards item 7 of Schedule D-2 it is conceded by the learned Vakil for the respondent that there must be a declaration that the amount of this decree is recoverable solely by the plaintiff. As regards item 2 of Schedule D-2 the case of the plaintiff is that that sum was collected by the father; there is the evidence of P. Ws. Nos. 1 and 2 to support the plaintiff. The 1st defendant in his deposition does not deny that item 2 was collected by the father; but it has been pointed out that the amount was collected during the lifetime of the father and that no demand was made by the plaintiff for his share from the father. Under these circumstances we are not prepared to say that the money, even if collected by the father, has been traced to the possession of the 1st defendant. As regards moveables the Subordinate Judge is clearly wrong in shutting out evidence. His view that the recital that the moveables were already divided is a term of the document is clearly erroneous. It is unfortunate that we should be obliged to remand the case for further enquiry on that ground; but we are unable to resist the contention of the appellant that he is entitled to show that notwithstanding the recital in the document the moveables belonging to the family were not wholly divided. We must, therefore, ask the Subordinate Judge to return a finding on fresh evidence whether any moveables belonging to the family were left undivided. If so, what their value is and who is in possession of them.

As regards the memorandum of objection by the 2nd defendant, although he may not strictly be entitled to a decree in this suit, having regard to the fact that this litigation should not be protracted any further, we think it necessary that there should be a finding as regards item No. 37 of Schedule 2. Issue No. 10 claims in the alternative either the particular item or its value if it has been realised before. We must, therefore, ask for a finding upon that issue specifically from the Subordinate Judge on the evidence on record.

Now we turn to the appeal of the 1st defendant. We think the Subordinate Judge has given very good reasons for disallowing the items claimed by the 1st defendant in this appeal. The most material property is contained in Schedule A-3. In the partition deed it is stated that a sum of about Rs. 15,000 and odd was due to the family under a decree, that the father should, if he collects the amount, pay the share of the sons or if he purchases the mortgaged property, he should divide that property among the sons. The father, instead of himself purchasing the mortgaged properties, had them conveyed in the name of the 1st defendant. The 1st defendant says that he is only liable to give the plaintiff a share of the decree amount, and that the plaintiff is not entitled to any share of the properties purchased by him. His argument was twofold. In the first place the father did not purchase but he purchased. Consequently the condition in the partition deed is not operative against him. In the second place, the learned Vakil for the appellant contended that an option was reserved to the father to purchase the property and if he did not exercise the option and allowed the 1st defendant to purchase, the plaintiff can have no cause of action against the latter. We feel no hesitation in holding that the father connived at the 1st defendant becoming the purchaser. He had made a Will of his properties in favour of the 1st defendant and was greatly attached to him. In our opinion the conduct of the father amounts to a fraud upon his powers. Where an authority is given to a particular individual to be exercised for the benefit of a number of persons and the owner of the authority fraudulently exercises it in favour of one of them, and that one is aware of the full significance of the power, he should not be entitled to take advantage of the benefit secured by fraud to which he had consented. In Farwell on Powers it is stated that even where the person in whose favour the fraud was committed was unaware of the fraud, he must not be allowed to take advantage of it. The case is stronger

where the party benefiting by the fraud is fully aware of the motive operating upon the donee of the power. See 23 Halsbury, page 16, sections 111—113, and Farwell on Powers, pages 77 *et seq.* We think the Subordinate Judge is right in holding that the plaintiff is entitled to a share of the A-3 Schedule properties purchased by the 1st defendant. We also agree with the Subordinate Judge in holding that it has not been proved that anything more than Rs. 3,750 was paid in addition to the amount due under the mortgage decree. He has given excellent reasons for his conclusion and we see no reason for differing from him.

We also agree with the Subordinate Judge in his finding upon Issue No. 10-B. The evidence let in on behalf of the 1st defendant that the difference between the amount due from the Thambiran and the sum of Rs. 3,000 and odd due from Visvanathier was reserved by the father for adjusting inequalities in the partition is absolutely worthless. We must, therefore, uphold the decree of the Subordinate Judge in this behalf. The decree of the Subordinate Judge requires a slight modification. The decree should declare that the plaintiff is entitled to proceed against the assets of the deceased father Mahalinga Sivan in the hands of defendants Nos. 1 and 3 instead of making the 1st defendant alone liable for the amount and the other sums decreed against him. We also think that no good grounds have been shown for awarding interest against the 1st defendant at the rate of 12 per cent. There is no issue as to whether any interest was due at all.

We think on the whole that interest should run from June 1913 at the rate of six per cent. on the sums awarded to the plaintiff against the 1st defendant. Subject to this modification we dismiss Appeal No. 212 with costs. The findings in Appeal No. 277 should be submitted within 2 months from this date and 7 days will be allowed for filing objections.

In compliance with the order dated the 13th August 1917 contained in the judgment herein, the Subordinate Judge of Kumbakonam submitted the following

FINDING.—In this case I have been asked by the High Court to receive evidence and submit a finding on the following issue:—

"Whether any moveables belonging to the family were left undivided, and if so, what their value is and who is in possession of them"

I have also been asked to submit a finding upon the evidence on record, on the following issue: "Was item 37 of the Schedule D due at the time of division or has it been realised even before?"

As regards the 2nd issue I have stated in paragraph 26 of my judgment that it was for plaintiff to prove that item No. 37 of Schedule D was an outstanding debt on the date of Exhibit B, and that upon the evidence given by him I was not at all satisfied that the amount was outstanding and that plaintiff and 2nd defendant were entitled to a share in it. The Vakil for the plaintiff stated that he was not interested in this item and that the matter was one between defendants Nos. 1 and 2. The 2nd defendant who appeared in person stated that he accepted the finding already recorded by me and referred to above, and the Vakil for the 1st defendant also stated that the finding already recorded was acceptable to him.

So far as the question of division of moveables goes * * * * * * * * *

For the reasons above given and for the reasons already given by me in paragraphs 12, 15 and 37 of my judgment I find this issue against plaintiff and in the negative.

Although there is no reference in the order, the judgment upon which the order is based wants me "to hold an enquiry as to how much of Rs. 1,200, which was set apart for the purpose of being spent by the father for taking proceedings against debtors, was spent." The Vakil for the 1st defendant contended that I was to be guided by the order and not by the judgment, and the Vakil for the plaintiff stated that he wanted time to get the order amended in terms of the judgment. The Vakil for the 1st defendant then stated that he had no objection to have the question determined when the final decree was passed, in case the High Court wanted this to be done. To this course the Vakil for the plaintiff agreed.

The Appeal No. 277 of 1916 and the memorandum of objections filed by the 2nd respondent, coming on for final hearing after

the return of the finding of the lower Court upon the issue referred to by this Court for trial, the Court delivered the following

JUDGMENT.—The finding of the Subordinate Judge as regards moveables is amply supported by the evidence referred to by him. We see no reason to differ from him. We also agree with his suggestion that the right of the parties to the whole or such portion of the Rs. 1,200 not utilised by the father should be adjusted in passing the final decree; subject to this reservation and to the modification as regards item 7 of Schedule D-2 contained in the judgment, the appeal is dismissed with costs of the 1st respondent.

We see no reason to doubt the correctness of the Subordinate Judge's statement in the finding that the parties agreed to accept his previous finding regarding item 37 of Schedule D. We dismiss the memorandum of objections in the above appeal with the costs of the 1st respondent.

M.C P.

Appeals and memo. of objections dismissed.

ALLAHABAD HIGH COURT.

FULL BENCH.

SECOND CIVIL APPEAL No. 1473 OF 1915.

December 15, 1917.

Present:—Justice Sir George Knox, KT., Justice Sir P. C. Banerji, KT., Mr. Justice Tudball, Mr. Justice Rafique and Mr. Justice Walsh.

CHUNNI LAL—DEFENDANT—APPELLANT

versus

NARSINGH DAS—PLAINTIFF—RESPONDENT.

Defamation—Defamatory words used in complaint—Privilege, defence of—Damages, suit for, whether maintainable—English Law, rule of, applicability of, to India.

So far as a civil suit for damages is concerned, defamatory words used by a party in a complaint to a Criminal Court are absolutely privileged and are not actionable. [p. 542, cols. 1 & 2.]

There is no Statute in India dealing with civil liability for defamation. The rules to be applied, therefore, are the rules of equity, justice and good conscience which has been interpreted by the Privy Council to mean the rules of English Law if found applicable to Indian society and circumstances; and as there is nothing in the circumstances and society of this country that would make it improper or inadvisable to apply the English rule, what is sound public policy in England is equally sound policy in India and the rule of English Law is in accordance with the principles of justice, equity and good conscience. [p. 541, col. 2; p. 542, col. 1.]

There is no support for the plea that a criminal enactment can be interpreted as amending the civil law by implication, though it may be anomalous that a party should be criminally punishable and yet be not civilly liable. [p. 542, col. 1.]

The civil and criminal law and procedure do not coincide but are independent of each other. [p. 541, col. 1.]

In a civil action for libel the plea of mere truth is, if established, a complete defence. In a criminal charge it is not so, for the accused has further to prove the fact that it was for the public good that the imputation was made or published. [p. 541, col. 1.]

Second appeal from a decree of the District Judge, Mainpuri.

Mr. *Peary Lal Banerji*, for the Appellant.

Sir *Sundar Lal*, for the Respondent.

JUDGMENT.—This second appeal arises out of a civil action for damages for defamation, the facts of which are briefly as follows:—

The defendant, who is the appellant before us, was prosecuted in a Criminal Court for an offence under section 193 of the Indian Penal Code. The plaintiff, who is a Pleader, appeared to defend him. The Court allowed bail and the plaintiff stood surety for the defendant to the extent of Rs. 100. Not being sure of his client, however, he asked the Court to allow Rs. 100 to be deposited in cash. The prayer was granted. The defendant produced the cash giving it to the plaintiff and it was actually deposited on the same date, August 22nd, 1913, in the Sub-Treasury at Shikohabad. There was some error in the usual procedure for the depositing of money and the full number of acknowledgments was not issued.

On the 4th September 1913 the case was heard and the defendant acquitted. On that date, however, he employed another Pleader; on 17th September 1913 he filed a petition stating that no receipt had been issued by the Treasury and he was in doubt as to whether the money had actually been deposited by the plaintiff. He asked for inquiry to be made from the Tahsildar. Inquiry was ordered and made and on September 22nd, 1913, the Court received a reply that the money had actually been deposited on August 22nd. Without first inquiring from the Court the result of the inquiry ordered,

the defendant, on September 24th, 1913, filed a written complaint in the Court of the District Magistrate charging the plaintiff with having committed the offences of cheating and criminal breach of trust in respect to the sum of Rs. 100.

The District Magistrate issued no process on this complaint, but made a preliminary inquiry and dismissed it on ascertaining the fact as to the deposit. The plaintiff thereupon prosecuted the defendant in a Criminal Court. For reasons with which we are not concerned, the defendant was acquitted.

The plaintiff then filed the suit out of which this appeal has arisen to recover Rs. 1,000 as damages for defamation. The Courts below have decreed the claim to the extent of Rs. 200. Hence the present appeal by the defendant.

The plea raised on his behalf is that in a civil action arising out of facts such as have been found in the present case, the defendant has an absolute privilege and is absolutely protected by the law from a civil action for damages for defamation.

For the plaintiff it is urged that in such a case there is no absolute privilege but only a qualified privilege and that as the defendant did not act in good faith he is not protected. There being a conflict of rulings on the point, the case has been referred to this Full Bench for decision.

We deem it necessary, in view of certain arguments that have been raised before us in regard to the criminal law of defamation, to emphasize in the forefront of our judgment that we are "*not*" here concerned with libel as a criminal offence, but only with the civil wrong and the right to redress in a civil action. The civil and the criminal law and procedure do not, in our opinion, coincide but are independent of each other. We may quote as an instance one admitted difference between the civil and the criminal law. In a civil action the plea of mere truth is, if established, a complete defence. In a criminal charge it is not so, for the accused has further to prove the fact that it was for the public good that the imputation was made or published. We, therefore, restrict ourselves to the civil wrong and the right to redress in a civil action. Next, it is clear (and is also admitted before us) that the English rule of law on the point for decision is well established and beyond discussion and that under that rule the appellant before us would be absolutely protected. It is unnecessary, therefore, to discuss the English decisions on a principle which has been accepted for generations and has never been questioned in England. It has been recognised by Indian Judges. It has to be conceded before us that the High Courts of Bombay and Madras have applied it without hesitation and that the latter has even gone to the extent of applying it to criminal cases, on the correctness of which we abstain from expressing any opinion.

There is no Statute in India dealing with civil liability for defamation. We have, therefore, to apply the rules of equity, justice and good conscience. This has been interpreted by the Privy Council in *Wajhela Rajsanji* v. *Shekh Masludin* (1), to mean the rules of English Law if found applicable to Indian society and circumstances. On behalf of the plaintiff-respondent it is urged that *in the present instance* the rule of English Law is inapplicable to the circumstances of this country and that whatever may have been the rule applied prior to 1860, the Legislature in introducing the Penal Code in that year did not apply the rule of English Law to criminal cases and may be said, by implication, to have amended the civil law. Reliance has been placed on the decision of the Calcutta High Court in *Augada Ram Shaha* v. *Nemai Chand Shaha* (2) and on the *dictum* in *Abdul Hakim* v. *Tej Chandar Mukarji* (3).

Reference has also been made to several decisions in criminal cases, but we decline to discuss them for the reasons already given. In regard to the first part of the argument the learned Advocate for the respondent has failed to show us what there is in the circumstances and society of this country that would make it

(1) 14 I. A. 89; 11 B. 551; 11 Ind. Jur. 315; 5 Sar. P. C. J. 16; 6 Ind. Dec. (N. S.) 364.
(2) 23 C. 867; 12 Ind. Dec. (N. S.) 576.
(3) 3 A. 815; A. W. N. (1881) 81; 6 Ind. Jur. 320; 2 Ind. Dec. (N. S.) 521.

improper or inadvisable to apply the English rule. It is suggested that the mass of the population is uneducated and more impulsive and sensitive and, therefore, more likely to take the law into its own hands if it cannot get redress for defamation and that, therefore, it would not be sound public policy to enforce the English rule. We do not think that these are weighty reasons. The English Law does not seek to protect dishonest parties, witnesses or Advocates; but deems it a lesser evil that they should escape than that the great majority of honest parties, witnesses and Advocates should be exposed to vexatious actions. Unless it can be said that the great majority of these classes in India is dishonest, there can be no good reason against applying the same rule in this country. Needless to say this has not been urged before us and *in this instance* we consider that what is sound public policy in England is equally sound policy in India and that the rule of English Law is in accordance with the principles of justice, equity and good conscience.

The *dictum* of the Privy Council in the case of *Baboo Gunnesh Dutt Singh* v. *Mangneeram Chowdhry* (4) supports us; that in *Abdul Hakim* v. *Tej Chandar Mukarji* (3) is based on vague and indefinite grounds.

We cannot agree with the decision of the Calcutta High Court in *Augada Ram Shaha* v. *Nemai Chand Shaha* (2). It appears to be based upon the assumption that there was no law of defamation in India before the Penal Code. This is not the case, for there are reported decisions on the subject in this province as far back as 1852. Moreover, the learned Judges applied the test of the criminal law to the civil law, whereas we hold that the two are independent of each other.

Lastly the plea that a criminal enactment can be interpreted as amending the civil law by implication stands unsupported. It may be anomalous that a party should be criminally punishable and yet be not civilly liable in a case like the present, but it is not the only anomaly in this branch of the law.

We, therefore, hold that defamatory words used on such an occasion as is alleged by the plaintiff in this suit are not actionable on the ground of absolute privilege and that the present suit fails.

We allow this appeal, set aside the decrees of the Courts below and dismiss the suit. In view of the circumstances of the case the parties will abide their own costs throughout.

Appeal allowed.

(4) 11 B. L. R. 321; 17 W. R. 283 (P. C.).

PUNJAB CHIEF COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 598 OF 1916.

February 11, 1918.

Present:—Mr. Justice Broadway.

AHMAD HASSAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat SHAMS-UL-NISA—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), s. 5—Appeal, delay in filing—Sufficient cause—Mistake of legal adviser.

A legal adviser's mistake, in order to justify an extension of the period prescribed for presenting an appeal, must be a *bona fide* one; and nothing can be deemed to be done in good faith which is not done with due care and attention. [p. 543, col. 2.]

Presentation of an appeal to a Court which has obviously no jurisdiction to entertain it is not a *bona fide* mistake. [p. 543, col. 2.]

Miscellaneous first appeal from the order of the Subordinate Judge, 1st Class, Delhi, dated the 7th August 1915, rejecting the application.

Mr. *Ralli*, for the Appellants.

Mr. *Santanam*, for the Respondent.

JUDGMENT.—In 1900 *Musammat* Shamas-ul-Nisa and her sisters instituted a suit claiming their shares in their father's property. This suit was decided in 1907 and the plaintiffs were given a 1/13th share each, the decree in their favour being maintained by the Chief Court on appeal by its order of 15th November 1909.

Musammat Shams-ul-Nisa's share, *viz.*, 1/13th was valued at Rs. 7,370 and in execution she was awarded $\frac{1}{2}$ share in a garden named Ghazi-ud-din Bagh value Rs. 4,000 and Katra Reori valued at Rs. 4,000. She was to pay the difference of Rs. 1,130. The other side were not content with this division and came again to

the Chief Court when she was awarded 5/6ths of the said garden value Rs. 7,500 and was to pay back Rs. 130.

In the meantime she had obtained possession of Katra Reori.

After the decision by the Chief Court the properties were made over according to the directions.

Malak Ahmad Hassan, the present appellant, then sued *Musammat* Shams-ul-Nisa for Rs. 1,276-8-0, alleging that this was the amount she had realized as rents during her occupation. The suit was dismissed as being barred by section 144, Civil Procedure Code, and thereupon Malak Ahmad Hassan made an application under that section. The learned Subordinate Judge refused to grant the application on 7th August 1915, holding that as the lady was entitled to the profits derived from the garden which had remained in the applicant's possession he had no claim for the rents of this property.

The present appellant then preferred an appeal from that order in the Court of the Additional Judge, Delhi, who on the 26th January 1916 returned the appeal on the ground that it lay to this Court and not to the District Court.

Malak Ahmad Hassan thereupon lodged the appeal here on 28th February 1916 through Mr. Ralli.

Mr. Santanam for the respondent raised a preliminary objection to the effect that the appeal was barred by time.

The important dates are:—

(1) Date of decision by first Court—7th August 1915.

(2) Date of filing appeal in District Court—1st October 1915.

(3) Date of returning appeal—26th Jaunary 1916.

(4) Date of filing in this Court—28th February 1916.

It was urged that the appeal clearly lay to the Chief Court, inasmuch as the suit out of which this application had arisen was valued at over Rs. 9,000 and had on two occasions been up before the Chief Court. Further that even if the mistake was excusable, there had been great delay in filing the appeal in the Chief Court after it had been returned for that purpose by the Additional Judge. *Sant Singh* v. *Qaim* (1), *Mohamda* v. *Ludha Singh* (2), *Dhanpat Mal* v. *Mela Mal* (3) and *Resal Singh* v. *Shadi* (4) were referred to, and it was sought to distinguish *Brij Indar Singh* v. *Kanshi Ram* (5) relied on by Mr. Ralli. Although this last case is not on all fours with the present one, there can be no doubt that the principle therein enunciated is applicable and of course by this decision I am bound. If the time taken by the appellant in prosecuting the abortive appeal to the Additional Judge can be allowed to him, the appeal must be allowed to be in time inasmuch as after deducting the period from 1st October 1915 to 26th January 1916 the prescribed limitation has not been exceeded.

The question is whether the said period can be allowed, and this involves the question whether a mistake in law must in every case be regarded *per se* as a sufficient reason for exercising the discretion under section 5 of the Limitation Act.

Mr. Ralli, if I understand him aright, would contend that in *Brij Indar Singh* v. *Kanshi Ram* (5) it was laid down that every mistake in law must be accepted as a sufficient excuse for the delay. In this I am unable to concur.

As was held in *Resal Singh* v. *Shadi* (4), a legal adviser's mistake, in order to justify an extension of time, must be a *bona fide* one. In the present case it is difficult to understand how any one who had used due care and attention could have imagined that the appeal lay to the Additional Judge, and nothing shall be deemed to be done in good faith which is not done with due care and attention.

On two separate occasions the same case had been up before this Court, the question of jurisdiction was patent and a

(1) 118 P. R. 1908.

(2) 23 Ind. Cas. 86; 9 P. L. R. 1914; 23 P. W. R. 1914.

(3) 41 Ind. Cas. 918; 67 P. R. 1917; 133 P. W. R. 1917.

(4) 43 Ind. Cas. 317; 95 P. R. 1917; 174 P. W. R. 1917; 13 P. L. R. 1918.

(5) 42 Ind. Cas. 43; 104 P. R. 1917; 33 M. L. J. 486; 22 M. L. T. 362; 6 L. W. 592; 126 P. W. R. 1917; 15 A. L. J. 777; 19 Bom. L. R. 866; 3 P. L. W. 313; 26 C. L. J. 572; (1917) M. W. N. 811; 22 C. W. N. 169; 127 P. L. R. 1917; 45 C. 94 (P. C.).

mere cursory examination of the past proceedings would have shown that the appeal could not lie to any other Court. Mr. Ralli never suggested that there could have been any real doubt as to the course of appeal.

In these circumstances I must hold that the appellant is not entitled to be given credit for the period between 1st October 1915 and 26th January 1916.

I have the less hesitation in coming to this decision, as in my opinion the order complained of is equitable. If the appellant is entitled to the profits of this Katra, *Musammat* Shams-ul-Nisa is equally entitled to the profits of the garden and as the valuation of the properties is approximately the same, profits may fairly be calculated as equal also.

I accordingly dismiss this appeal with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 428 OF 1917.

January 16, 1918.

Present:—Mr. Justice Rafique.

LABHU AND OTHERS—DEFENDANTS—APPELLANTS

versus

RADHA CHARAN—PLAINTIFF—RESPONDENT.

U. P. Land Revenue Act (III of 1901), ss. 111, 112, 132, 133—Partition, suit for—Objection by persons not recorded co-sharers, whether maintainable—Appeal, forum of—Jurisdiction.

In a partition suit of certain land, trees and wells, the defendants objected to the partition on the ground that when their ancestors sold the village, they reserved to themselves and their heirs the said land, etc. The Assistant Collector decided in favour of the objectors, overruling the plaintiff's plea that defendants not being recorded co-sharers had no *locus standi* to object to the partition. The plaintiff preferred an appeal to the District Judge, who allowed it on the ground that the objectors not being recorded co-sharers could not object under section 111 of the Land Revenue Act:

Held, that the defendants not being recorded co-sharers, sections 111 and 112 of the U. P. Land Revenue Act had no application to the case and that no appeal, therefore, lay to the District Judge.

Second appeal from the decree of the District Judge, Cawnpore, dated the 29th March 1917.

Mr. *K. N. Laghate*, for the Appellants.

Mr. *Iqbal Ahmad*, for the Respondent.

JUDGMENT.—Radha Charan applied to the Revenue Court for partition and notices were accordingly issued on his application. Labhu and others objected to the partition of some land, trees, wells, etc., on the ground that when their ancestors sold the village to the ancestor of the applicant the vendors reserved to themselves and their heirs the said lands, trees, wells, etc., free of revenue. The applicant met the objection by raising various pleas, one of which was that the objectors not being recorded co-sharers had no *locus standi*. The Assistant Collector disallowed the plea and proceeded with the application for partition and the consideration of the merits of the objection under clause 3 of section 111 of the Land Revenue Act. He decided in favour of the objectors. Radha Charan preferred an appeal to the Court of the District Judge, who allowed the appeal on the ground that the objectors not being recorded co-sharers could not be heard. The objectors have come up in appeal to this Court and contend that no appeal lay to the District Judge, inasmuch as on the plea of the applicant they, the objectors, were not recorded co-sharers and could not object under section 111 of the Land Revenue Act; the appeal should have been preferred to the Collector or the Commissioner under the other provisions of the Land Revenue Act. In support of this contention they rely on the following cases, *Habib Ullah* v. *Kushimba* (1) and *Tota Ram* v. *Musammat Sahodra* (2). Both these cases bear out the contention of the appellants. I, therefore, allow the appeal and set aside the lower Court's order and direct that the memorandum of appeal be returned to the respondent to be presented to the proper Court. Costs are allowed to the appellant.

Appeal allowed.

(1) A. W. N. (1906) 199; 3 A. L. J. 481.
(2) 2 Ind. Cas. 988.

GOPAL MANDAL v. TAPAI SANKHARI.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 858 OF 1916.

March 15, 1918.

Present:—Mr. Justice Fletcher and Justice Sir Shamsul Huda, Kt.

GOPAL MANDAL—PLAINTIFF—APPELLANT

versus

TAPAI SANKHARI AND ANOTHER—DEFENDANTS—RESPONDENTS.

*Bengal Tenancy Act (VIII B. C. of 1885), s. 49, whether applies to under-*raiyat *with right of occupancy—Under* raiyat *whether can acquire right of occupancy.*

An under-*raiyat* can by usage or custom obtain a right of occupancy. [p. 545, col. 2.]

Section 49 of the Bengal Tenancy Act cannot apply to an under-*raiyat* who has got a right of occupancy. [p. 546, col. 1.]

Appeal against the decision of the Sub-Judge, Faridpore, dated the 23rd December 1915, reversing that of the Munsif, Bhanga, dated the 6th May 1915.

FACTS appear from the judgment.

Babu *Surendra Chander Sen*, for the Appellant.—Section 4 of the Bengal Tenancy Act, which gives a classification of tenants, does not recognise an under-*raiyat* with a right of occupancy; the classes of tenants mentioned there are exhaustive; therefore, illustration (2) to section 183, when it speaks of an under *raiyat* acquiring a right of occupancy by custom or usage, is in contravention of and inconsistent with the provisions of section 4. Section 113 no doubt mentions an under-*raiyat* with a right of occupancy, but those words were added subsequent to the passing of the Act as it originally stood, and it is probable that the Bengal Legislature in inserting the said provisions in section 113 was guided by the erroneous illustration (2) to section 183, which illustration was inconsistent with the provisions of the Act. There are no provisions in the Act relating to the incidents as to enhancement, etc., relating to an under-*raiyat having a right of occupancy*; this also shews that the Legislature never contemplated such a right. In Act X of 1859 and Act VIII (B.C.) of 1869, *i. e.*, the previous Acts relating to the law of landlord and tenant, a person holding under an occupancy *raiyat* could not acquire a right of occupancy; there was, therefore, no such law and there was no such custom or usage.

Section 49 of the Bengal Tenancy Act is not limited in its application but applies to all kinds of under *raiyats*.

Babu *Girija Prosanna Roy Chowdhury*, for the Respondents, was not called upon.

JUDGMENT.

FLETCHER, J.—This is an appeal by the plaintiff against the decision of the learned Subordinate Judge of Faridpore, dated the 23rd December 1915, reversing the decision of the Munsif at Bhanga. Mr. Sen who appears in support of the appeal considers that the case is one of importance and difficulty. Of course, in a matter dealing with a question coming under the Bengal Tenancy Act, on account of Mr. Sen's great knowledge in this matter, one always pays great attention to what he says. But having listened to his arguments, it seems to me that the case is one of great simplicity. The question is, "can an under-*raiyat* by usage or custom obtain a right of occupancy?" Mr. Sen says he cannot. The Legislature of the country have said that he can. Therefore, one has got to decide, whether the Indian Legislature, when they gave the second illustration of section 183 of the Bengal Tenancy Act which expressly shows that an under-*raiyat* may by usage or custom obtain a right of occupancy, gave an illustration opposed to the provisions of the Act. Section 183 is a saving clause and it says that nothing in the Bengal Tenancy Act shall affect any custom, usage or customary right not inconsistent with or not expressly or by necessary implication modified or abolished by its provisions. The second illustration is one showing that an under-*raiyat* may acquire by custom or usage a right of occupancy. The saving section means this: that the provisions of the Act shall not affect any right, amongst other things, that an under-*raiyat* has by usage or custom and, therefore, if by usage or custom it is duly proved that an under *raiyat* has acquired a right of occupancy, section 183 says that that shall not be affected unless it is inconsistent with the provisions of the Act. The section that it is said it is inconsistent with is section 4, which defines the classes of tenants under the provisions of the Bengal Tenancy Act; and, amongst those tenants, there are *raiyats* and under-*raiyats*. A person may be an under-*raiyat*

to whom a special usage or custom applies, but he still remains an under-*raiyat*. It seems to me that it is quite impossible to say on reading section 183 and the provisions of the Act that an under-*raiyat* cannot by usage or custom obtain a right of occupancy.

There is another matter, and that is that section 113 expressly makes mention of an under-*raiyat* having occupancy rights. The criticism that Mr. Sen makes on that is that that was not in the original draft as passed by the Indian Legislature but is only an amendment by the Bengal Legislature. Still the Bengal Legislature were within their powers in making the amendment and there does not seem to be any reason for supposing that when they made that amendment they did not recognise that an under-*raiyat* could have no occupancy right.

The next point that is raised is that, even if an under-*raiyat* has a right of occupancy, still he is liable to be ejected after notice to quit under section 49 of the Bengal Tenancy Act. That is clearly not so. That would mean that section 49 would affect a custom, usage or customary right not inconsistent with the provisions of the Act by which an under *raiyat* may have a right of occupancy. I think that section 49 cannot apply to an under-*raiyat* who has got a right of occupancy.

Then it was finally said that in this case the presumption applied by reason of the entry in the Record of Rights was rebutted. That is a question of fact and it was clearly within the competence of the learned Judge of the Court below.

I may mention that Mr. Justice Mookerjee in the case of *Akhil Chandra Biswas* v. *Hasan Ali Sadagar* (1) expressly stated that by a special usage or custom an under-*raiyat* might under certain circumstances have a right of occupancy. That seems to me to be in accordance with the provisions of the Bengal Tenancy Act.

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

SHAMSUL HUDA, J.—I agree.

Appeal dismissed.

(1) 20 Ind. Cas. 698; 19 C. W. N. 246; 18 C. L. J. 262.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1211 OF 1916.

January 28, 1918.

Present:—Mr. Justice Tudball.

NIRBHAY LAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KALLAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 60 (c)—*Agra Tenancy Act (II of 1901)*, ss. 20, 21—*Occupancy holding—Agriculturist, house of, whether transferable—Execution—Hindu Law—Joint family consisting of brothers—Alienation by manager, whether binding on other members—Necessity.*

The house of an agriculturist is liable to sale in execution of a decree on foot of a mortgage made by him, when such house is not an appurtenance of his holding which he is forbidden by law to transfer. [p. 548, col. 1.]

The manager of a Hindu joint family, which owned a house in a town and lived by cultivation of an occupancy holding, executed a mortgage of the house in favour of the plaintiff. The mortgagor died and the plaintiff brought a suit for the sale of the house against the remaining members of the joint family, who contended that as they and their ancestors were cultivators and the house in dispute was used in connection with their cultivation, its hypothecation could not be valid according to law and no decree could be passed in respect thereto:

Held, that the house being situated in a town and there being nothing to show that it passed to the defendants as an appendage or adjunct of the tenure or that there was any connection whatsoever between the two, it could not be held to be appurtenant to their occupancy holding. [p. 548, col. 1.]

In a joint Hindu family consisting of brothers and their families, an antecedent debt incurred by a brother in the position of a manager is not binding upon his other co-parceners, unless it can be shown to have been incurred for family necessity. It is not the pious duty of brothers or nephews to pay debts incurred by their brothers or uncles. [p. 547, col 2.]

Second appeal from a decree of the First Additional Judge, Aligarh, dated the 3rd of May 1916.

Mr. *Panna Lal*, for the Appellants.

Mr. *Mohan Lal Sandal*, for the Respondents.

JUDGMENT.—This is a plaintiff's appeal. The suit was decreed by the Court of first instance. It was dismissed by the Court below. The facts are simple. There was a joint family of which the managing members were Kanhaiya and Ram Sarup. This family owned a house in the town of Rabu Pura in the District of Bulandshahar. The family lived by cultivation in the year 1905, being the owners of an occupancy tenure. On the 31st of

July 1905 Kanhaiya and Ram Sarup executed a mortgage bond in favour of the plaintiffs for the sum of Rs. 200 and in that bond they mortgaged the house in the above-mentioned town in which the family lived. Of the Rs. 200, Rs. 100 was paid in cash on behalf of the family to the landlord as rent due on the holding, the other Rs. 100 is entered in the bond as being an antecedent debt due from the family. The debt not having been paid the suit was brought. The present defendants are the remaining members of the joint family, Kanhaiya and Ram Sarup having died. They denied the execution and the alleged consideration. They further pleaded that they and their ancestors were cultivators and that the house in dispute was used "in connection with their cultivation," hence its hypothecation could not be valid according to law and no decree for sale could be passed in respect thereto. They further pleaded that the consideration of the bond had not been obtained for any family necessity such as was binding upon them. The Court of first instance held that the house was not an appurtenance to the holding. It held the execution and consideration proved. It also held that the loan had been taken for family necessity. On appeal the Additional District Judge of Aligarh held that the execution was duly proved and also the consideration. He further held that Rs. 100 that had been paid to the Zemindar as rent had been borrowed for family necessity, but there was no evidence to show that the other Rs. 100 had been taken for family necessity. He then went on to hold for certain reasons stated in his judgment that the house was an appurtenance to the holding and that, therefore, it could not be mortgaged or sold, as the occupancy holding also could not be mortgaged or sold. The suit was brought in 1915, so no money decree could be passed. The Judge, therefore, dismissed the suit.

Two points are pleaded before me. (1) That the evidence on the record accepted by the Court below taken in its entirety does not establish the fact that the house is appurtenant to the holding, and that its mortgage is perfectly a legal act and is binding upon the defendants. Next it is pleaded that the Rs. 100 which was an antecedent debt is binding upon the defendants simply because it was an antecedent debt. In regard to the latter point which I take first, little need be said. Kanhaiya and Ram Sarup were not the fathers of the present defendants. They were two out of four brothers who with their families formed the joint family. An antecedent debt incurred by a brother in the position of a manager is not binding upon his other co-parceners unless it can be shown to have been incurred for family necessity. This is not the case of a father and sons. It is not the pious duty of one brother or of nephews to pay the debts incurred by brothers or uncles. In regard to the first point it is quite clear to my mind that the lower Appellate Court is quite wrong. The judgment runs as follows:—"The last question argued is whether the house is liable to sale or not. In order to decide this point, it is necessary to settle another question, as to whether the house is appurtenant to the occupancy holding of the defendants. Patwari Ganga Prasad, who was examined by the plaintiffs, clearly states that the defendants own only one house, that is, the house in suit. He also says '*Is men rahkar kheti karte hain*' (They live in it and cultivate land). Further on, he deposes that their cattle, ploughs, etc., are also kept in this house. The defendants' witnesses also say that this is the only house in which the defendants resided and kept their cattle. All the plaintiffs' witnesses depose that the defendants are occupancy tenants and the Patwari says that the holding is 29 Bighas odd in area. Under the circumstances I have no hesitation in holding that the house is appurtenant to the occupancy holding of the defendants." I have no hesitation myself in holding that these circumstances in no way prove that the house is appurtenant to the holding and that the lower Court's deduction from these circumstances is erroneous and bad. The house in question is situated in a town. The defendants no doubt earn their livelihood by cultivating land. They must live in a house just as other people who follow other professions live in houses. There is nothing to show that the house in question had any connection in any way with the holding which the defendants occupy as

tenants. A man may be a labourer to-day and a cultivating tenant to-morrow. He may desert his tenure and follow a profession and may again take up a fresh tenure. There is nothing to show that this house passed to the defendants as an appendage or adjunct of the tenure or that there was any connection whatsoever between the two. It is not even a house standing upon the holding. It is situated within the town. On these facts alone to hold that the house is an appurtenance to the holding is a very bad mistake in law. The Additional District Judge quotes from a ruling at page 190 of the Allahabad Law Journal, Volume VIII [*Ramdial* v. *Narpat Singh* (1)], in the head-note of which there is a remark that "the dwelling house of an agriculturist may be deemed to be an appurtenance to his holding." It seems to me that in every case it is a question of fact whether or not it is appurtenant to the holding. The question was considered in *Bhola Nath* v. *Kishori* (2), in which a majority of the Judges who constituted the Bench held that the house of an agriculturist is liable to sale in execution of a decree on foot of a mortgage made by him, when such house is not an appurtenance of his holding which he is forbidden by law to transfer. In the present case the lower Court has clearly made a distinct error. There is no evidence on the record to establish the fact that the house is appurtenant to the holding. In this view the appeal must be allowed, but only to the extent of Rs. 100 out of the principal of Rs. 200 secured by the bond. The plaintiffs will have a decree for Rs. 100 *plus* interest according to the terms of the bond from the date thereof up to the date fixed for payment by sale of the house in question. I allow six months from to-day's date for payment. Future interest after the date of payment will be six per cent. simple. The parties will pay and recover costs in all Courts in proportion to success and failure. Costs in this Court will include fees on the higher scale.

Appeal allowed.

(1) 9 Ind. Cas. 931; 8 A. L. J. 190; 33 A. 136.
(2) 11 Ind. Cas. 646; 8 A. L. J. 1045; 34 A. 25.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2341 OF 1915.

January 18, 1918.

Present:—Mr. Justice Richardson and Mr. Justice Beachcroft.

HARI DAS AND OTHERS—PLAINTIFFS—APPELLANTS

versus

DEBENDRO RAM BANERJEE AND ANOTHER—DEFENDANTS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 142—Possession and dispossession—True owner obtaining possession by force—Limitation, commencement of.

Possession of the true owner, however obtained, counts in his favour for the purposes of Article 142 of the Limitation Act in a suit brought by him for recovery of possession on establishment of title. [p. 549, col. 1.]

The plaintiffs, having been dispossessed by the defendants of certain lands belonging to them, succeeded in ousting the latter therefrom and retained possession until they were evicted under a decree in a suit brought by the defendants under section 9 of the Specific Relief Act:

Held, that time began to run against the plaintiffs from the moment they were evicted in execution of the decree under the Specific Relief Act, and not before. [p. 549, col. 1.]

Appeal against the decree of the Subordinate Judge, Burdwan, dated the 23rd July 1915, confirming that of the Munsif, Katwa, dated the 30th June 1914.

Babu *Sib Chundra Palit*, for the Appellant.

Babu *Amulya Charan Bhattacharjee* for Babu *Mrityunjoy Chatterjee*, for the Respondents.

JUDGMENT.—This is an appeal from the judgment and decree of the Subordinate Judge of Burdwan, dated the 23rd July 1915, confirming the decree of the Munsif of Katwa, dated the 30th June 1914. The suit is a suit in ejectment and both the Courts below have found that the plaintiffs have a good title to the land which they claim, but that the suit is barred by limitation inasmuch as it was not instituted within 12 years of the date on which they were dispossessed. The findings of the Courts below are findings of fact and we are unable to interfere with them except so far as they are vitiated by error of law. There is only one point in the case. In respect of a portion of the disputed land it appears that while the defendants were in possession the plaintiff succeeded in ousting them. The defendants thereupon brought a suit under section 9

of the Specific Relief Act to recover possession from the plaintiffs. It is admitted by the written statement of the defendants that in the interval, until the defendants recoverd under the Specific Relief Act, the plaintiffs were in possession of this portion of the land. That being so, it is clear on the face of the record that on the question of dispossession the Courts below have overlooked the fact that possession by the true owner, however obtained, counts in his favour for the purpose of Article 142 of the Limitation Act. The appeal, therefore, succeeds to this extent.

The result is that this appeal is allowed in part, the decree of the Court below will be modified and the suit dismissed except in so far as it relates to the portion of the disputed land covered by the decree in the suit under the Specific Relief Act. As regards that portion the suit will be decreed. The plaintiffs do not appear to have made this point effectively in the Courts below and we, therefore, make no order as to costs.

Appeal allowed in part.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1190 OF 1916.

January 28, 1918.

Present:—Mr. Justice Tudball.

ABHILAKH DHELPHORA—DEFENDANT—APPELLANT

versus

LILADHAR DHALPHORA—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 134—Mortgage of occupancy holding to zemindar—Transfer of holding by zemindar—Redemption, suit for—Limitation.

An occupancy tenant gave a usufructuary mortgage of his holding to the *zemindar*, who sold his property rights including the holding to the defendant. The plaintiff brought a suit for redemption and the defendant contended that the plaintiff being an occupancy tenant and having been dispossessed for more than six years from his holding, his suit for possession was barred by time:

Held, that the suit was not one to recover possession of a holding from which the plaintiff had been unlawfully dispossessed, but was a suit by a mortgagor to recover possession of the mortgaged property from his mortgagee and certain persons to whom the mortgagee had transferred the property and as the plaintiff had not been unlawfully dispossessed from the holding, the limitation of 12 years applied from the date of transfer to defendant under Article 134 of Schedule I of the Limitation Act. [p. 550, col. 1.]

Second appeal from a decree of the District Judge, Gorakhpur, dated the 14th April 1916.

Mr. *Ishwar Saran*, for the Appellant.

Mr. *Harnandan Prasad*, for the Respondent.

JUDGMENT.—The facts of this case are clearly set out in the judgment of the District Judge, dated the 9th of September 1915, by which he remanded an issue to the Court of first instance. Briefly put the case is as follows. An occupancy tenant in the year 1900 gave a usufructuary mortgage of his holding to the Zemindar. About a year before this suit was brought the Zemindar sold his property rights to Abilakh and Lochan. He also relinquished his *sir* and *khudkasht* lands in favour of his vendees. Among such lands he transferred to the vendees the property which is now in suit. The mortgagor deposited the money due under the mortgage under section 83 of the Transfer of Property Act making Sheo Narain, Lochan and Abilakh all parties to his application. This was on the 17th of April 1914. As the money was not taken, he sued on the 21st of July 1914 for redemption of the mortgage and for damages. The Court below set aside the decree of the Court of first instance and decreed the plaintiff's suit, awarding the plaintiff mesne profits with effect from the date of the institution of the suit. It was pleaded on behalf of the appellant that the suit is time-barred because the plaintiff is an occupancy tenant who has been dispossessed for more than six years and his suit for possession was barred by time. Attention is called to the ruling of *Pahalwan Singh* v *Satrupa Kuar* (1). This decision does not assist me in the present case at all. That was a suit by a mortgagee of an occupancy holding to recover possession of that holding when his mortgagor, the occupancy tenant, had been dispossessed by the Zemindar. There has been no unlawful dispossession in the present case. The mortgagee has made a transfer to Abilakh and Lochan of his Zemindari rights. He voluntarily and willingly gave up these lands to them

(1) 2 A. L. J. 471; A. W. N. (1905) 178.

They did not unlawfully dispossess him in any way. As against them Sheo Narain could not possibly recover possession, they being the transferees of his rights. There can be no doubt as to the mortgage and as to the transfer by Sheo Narain to Abilakh. The tenant, that is the respondent to this appeal, could not possibly recover possession without paying his money and he can only recover possession by a redemption suit. The suit is not a suit by a tenant to recover possession of a holding from which he has been unlawfully dispossessed. It is a suit by mortgagor to recover possession from his mortgagee and certain persons to whom the mortgage has transferred. The limitation of 12 years applies from the date of transfer to Abliakh and Lochan. (Article 134).

The next point which has been pressed is that the appellant is not liable for mesne profits which have been awarded by the Court below as damages. The appellant has been in possession with effect at least from the date of the suit, knowing very well that his right to retain possession was contested and with all the facts of the case before him. The profits that were in his pocket belonged *prima facie* to the plaintiff who had deposited the money under section 83 of the Transfer of Property Act. If the appellant has any remedy against Sheo Narain it is open to him to take it. I see no justice in exempting him from the decree and allowing him to keep in his pocket that which belongs to the plaintiff. There is no force in this appeal. It is, therefore, dismissed with costs.

Appeal dismissed.

BOMBAY HIGH COURT.
SECOND CIVIL APPEAL No. 1068 OF 1916.
January 31, 1918.
Present:—Mr. Justice Beaman and Mr. Justice Heaton.
BAPUJI NARAYAN CHITNIS
AND OTHERS—PLAINTIFFS—APPELLANTS
versus
BHAGVANT BALWANT CHITNIS
—DEFENDANT—RESPONDENT.

Ejectment—Title—Proof of—Burden of proof—

In a suit in ejectment the plaintiff must prove good title and there is no onus on the defendant to prove title relatively good or bad at all.

It needs twelve full years' possession to make title, and, therefore, where a plaintiff fails to prove anything more than possession within twelve years of suit, the onus is not shifted on to the defendant to prove good title.

Second appeal from the decision of the Assistant Judge, Satara, in Appeal No. 29 of 1915, confirming the decree passed by the Joint Subordinate Judge, Islampur, in Civil Suit No. 488 of 1911.

Mr. *N. M. Samarth*, for the Appellant.

Mr. *M. V. Bhat*, for the Respondent.

JUDGMENT.—The point taken before us is that although the plaintiffs have been held by both the Courts not to have proved any title, still the fact that they were once in possession within twelve years of suit throws the onus of proving good title on the defendants. Doubtless there is some case-law authority which might be construed into supporting such a proposition. We, however, prefer to follow the simple law established ever since the English Courts settled any principles of law at all, that in a suit in ejectment the plaintiff must prove good title and that there is no onus on the defendant to prove title relatively good or bad at all. Here the plaintiffs have attempted to prove title and have proved some years' possession. But it needs twelve full years to make title. Both the Courts have found that the plaintiffs have no title. It is not disputed that that finding of fact is binding upon us, and we are unable to see how in the face of it any relief can be decreed to the plaintiffs in this form of action.

We must, therefore, dismiss the appeal with all costs.

Appeal dismissed.

HAR PRASAD RAI *v.* BRIJ KISHEN DAS.

PATNA HIGH COURT.

PRIVY COUNCIL APPEALS NOS. 67 AND 68 OF 1917.

May 6, 1918.

Present:—Sir Dawson Miller, KT., Chief Justice, and Justice Sir Ali Imam, KT.

Choudhri HAR PRASAD RAI AND OTHERS—APPELLANTS

versus

BRIJ KISHEN DAS AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 151, O. XLV, r. 4—Consolidation of appeals to Privy Council — High Court, power of, to consolidate—Security for costs.

It was not intended by Order XLV, rule 4, to limit the powers of the High Court to consolidate cases to the purposes mentioned in that rule alone. [p. 552, col. 1.]

The power of consolidation is an inherent power of the High Court, which can be exercised in consolidating appeals to the Privy Council for the purpose of security for costs and to save expenses. [p. 552, col 1.]

Application for consolidating two appeals preferred to the Privy Council.

FACTS.—In order to set aside an *ex-parte* decree two suits were brought by two sets of plaintiffs. The defendants filed separate written statements. By consent of parties in both the suits the same evidence was given and the suits were tried together. The Subordinate Judge decreed both the suits by one judgment. The defendant filed two appeals to the High Court. In the High Court two paper books were prepared but the evidence was printed in only one of the paper-books. The appeals were heard together and were disposed of by one judgment. The plaintiffs in each of the suits filed two separate applications for leave to appeal to the Privy Council. The applications were granted as the valuation in each of the appeals was above Rs. 10,000. The plaintiffs then made an application for consolidating the two appeals to the Privy Council and for permission to deposit only one set of security for costs.

Mr. *Ganesh Dutt Singh*, for the Appellants, submitted that although there was no express provision in the Code of Civil Procedure for consolidation of appeals, the High Court had inherent power to consolidate them for expediency and for the ends of justice. He relied on *Hukum Chand Boid* v. *Kamlanand Singh* (1), *Nand Kishore Sing* v. *Ram Golam Sahu* (2).

(1) 33 C. 927; 3 C. L. J. 67.
(2) 18 Ind. Cas. 207; 40 C. 955; 16 C. L. J. 508.

Mr. *Parmeshwar Dayal*, for the Opposite Party, contended that the High Court had no jurisdiction to consolidate separate appeals to the Privy Council for the purposes of the security for costs. The appellants in the two appeals were two distinct sets of persons, they had filed two distinct suits out of which the two separate appeals had arisen. They were liable for costs separately, therefore, they should give separate security for costs in each of the appeals as required by law. In the matter of Privy Council Appeals the Code of Civil Procedure has provided for consolidation of appeals in Order XLV, rule 4. This rule gives the High Court power to consolidate only for the purposes of pecuniary valuation and not for any other purpose. The provision contained in the rule affords a clear indication as to the intention of the Legislature to limit the jurisdiction of the High Court in matters of consolidation of Privy Council Appeals. If section 151 of the Code be invoked to enable the High Court to grant consolidation for purposes other than that laid down in Order XLV, rule 4, it would have the effect of widening the scope of the rule. The ruling relied upon by the applicants has no application to the case.

ORDER.—This is an application for consolidation of two appeals to the Privy Council which arise out of the same judgment. The cases were tried together in the Court below and the appeal in this Court was heard and determined in both cases at the same time and one judgment alone was delivered. The questions in dispute in each of these appeals are substantially the same, the appellants in one case being the adult members of a family and the appellants in the other case being the minor members of that family. The only difference in the questions for determination in these two appeals is whether assuming that the adult members of the family fail to make out their case, it is still open to the minor members to contend that the sale which it is sought to have set aside is not binding upon them as they were not properly represented. We have been asked in this case, in order to save expense to all parties, to consolidate these appeals which arise out of the same judg-

ment and decide substantially the same questions and at the same time to order that one security bond of not Rs. 4,000, which is usual in the case of these appeals, but of Rs. 6,000 should be lodged to cover the costs of the respondents in these two appeals.

It has been contended by the respondents that under the rules which govern appeals to His Majesty in Council there is no provision made for consolidating appeals except in the one case provided in Order XLV, rule 4, where power is given to consolidate appeals for the purposes of pecuniary valuation. The object of that rule is that where you have appeals from one judgment involving substantially the same question for determination before the Privy Council, although each of these appeals separately may not amount in value to the appealable minimum, yet if in the aggregate they do amount to that sum, they may be consolidated so as to bring the amount up to Rs. 10,000 and as that is the only instance which is specifically mentioned in Order XLV, it is said that we have no jurisdiction to consolidate such appeals for any other purpose. After considering the arguments which have been put before us in this case and after considering the other sections of the Code which must be read together and especially section 151, it seems to us that the power of consolidation is an inherent power of this Court, as has been decided in the case of *Nand Kishore Sing* v. *Ram Golam Sahu* (2). We think that it was not intended by Order XLV, rule 4, to limit the powers of this Court to consolidate cases to the purposes mentioned in that rule alone. In the present case, where as I have already said, these two appeals are although in form two in substance practically one, we think that in the interests of justice and to save unnecessary expense the appeals ought to be consolidated. There will, therefore, be an order that these two appeals be consolidated and tried together, and further having regard to the fact that in ordinary cases Rs. 4,000 is considered sufficient security for the costs of the respondent we think that justice will be met in this case by ordering that security be given to the extent of Rs. 6,000 by the appellants jointly to meet the costs of the respondents. The result of that will be that that security of Rs. 6,000 will be available to the respondents as against each of the appellants in the present consolidated appeal, so that if it should turn out that the respondents are successful against only one set of appellants then the whole of that security will be available to them for their costs. Let the security bond filed in this appeal be sent down to the District Judge to test and report thereon.

Order accordingly.

BOMBAY HIGH COURT.

CIVIL APPLICATION No. 57 OF 1917.

January 24, 1918.

Present:—Mr. Justice Beaman and Mr. Justice Heaton.

BHAUSING RAGHO—PLAINTIFF—APPLICANT

versus

CHAGANIRAM HARCHAND—DEFENDANT—OPPONENT.

Civil Procedure Code (Act V of 1908), ss. 115, 151, O. XLI, r. 23—Court Fees Act (VII of 1870), s. 13—Remand, order of—Refund of Court-fee—Court, duty of—Revision—High Court, powers of—Scope of s. 151.

Where an Appellate Court disposes of an appeal under rule 23 of Order XLI of the Civil Procedure Code, the provisions of section 13 of the Court Fees Act automatically come into operation and the Court is bound to grant a certificate under that section. The refusal of the Court to grant the certificate amounts to a refusal to do what the law specifically says the Court must do and is either an illegality or a material irregularity within the meaning of section 115 of the Civil Procedure Code. [p. 553, cols. 1 & 2.]

Per *Beaman, J.*—Section 151 of the Civil Procedure Code is intended to empower Courts to deal with their own decrees and orders and is not intended to give authority to superior Courts by way of conferring supplemental jurisdiction to that conferred by section 115 of the Code. [p. 553, col. 1.]

Civil application under extraordinary jurisdiction from an order passed by the Assistant Judge, Dhulia, in Appeal No. 83 of 1916.

Mr. *P. V. Nijsure*, for the Applicant.

Mr. *P. V. Kane*, for the Opponent.

JUDGMENT.

BEAMAN, J.—I think it necessary to express my own emphatic opinion that an application of this kind is not within the scope or intention of section 151 of the

Civil Procedure Code. Nor does that section confer upon us jurisdiction to deal with errors of this kind. I think it is very clear that that section is intended to empower Courts to deal with their own decrees and orders and was not intended to give authority to superior Courts by way of conferring supplemental jurisdiction to that conferred by section 115. But I think that this is a good case under section 115. What has happened is very clear. The Trial Court held that the present applicant was not an agriculturist on the ground that the question was *res judicata*. On appeal, the learned Judge held that the question was not *res judicata* and remanded the case under Order XLI, rule 23. Of that there can be no doubt whatever. Where that happens, section 13 of the Court Fees Act makes it compulsory upon the Court to grant the certificate mentioned in that section. The Court has no discretion in the matter. The learned Judge of the lower Appellate Court appears to have confused the matter before him in such a way as to have entirely lost sight of the imperative requirements of section 13 of the Court Fees Act. Were it necessary to examine his reasoning, it would be, I think, very easy to show that he entirely missed the point and overlooked the obvious policy and intention of that section. It is, however, quite enough to say that as soon as he made his order of remand under Order XLI, rule 23, he was bound by section 13 of the Court Fees Act to grant the certificate which the applicant now prays for. As he refused to do, he clearly acted with illegality or with material irregularity, whichever word be preferred, and the relief which the applicant prays for must be granted, and the Court below must be directed to grant him the certificate which he asks for under section 13 of the Court Fees Act.

As the opponent, in spite of our opinion upon this point, given before he opened the argument, has elected to resist the application, in which, as far as I can see, he had no interest whatever, there is no reason why the application should not now be granted with costs against him, and I would so order. The Rule should be made absolute in the terms of the above judgment.

In respect of the remaining six applications of like nature (*viz.*, Civil Extraordinary Applications Nos. 164 to 169 of 1917) Mr. Kane for the opponent withdraws all further opposition, and we think that, while they will all be governed by the judgment just delivered, the opponent need pay no more than his own costs in each of them. The order, therefore, at the foot of the judgment in each of those cases will be that the Rule is made absolute, each party here bearing his own costs.

HEATON, J.—I agree. I say nothing as to whether the District Judge's order disposing of the appeal was correct in form or not. It has been appealed against and therefore remains. Taking it as it is, I can account for it only by supposing that it was made under rule 23 of Order XLI, because there is no other provision in the Code which empowers the Court of first appeal to set aside a decree and remand the case to be decided according to law. As it was a disposal of an appeal under rule 23 of Order XLI, the provisions of section 13 of the Court Fees Act automatically came into operation and the Appellate Court was bound to grant a certificate, and as my learned brother has said, its refusal to do that is a refusal to do what the law specifically says the Court must do and is either an illegality or a material irregularity. Therefore, the matter comes, in my opinion within section 115 of the Code. I agree entirely that it cannot come within section 151, because I feel quite sure that the powers of this Court of interfering with the orders of the subordinate Courts are to be found either in sections relating to appeal or in the section relating to revision, or, it may be, in the Charter of the High Court or the Letters Patent. And I feel perfectly certain that section 151 of the Code was not intended to extend those powers but was intended, as its words to my mind clearly indicate, to show what the Trial Court can do whilst it is seized of the case.

I think, therefore, that the order proposed is the correct order to be made in this case.

Rule made absolute.

SHANKAR GOVIND v. KISAN.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 496 OF 1911.
April 30, 1912.

Present:—Mr. Drake-Brockman, J. C.

SHANKAR GOVIND—PLAINTIFF—APPELLANT

versus

KISAN—DEFENDANT—RESPONDENT.

Land Acquisition Act (I of 1894), ss. 29, 30, 45—Compensation, apportionment of—Tenant of abadi *site, whether entitled to share of compensation*—Wajib-ul-arz, *provisions of.*

The plaintiff, a perpetual lessee of a village claimed from the defendant, a tenant, the entire compensation received by the latter under the Land Acquisition Act in respect of a house site in the *abadi* of the village. The village *wajib-ul-arz* declared the right of the defendant to occupy the site as long as he pleased, but also declared the right of the plaintiff to resume the site of the house after the occupant left the village, the latter having only the right to transfer the materials of the house:

Held, that the defendant had no interest in the land but was a mere licensee to occupy it and that he was not, therefore, entitled to any portion of the compensation awarded for the acquisition of the site under the Land Acquisition Act. [p. 554, col. 2.]

Appeal from the Court of the District Judge, Nagpur, dated the 27th September 1911, in Appeal No. 144 of 1911.

Mr. *G. L. Subhedar*, for the Appellant.

JUDGMENT.—The plaintiff in this litigation is the perpetual lessee of Mauza Dhantoli on the outskirts of Nagpur town. He claims from the defendant the entire compensation received by the latter under the Land Acquisition Act in respect of a house site in the *abadi* of the village. The Courts below have held that the defendant has an interest in the land; the lower Appellate Court, considering his position analogous to that of an ordinary tenant, has apportioned the compensation by giving two-thirds to the plaintiff.

The material part of the lower Appellate Court's judgment runs thus:—

"No doubt the site belongs to the Malguzar and if the houses were removed the site would revert to the Malguzar, but the tenant had also got a right to occupy the site so long as his house was standing and he was in occupation of the house. Therefore, it cannot be denied that the occupant of the house had also some sort of interest in the site, however small". Both parties have appealed to this Court, each claiming the entire sum allowed by the Land Acquisition Officer. The defendant also appealed in respect of the interest which has been allowed by both the Courts below from the date on which he drew the money. Both appeals are disposed of by this judgment.

In my opinion the Courts below should have been guided by the *wajib-ul-arz* and the decision in *Govind Rao* v. *Amrit Rao* (1). The material passage of the *wajib-ul-arz* has been translated as follows:—

"The sites of houses in the village *abadi* shall devolve upon heirs according to custom. But no one can dispose of such sites since we, proprietors, have the ownership thereof. Every person is authorized to sell or mortgage the materials of his house on leaving the village or on any other occasion." The plain intention seems to be that once the house is removed, transferred or abandoned the Malguzar is entitled to the land. I can see no valid reason, why this intention should not govern apportionment of compensation when the land and the house are compulsorily transferred to the Government. The *wajib-ul-arz* recognizes not an "interest in the land" but a mere license to occupy: see *Motiram* v. *Rup Khan* (2). In England a license is not an interest in land within the meaning of section 68, Land Clauses Act, 1845, so as to give a right to compensation for "lands or any interest therein" taken for public purposes see *Frank Warr & Co.* v. *London County Council* (3). It is true that to restore himself to the same position as he enjoyed before the site and the building thereon were acquired the defendant must find another site, but this would equally have been the case had he elected to sell the house privately. I hold, therefore, that the plaintiff is entitled to the whole of the compensation awarded for the site.

With regard to the claim for the interest the Courts below content themselves with holding that it is claimable from the date on which the defendant took the compensation as damages. The plaintiff, however, has not explained why he failed to appear before the Land Acquisition Officer as invited by the notices under section

(1) 4 N. L. R. 149.
(2) 4 N. L. R. 155.
(3) (1904) 1 K. B. 713; 73 L. J. K. B. 362; 90 L. T. 368; 52 W. R. 405; 68 J. P. 335; 2 L. G. R. 722; 20 T. L. R. 346.

9 of the Land Acquisition Act; nor does his learned Counsel in this Court cite any provision of law apart from the Interest Act, 1839, under which he can claim interest. I would, therefore, allow interest only from the date on which written notice of demand was given to the defendant. The decree of the lower Appellate Court will be modified and costs in all the three Courts will follow the result of the cross-appeals to this Court.

Decree modified.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 938 OF 1916.

January 17, 1918.

Present:—Mr. Justice Beaman and Mr. Justice Heaton.

LAKHICHAND CHATRABHUJ MARWADI—PLAINTIFF—APPELLANT

versus

LALCHAND GANPAT PATIL—DEFENDANT—RESPONDENT.

Evidence Act (I of 1872), s. 58—Execution of document—Proof—Admission—Inference drawn from matter not on record, validity of.

In a suit upon a mortgage alleged to have been executed by the father of the defendants, the latter denied all knowledge of the transaction. One of them, however, on being examined as a witness admitted that the signature on the deed was his father's. The suit had been brought on almost the last day allowed by the law of limitation, and from this the Court inferred that the plaintiff must all along have been receiving interest at the stipulated rate and that on that calculation the mortgage debt had been fully satisfied:

Held, (1) that as far as the defendant who identified his father's signature was concerned, his admission, under section 58 of the Evidence Act, relieved the plaintiff of any further responsibility of proving the mortgage-deed; [p. 555, col. 2.]

(2) that the Court had erred in law in drawing the inference as to the payment of interest from matters not in evidence before it, and that, therefore, there had been no proper trial of the suit. [p. 556, col. 1.]

Second appeal from the decision of the Assistant Judge, Dhulia, in Appeal No. 354 of 1915, confirming the decree passed by the Joint Subordinate Judge, Dhulia, in Civil Suit No. 16 of 1915.

Mr. *D. C. Virkar*, for the Appellant.

Mr. *H. B. Gumaste*, for the Respondent.

JUDGMENT.

BEAMAN, J.—This is a very unsatisfactory case. The plaintiff sued on a mortgage. There were seven defendants, of whom four were minors, all members of a joint Hindu family. The eldest defendant professes to know his father's hand-writing. The father was the mortgagor. This defendant, being examined and shown the mortgage-deed, said that the signature was his father's. As far as he was concerned, this admission, in our opinion, would, under section 58 of the Indian Evidence Act, relieve the plaintiff of any further responsibility of proving the document. But the decision is not so clear as regards the remaining six defendants. The plaintiff in fact did intend to produce the attesting witnesses, and there was, as far as we can see, no culpable delay on his part, but on the day fixed for the hearing he said that he was ill and his witnesses were not present. Both the Courts declined to grant him any further time, and, therefore, they held that he had failed to prove the mortgage deed. That finding, in our opinion, must be wrong against defendant No. 1 at any rate. It is to be remembered that these defendants plead that they know nothing of the mortgage transaction. They do not deny that it may have taken place, nor do they anywhere allege payment. Nevertheless both the Courts have inferred, from the mere fact that the plaintiff delayed bringing his suit until almost the last day allowed him by the law of limitation, that he must have been receiving interest all that time at the rate stipulated for in the deed, and on that calculation they have reached the conclusion that the debt has been fully satisfied. Both the Courts refer to two decisions of the Allahabad High Court, *Behari* v. *Ram Chander* (1) and *Balkaran Upadhya* v. *Gaya Din Kalwar* (2). But without commenting upon those cases, it is clear that an inference of the kind we have just mentioned is not one which can be supported by any authority. It is in effect an inference not drawn from any evidence. It could not have been drawn from any evidence, because payment was not alleged and no enquiry was made upon the point. Drawing inferences of

(1) 10 Ind. Cas. 927; 33 A. 483; 8 A. L. J. 368.
(2) 24 Ind. Cas. 255; 36 A. 370; 12 A. L. J. 635.

this kind from matters not in evidence before the Court is well settled to be an error of law. We feel no difficulty, therefore, in neglecting these concurrent findings of the two Courts below, which otherwise would no doubt conclude the case. The result is that at present, in our opinion, there has been no trial at all.

We feel, therefore, that we must reverse the decrees of the Courts below and remand the case for a proper trial upon the merits. Costs will abide the final result.

HEATON, J.—I concur.

Decree reversed: Case remanded.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 31 OF 1917.

January 9, 1918.

Present:—Sir John Wallis, Kt., Chief Justice, and Mr. Justice Sadasiva Aiyar.

VINAYAGA MUDALIAR—DEFENDANT—APPELLANT

versus

PARTHASARATHY AYYANGAR MINOR, BY NEXT FRIEND GOPU ARAMUDU AYYANGAR—PLAINTIFF—RESPONDENT.

Negligence—Damages, suit for—Physical injuries caused by falling of door—Damages, measure of—Civil Procedure Code (Act V of 1908), O. VI r. 17—Plaint, amendment of, for enhanced damages—Appellate Court, duty of.

In an action for damages for physical injuries caused to the plaintiff by defendant's negligence, the amount of compensation must be fair and reasonable, but an absolute compensation is not the true measure of damages. The Court should not give the value of an annuity of the same amount as the plaintiff's average income for the rest of the plaintiff's life. [p. 557, col. 1; p. 558, col. 2.]

An Appellate Court can form its own opinions on the reasons given by the lower Court for the award and measure of damages, but it should be slow to interfere unless, in its opinion, the damages awarded are clearly excessive or inadequate [p. 557, col. 1.]

In an action for damages, the Court has the power to order amendment of the plaint at any stage of the suit so as to enhance the claim for damages, if the application for amendment was made at the commencement of the trial. [p. 556, col. 2.]

The plaintiff, a lad of 16 who was a student in one of the lower forms of a school, sustained severe injuries by the fall of the door of a temple of which defendant was trustee. It was proved that the boy was dull and not very intelligent and that his father was a pauper, while his brother was earning Rs. 30 a month. The Court awarded him Rs. 12,000 as damages:

Held, that the award was excessive and it was reduced to Rs. 6,000. [p. 558, col. 1; p. 559, col 1.]

Appeal from the decree and judgment of Mr. Justice Coutts-Trotter, in the Ordinary Original Civil Jurisdiction of this Court in Civil Suit No. 399 of 1916.

FACTS appear from the judgment.

Mr. *C. P. Ramasamy Aiyar*, for the Appellant, argued that the Judge had no power to order amendment of the plaint so as to enhance the original claim for damages, which had been deliberately fixed. A larger relief than was asked for could not be awarded nor could the Court, after going through a portion of the evidence, allow an amendment so as to give increased damages.

The award was excessive. The Judge had given an annuity to the plaintiff. Judging of the boy's antecedents and of the intelligence he displayed in school, there was no reason to conclude that, but for the injuries, his future would be very brilliant.

Mr. *N. Grant*, for the Respondent, argued *contra*.

JUDGMENT.

WALLIS, C. J.—I think there is no ground whatever for the objection taken to the action of the learned Judge in allowing an amendment of the plaint as regards the amount claimed as damages. The application was made at the beginning of the trial, when the learned Judge reserved his decision until he had heard more of the case. When he granted it at a later stage, it was not opposed though the order was not made by consent. The fact that it was not opposed goes to show that the general feeling of those who had heard the evidence was that an award of Rs. 5,000 would be inadequate. The only question then is whether the sum of Rs. 12,000 awarded by the learned Judge is excessive. The principles on which compensation should be awarded in these cases is fully discussed in the latest edition of Mr. Bewan's well-known book on Negligence. The observations of Parke, B., in *Armsworth* v. *South Eastern Railway Co.* (1) and of Brett, J., in *Rowley* v. *London and North Western Railway Co.* (2) were approved

(1) (1847) 11 Jur. 758; 81 R. R. 918.

(2) (1873) 8 Ex. 221; 42 L. J. Ex 153; 29 L. T. 180; 21 W. R. 869.

generally by the Court of Queen's Bench in *Phillips* v. *London and South Western Railway Co.* (3) and by the Court of Appeal in *Phillips* v. *London and South Western Railway Co.* (4) giving effect to these rulings. Lord Coleridge, C. J., when the case was retried before him, told the Jury that the amount of compensation must be fair and reasonable but that an absolute compensation was not the true measure of damages, and in the Court of Appeal Bramwell, L. J., in *Phillips* v. *London and South Western Railway Co.* (5) stated that the direction was such as was usually given and was right. *Pace* M. R. Bewan, therefore, I think that the proper ruling is that something fair and reasonable but less than an absolute compensation should be given in these cases. The later decision in *Johnston* v. *Great Western Railway* (6) was concerned with the question as to whether the Court of Appeal should interfere with the finding of a Jury in a case of the kind, and the rule laid down was that it would do so when it was clear that the Jury had disregarded the direction of the Court. When the damages are assessed by the Court, and the Court gives its reasons as in the present case the Appellate Court can, of course, form its own opinion on the reasons given but should, in my opinion, be slow to interfere, unless in its opinion the damages awarded are clearly excessive or inadequate.

Coming now to the facts there can be no doubt that, owing to the admitted negligence of the defendant, the plaintiff sustained dreadful injuries and was reduced to the pitiable condition referred to by the learned Judge and that his prospects in life were completely ruined. He is, therefore, entitled to the largest compensation that could properly be awarded to any one of his position and prospects in life. As regards this part of the case I cannot help thinking that the learned Judge has taken rather too favourable a view. I accept the statement of the learned Counsel that the plaintiff impressed the Court as a bright and intelligent boy. Nonetheless he was a backward boy who would not have completed his school course and become eligible for admission to a college, until three years after the average age. This may be assumed to have been due to his father's want of means, but that want of means would have been an even more fatal obstacle to his completing his college course and obtaining a degree in Arts, to say nothing of Law, so as to put him on an equality with other educated boys of his age and caste. No doubt, he had a distant connection who was in a position to help him, and such help is not infrequently but by no means invariably given. Help from this quarter appears to me to be too problematical to take into account in assessing damages. His father was practically without means. One brother is a failed 'matriculate', who is now in the Government service and debarred by his failure from rising to better paid appointments. The other brother was unemployed at the date of the trial but had been a clerk in a mercantile firm. On the whole the plaintiff's prospects were by no means so bright as those of any young Iyengar boy with parents in comfortable circumstances and able to afford him the best educational advantages. The learned Judge, as I understand him, was of opinion that Rs. 6,000 or Rs. 7,000 would not reproduce more as an annuity than an averagely successful person in the plaintiff's position would have earned, but he has felt entitled to double that sum having regard to the sufferings the plaintiff has undergone, the sufferings he will undergo and the permanent disabilities he has to suffer from. The plaintiff is, no doubt, entitled to compensation for the pains and sufferings he has undergone and will have to undergo as well as for the loss of his career, but this award, in my opinion, is something more, rather than something less, than an indemnity as it ought to be according to the authorities to which I have referred. Rs. 6,000 represents an annuity starting at much more than the plaintiff would have been likely to earn after many years of employment. I also think that having regard to the authorities I have referred to, it is going too far to double the amount awarded under this head as compensation for pain

(3) (1879) 4 Q. B. D. 406; 48 L. J. Q. B. 693.

(4) (1880) 5 Q. B. D. 78; 49 L. J. Q. B. 233; 41 L. T. 121; 28 W. R. 10.

(5) (1880) 5 C. P. D. 280 at p. 287; 49 L. J. C. P. 233; 42 L. T. 6; 44 J. P. 217.

(6) (1904) 2 K. B. 250; 73 L. J. K. B. 568; 91 L. T. 157; 52 W. R. 612; 20 T. L. R. 455.

and suffering. My learned brother sitting with me, who is in a better position than I am to judge of the prospects of the boy in the plaintiff's position, holds this view even more strongly than I do. In the result, however, we have agreed that the damages should be reduced to Rs. 6,000. Otherwise the appeal is dismissed with costs.

SADASIVA AIYAR, J.—The defendant is the appellant. He is trustee of a temple. The falling of the temple door through the negligence of the temple servants has injured the plaintiff, who was about 16 years old at the date of suit, in a very serious manner as spoken to by the plaintiff's 4th witness, Dr. Gibson. The plaintiff may "never be able to walk by himself without crutches or human aid," and has also "lost control of the muscles" controlling the excretion of the fæces and the discharge of urine. He sued through his Vakil for recovery of damages estimated at Rs. 5,000. He afterwards changed his legal adviser, and the Counsel instructed by Attorneys appeared for him at the trial. The plaint was allowed to be amended into a claim for Rs. 12,000 and the learned Judge gave a decree for damages for Rs. 12,000.

It is clear from the evidence that the plaintiff's father is practically a pauper who earns nothing. The plaintiff's elder brother, who was unable to pass the Matriculation Examination, was earning Rs. 30 a month and was probably the support of his father and of the plaintiff. The plaintiff was studying in the 3rd form when he got his injuries, and I think he must be treated as a backward boy as, even if he continued to have his promotion regularly, he would have got his secondary school leaving certificate only in his 19th year. The learned Judge says, "I am not going to give this boy annuity to compensate him for the loss of his career which would bring him more than an averagely successful person would have earned." But I think in giving a judgment for Rs. 12,000, he has given him such an annuity and even an annuity giving a larger income than he could reasonably expect. Considering the plaintiff's previous scholastic career and the intelligence to be expected of a person born in the family to which he belongs, he might be expected to earn Rs. 20 to Rs. 30 a month after he became a major. Even in that view, he cannot be said to be entitled to a sum which would give him an annuity of Rs. 360 a year. The measure of damages in a suit like this is discussed in Mayne on Damages, 8th Edition, pages 541 to 544. In one of the cases cited, *Phillips* v. *London and South Western Railway Co.* (3), confirmed in appeal in *Phillips* v. *London and South Western Railway* (5), a plaintiff, who was getting a secured income of £6,000 to £ 7,000 per annum in medical practice and who was supposed to have been permanently disabled from earning that income, was given only £7,000 as damages by Jury, that is, a sum giving an annuity of £ 350 at 5 per cent. The summing up of Mr. Justice Field in that case was approved of in appeal (though a new trial was ordered on the ground that the damages did not even cover actual expenses incurred by plaintiff). The rule in these cases is: "You are not to give the value of annuity of the same amount as the plaintiff's average income for the rest of the plaintiff's life. If you gave that, you would be disregarding some of the contingencies....An accident might have taken the plaintiff off within a year. He might have lived on the other hand for the next 20 years and yet many things might have happened to prevent his continuing his practice." So also in another case, Parke, B., said: "It would be most unjust if, whenever an accident occurs, Juries were to visit the unfortunate cause of it with the utmost amount which they think an equivalent for the mischief done....Scarcely any sum could compensate a labouring man for the loss of a limb, yet you do not in such a case give him enough to maintain him for life." *Armsworth* v. *South Eastern Ry. Co.* (1). Bearing these observations in mind, I think the sum of Rs. 5,000, which was demanded by the plaintiff's father in the lawyer's notice sent before the institution of the suit and which was also claimed as reasonable damages legally claimable in the plaint before its amendment, is the amount which a reasonable Jury ought to have given to the plaintiff and I would, therefore, hold that there was no sufficient ground for the learned Judge to have allowed the plaintiff to amend the plaint by asking for higher

damages or for allowing any portion of the additional amount claimed. I cannot, however, state that the amendment allowed was illegally granted.

Mr. Grant for the respondent argued that Mr. C. P. Ramasami Aiyar in the lower Court said that provided that his client was not made personally liable and provided the damages are given against the temple, he would not object to the amendment of the plaint. Mr. Ramasami Aiyar on the other hand said that he remained silent as no formal application to amend was made. Anyhow, I think that the interests of the temple cannot be said to require less protection than the personal interests of the defendant trustee. In the words of Parke, B., "the unfortunate" temple ought not to be "visited"..."with the utmost amount which" a too compassionate Jury might think "equivalent to the mischief done." The question of the quantum of damages in these cases is not one that can be accurately and mathematically answered. I would have been inclined to assess it at only Rs. 5,000 or even less if I had tried the case as a single Judge exercising solely the functions of the Jury. Where two Judges sitting as an Appellate Bench have to decide on a question of this kind, it is clearly desirable that in exercising the functions of a Jury, the Bench should come to an agreement on a matter in which there is room for the exercise of a large though not wholly arbitrary discretion. We have (as stated as the judgment of my Lord) agreed to the award of Rs. 6,000 as damages in this case. I would, therefore, modify the decree of the learned Judge by substituting Rs. 6,000 for Rs. 12,000. As, however, the defendant in his appeal memorandum contended that Rs. 2,000 was a sufficient compensation and considering also the nature of the case, I would, as regards costs, not interfere with the lower Court's award in favour of the plaintiff and I would also direct the appellant to bear the respondent's costs of this appeal.

M.C.P.

Decree modified.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 280 OF 1917.

February 8, 1918.

Present:—Mr. Justice Beaman and Mr. Justice Heaton.

NILKANTH LAXMAN JOSHI—DECREE-HOLDER—APPELLANT

versus

RAGHO MAHADU PAVALE—JUDGMENT-DEBTOR—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 182 (6)—Date of issue of notice, what is.

The words, "date of issue of notice" in clause (6) of Article 182 of Schedule I of the Limitation Act mean the date on which the notice was in fact issued, and not the date on which the Court ordered it to be issued. [p 559, col. 2]

Second appeal from the decision of the District Judge, Poona, in Appeal No. 227 of 1916, dismissing an appeal from an order passed by the Subordinate Judge, Haveli, in Darkhast No. 295 of 916.

Mr. *S. Y. Abhyankar*, for the Appellant.

JUDGMENT.

BEAMAN, J.—The application for execution would undoubtedly be in time if we take the date of the issue of the notice upon the last application to be in fact the date on which it was issued, and not the date on which the Court ordered it to be issued. There was a conflict of authority under the former Indian Limitation Act, this Court holding that the word "issuing" in the Article meant, not the actual sending out of the notice, but the making of the order that it should on some future day be sent out. The Calcutta and Madras High Courts took the opposite view. The Indian Limitation Act was accordingly amended and the word "issue" was substituted for "issuing." I entertain no doubt but that the intention of that amendment was to give effect to the view held by the Calcutta and Madras High Courts. As the Article now stands, I do not see how it is capable of any other construction. Time is said to run in all cases in which notices have been issued from the issue of the notice. Taking language in its natural sense and assuming the Legislature to mean what it says, I cannot read into that the strained construction which was put upon the Article in the former Indian Limitation Act, a construction made possible, if indeed it was made possible, only by treating the word "issuing" as a continuing verb dating

back to the time from which the process was started by the Court. By a parity of reasoning, it appears to me that it would be as permissible to say that the date of a man's hanging was not the day on which he was actually hanged but the day on which the Court sentenced him to be hanged. I must confess for my own part that I am always strongly averse from putting an unnatural construction upon language which seems to me to have a perfectly plain and natural meaning.

In my opinion, there can be no doubt but that the present application is within time, since it is within three years from the date on which notice was actually issued upon the last application.

I would, therefore, reverse the order of the Court below, direct that this application be again taken on the file and proceeded with according to law.

HEATON, J.—I concur.

Order reversed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 149 OF 1916.

November 2, 1917.

Present:—Mr. Justice Piggott and Mr. Justice Walsh.

ANT RAM—PLAINTIFF—APPELLANT

versus

MITHAN LAL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Provincial Small Causes Courts Act (IX of 1887), Sch. II, Art. 41—Decree for maintenance against three brothers making one of them expressly liable for whole amount—Payment by defendant made liable—Suit to enforce contribution, whether cognisable by Small Cause Court—Jurisdiction.

A Hindu widow sued the brothers of her deceased husband for maintenance and obtained a decree. For certain reasons the decree made one of the defendants expressly liable for the whole amount of the decree. The latter made payments under the decree and then sued the other defendants for contribution:

Held, that under the peculiar circumstances of the case the fact of his having made payments under the decree gave rise to an equity in favour of the plaintiff as against the defendants, but that nevertheless the suit as brought could not be treated as a suit for contribution within the meaning of Article 41 of Schedule II of the Provincial Small Causes Courts Act, and was not, therefore, excluded from the cognisance of a Court of Small Causes. [p. 561, col. 1.]

Per Walsh, J.—It is only suits for contribution of a peculiar and special character which are included in the exemption contained in Article 41 of Schedule II of the Provincial Small Causes Courts Act, and a litigant who wants to bring himself within the exemption must clearly establish that his suit in every respect complies with the very precise definition contained in the Article. [p. 561, col. 2.]

Second appeal against the decision of the Subordinate Judge, Muttra, dated the 7th December 1915.

The Hon'ble Mr. *Narain Prasad Asthana*, for the Appellant.

Mr. *M. L. Agarwala*, for the Respondents.

JUDGMENT.

PIGGOTT, J.—This is a second appeal by a plaintiff, whose suit to recover from the two defendants, his own brothers, a sum amounting to Rs. 340, after having been decreed by the Court of first instance, has been decreed in part only by the lower Appellate Court. The sum covered by this appeal is Rs. 190. On behalf of the defendants-respondents a peliminary objection was raised to the effect that the cognizance of this appeal is barred by section 102 of the Code of Civil Procedure. We have to determine whether the suit brought by the plaintiff Ant Ram was or was not one of a nature cognisable by a Court of Small Causes. It was a simple claim for money to an amount falling short of Rs. 500 and therefore fell within the cognizance of a Court of Small Causes, unless excluded by some Article in the Second Schedule of the Provincial Small Causes Courts Act (IX of 1887). There is really one Article alone (Article 41) about which there can be any substantial argument. Something has been said about Articles 38 and 42, but they are so clearly inapplicable that we need not mention them further. On behalf of the applicant it is contended that the suit in question is a suit for contribution and that it was brought by himself, either as a sharer in joint property in respect of a payment made by him of money due from a co-sharer, or in the alternative made by him as a manager of joint property on account of the said property. As a matter of fact the question raised by this preliminary objection is one which we should have to consider in one form or another at the hearing of the appeal itself, because the

only question decided against the plaintiff has been one of limitation, and in order to determine the question of limitation it would be necessary to determine the nature of the suit as brought. We have come to the conclusion that the preliminary objection must prevail, as the suit in question is not a suit for contribution at all within the meaning of Article 41 aforesaid and cannot be held to be concerned with joint property within the meaning of that Article. The somewhat peculiar circumstances out of which the litigation arises need not be gone into at length. The essential point is that a decree was passed on the 15th of February 1910, against all the three brothers who were parties to the present suit in favour of *Musammat* Basanti, the widow of a previously deceased brother. The object of that decree was to secure to this lady maintenance at the rate of Rs. 10 per mensem chargeable on the whole of the property which had belonged to the father of the three defendants. In consequence, however, of certain antecedent circumstances which need not be gone into, the Court thought fit to include in its decree an express direction that the present plaintiff, Ant Ram, should alone be liable for the payment of the money. The consequence of this is that the liability of the property, and, therefore, the liability of the remaining defendants, could not come into existence except in the event of failure on the part of Ant Ram to comply with the terms of the decree. We do not think there is any getting away from the fact that, at the time when he made the payments which formed the basis of his cause of action, Ant Ram alone was liable to make them under the terms of the decree. No doubt, under the peculiar circumstances, the fact of his making these payments gave rise to an equity in his favour as against his two brothers, and this equity has been recognised by the decree passed in the Courts below. The fact remains nevertheless that the suit as brought cannot be treated as one for contribution and, therefore, was not excluded from the cognizance of a Court of Small Causes. For authorities on this point it is sufficient to refer to two judgments of the Madras High Court, *Mavula Ammal* v. *Muvulu Maracoir* (1) and *Ramaswamy Pantulu* v. *Narayanamoorthy Pantulu* (2). We were referred in argument on the other side to a case of this Court, *Fatima Bibi* v. *Hamida Bibi* (3), but that case is fully reconcilable with the Madras authorities and indeed proceeds on the same principles of law. What the learned Judge of this Court who decided that case laid stress upon was that the liability which the plaintiff had satisfied was a joint liability as between himself and the defendants at the moment when the payment was made, and, moreover, a liability attaching to a joint tenancy and therefore attaching to property jointly held by the parties to the suit. It was, therefore, a suit for contribution in the full sense of the word. We hold accordingly that no second appeal lies in this case and we dismiss this petition of appeal accordingly with costs including fees on the higher scale.

WALSH, J.—I entirely agree. One thing is quite clear, that it is only suits for contribution of a peculiar and special character which are included in this exemption. If what is ordinarily known as a suit for contribution was intended to be exempted nothing would have been easier than to say so. I think it must be taken that a litigant who wants to bring himself within Article 41 must clearly establish that his suit in every respect complies with the very precise definition.

Appeal dismissed.

(1) 30 M. 212; 17 M. L. J. 376.
(2) 14 M. L. J. 480.
(3) 28 Ind. Cas. 587; 13 A. L. J. 452.

BOMBAY HIGH COURT.
SECOND CIVIL APPEAL No. 232 OF 1917.
January 11, 1918.
Present:—Mr. Justice Beaman and Mr. Justice Heaton.
SUBRAYA VENKAPPA HEGDE—DEFENDANT—APPELLANT
versus
SOMBAYA HEGDE—PLAINTIFF—RESPONDENT.

Decree, construction of—Instalment decree—Default in payment of instalment—Waiver.

SUBRAYA VENKAPPA HEGDE v. SOMBAYA HEGDE.

An instalment decree provided that in case of failure to pay the amount of any two instalments the defendant should pay to the plaintiff the whole of the unpaid balance of the decree. The first instalment was not paid on the date fixed, but before the due date of the second instalment it was paid in full with interest at the agreed rate. There was a further default in paying the second instalment and the decree-holder thereupon claimed that there was a failure to pay the amount of two instalments at the period fixed, and, therefore, that he was entitled to claim the whole amount of his debt at that time remaining unpaid:

Held, that the real intention of the parties was that before the penalty could be enforced two instalments must be in arrears together and that condition not having been fulfilled in this case the decree-holder was not entitled to execute the decree for the whole of the unpaid balance. [p. 563, col. 1.]

Second appeal from the decision of the District Judge, Kanara, in Appeal No. 124 of 1916, reversing the order passed by the Subordinate Judge, Sirsi, in Darkhast No. 226 of 1916.

Mr. *G. P. Murdeshwar*, for the Appellant.

Mr. *S. N. Karnad*, for the Respondent.

JUDGMENT.

BEAMAN, J.—The consent decree runs in the following terms :—

"Plaintiff do recover from defendant Rs. 253-10-5 out of Rs. 753-10-5, alleged by plaintiff (to be due to him) and admitted by defendant, on the 30th day of *Chaitra* of the next cyclical year *Rakshasa* (14th April 1915). As to the balance of Rs 500 on deducting the said amount (of Rs. 253-10-5) plaintiff do pay the same to defendant by five instalments of Rs. 100 each payable on the 30th day of the *Magh* of each year beginning from the 30th of *Magh* of the next year, that is, of the cyclical year *Rakshasa*. In this way defendant do pay (the whole amount) by six instalments. In case of failure to pay the amount of any one instalment he should pay the amount of instalment he has failed to pay with interest at the rate of Rs. 12-8 0 per cent per annum from the date of failure to pay the instalments up to the date of payment. In case of failure to pay the amount of any two instalments at the period fixed, defendant do pay to plaintiff all the amount of instalments remaining unpaid on deducting the amount of instalments paid at that time, together with interest thereon at the above rate, that may accrue from the date of default up to the date of payment; in this manner the amount should be paid in one lump sum."

Upon this decree a dispute has arisen in the following circumstances. The first instalment of Rs. 253-10-5 was to be paid on or before the 14th April 1915. The second instalment of Rs. 100 was to be paid on or before the 30th March 1916. The first instalment was not paid on the date fixed, but in January 1916, before the due date of the second instalment, it was paid in full with interest at the agreed rate. There was a further default in paying the second instalment due on the 30th March 1916. The decree-holder thereupon claimed that there was a failure to pay the amount of two instalments at the period fixed, and, therefore, that he was entitled to claim the whole amount of his debt at that time remaining unpaid. The lower Appellate Court has acceded to that contention and held upon a construction of the decree that on the 30th March 1916 there had been a failure to pay the amounts of two instalments at the period fixed. We are of a different opinion. We think it unnecessary to go into the questions raised and discussed in the judgment of Jenkins, C. J., in the Full Bench case of *Kashiram* v. *Pandu* (1). That and the case out of which it arose had special reference to the points at which limitation began to run on breach of conditions in instalment bonds very similar in their terms to those we are considering. All that I would say is that if the view taken by the learned Chief Justice be correct that the acceptance of an overdue instalment before the next succeeding instalment becomes due amounts to estoppel and precludes the creditor from alleging that there was a prior default, then the position here would admit of no argument. It is, however, contended on behalf of the respondent that he had no option in the matter; that there was in no real sense a waiver when he accepted the amount of the first instalment with interest in January 1916 and, therefore, that there is no room for the introduction of the principle of estoppel. It appears to us, however, that the decision can be put upon a much simpler and more satisfactory ground.

(1) 27 B. 1; 4 Bom. L. R. 688.

RATAN DAS *v.* GURAN.

Upon our reading of the decree itself, we entertain no doubt but that the real intention of the parties was that before the penalty could be enforced two instalments must be in arrears together. Adopting that construction, it is clear that the condition had not been fulfilled in this case, for before the default of the 30th March 1916 the first instalment had been paid in January 1916. There was, therefore, at the time the decree-holder claimed to call in the whole debt, only one instalment in arrears. We think, therefore, that the view taken by the learned District Judge was wrong and that there has been no such failure to pay the amounts of two instalments at the period fixed as would entitle the decree-holder to the order he obtained in the lower Appellate Court.

We think that the decree of the learned Judge must be reversed and this appeal allowed with all costs.

HEATON, J.—I concur.

Decree reversed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1679 OF 1916.

February 27, 1918.

Present:—Mr Justice Scott-Smith and Mr. Justice LeRossignol.

RATAN DAS AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat GURAN—DEFENDANT—RESPONDENT.

Bengal Regulation XVII of 1806, *s.* 8—*Limitation Act (IX of* 1908), *Sch. I, Arts.* 135, 144.—*Mortgage by way of conditional sale—Mortgagor continuing in possession after default—Adverse possession—Foreclosure proceedings—Suit for possession by mortgagee—Limitation.*

In the case of a mortgage by way of conditional sale where, under the terms of the mortgage-deed, the mortgagee is entitled to possession of the mortgaged property without first taking out foreclosure proceedings, the right to possession of the mortgagor determines on the date of default; but where under the deed, the mortgagee as such has no right to possession, the right to possession of the mortgagor does not determine and his possession does not become adverse until the foreclosure proceedings have been perfected and the year of grace has expired. [p. 566, col. 1.]

A mortgage-deed by way of conditional sale dated the 28th June 1898 provided that the mortgage money shall be paid after three years and in case of default the mortgagee shall be at liberty to take possession by issuing foreclosure notice under Regulation XVII of 1806 but that if he did not elect to do so, the mortgagor would continue to pay him interest until the mortgage was redeemed. The mortgagor made default and on the 17th of June 1913 the mortgagee gave him notice of foreclosure, which was served on the 7th of September 1913 so that the year of grace expired on the 7th of September 1914. The mortgagee then brought a suit for possession as owner on the 9th of February 1915:

Held, (1) that the mortgage having continued even after the date of default, the mortgagor's right to possession did not determine and his possession did not begin to be adverse to the mortgagee till the expiry of the year of grace, so that the suit was not barred by time under Article 144 of the Limitation Act; [p. 566, col. 1.]

(2) that Article 135 of the Limitation Act had no application to the case. [p. 567, col. 2.]

Proceedings under Regulation XVII of 1806 are purely ministerial proceedings devised to give warning to the mortgagor of the impending disappearance of his right to redeem the mortgage and avoid a conditional sale, and cannot in themselves confer any new period of limitation on a claim which otherwise would be barred by time. [p. 564, col. 2.]

Second appeal from the decree of the District Judge, Ferozepur, dated the 8th March 1916, affirming that of the Subordinate Judge, 2nd Class, Ferozepore, dated the 6th October 1915, dismissing the claim.

Mr. *Ganpat Rai* for the Appellants.

Sardar *Kharak Singh*, for the Respondent.

JUDGMENT.—As will be observed from the order of the learned Judge in Chambers, this is a suit by *quondam* mortgagees for possession as owners of land mortgaged to them by deed dated 28th June 1898, and the appeal has been referred to this Bench because its decision involves the determination of a difficult point of limitation. The term of the mortgage expired on the 28th of June 1901, but it was only on the 17th of June 1913 that the mortgagees took action for the issue of notice of foreclosure to the mortgagor which notice was served on the 7th of September 1913, so that the year of grace expired on the 7th September 1914. This suit was brought on the 8th of February 1915, and the point for decision is whether under Article 135 or 144 of the Second Schedule to the Limitation Act, the mortgagees' suit for possession as full owners is barred on the ground that the suit was not brought within

twelve years of the date on which the mortgagor's right to possession determined, nor within twelve years of the date when the mortgagor's possession became adverse to the mortgagees. The Courts below have agreed that the mortgagor's right of possession determined on the 28th of June 1901, and the suit is time-barred.

On behalf of the appellants *Nagar* v. *Saudagar* (1) and *Tek Chand* v. *Sohel Singh* (2) have been cited, but neither of these cases is on all fours with the case now under consideration. *Tek Chand* v. *Sohel Singh* (2) is a judgment by a single Judge and in that case, although the suit was brought more than twelve years from the date when the right of the mortgagor's possession determined, the mortgagee had completed his foreclosure proceedings within twelve years and it was held that he had twelve years in which to institute his suit and that the said period of twelve years ran from the date of the expiry of the year of grace. In the suit before us, however, the notice of foreclosure is dated more than twelve years later than the date on which the mortgagee's debt became due and the year of grace began to run after the date on which a suit to recover possession as mortgagee would have been time-barred under Article 135. *Nagar* v. *Saudagar* (1) affords us still less assistance, for in that case the mortgagee was in possession of the mortgaged property and his suit was merely for a declaration that the mortgage right had merged in a full proprietary right.

On behalf of the respondent it is contended that the decisions of the Courts below are correct, and it is urged that *Moman* v. *Ishri Pershad* (3) and *Nand Lal* v. *Goojar* (4) are on all fours with the present case. Respondent also cited *Dinonath Gangooly* v. *Nursingh Pershad Doss* (5), *Shurnomoyee Dasi* v. *Srinath Das* (6), *Murlidhar* v. *Kanchan Singh* (7) and *Bhandari* v. *Musammat Jasodhan* (8).

Now the proceedings under the *bai-bil-wafa* Regulation are purely ministerial proceedings devised to give warning to the mortgagor of the impending disappearance of his right to redeem the mortgage and avoid a conditional sale, and it seems to us impossible to hold that those proceedings in themselves can confer any new period of limitation, on a claim which otherwise would be barred by time. In *Bhandari* v. *Musammat Jasodhan* (8) it was held that the mortgagee, having foreclosed, had twelve years within which to institute his suit for proprietary possession, running from the date of the expiry of the year of grace, when the mortgagor's right to possession of the character sought for in the suit first determined, and this conclusion was arrived at by a consideration of the English case of *Pugh* v. *Heath* (9). However that may be, neither *Moman* v. *Ishri Pershad* (3) nor *Nand Lal* v. *Goojar* (4) is of much aid to us in this case, for in all the cases cited the mortgagee was entitled in accordance with the terms of the mortgage-deed to immediate possession of the mortgaged property, whereas in the case before us the mortgagee was entitled to possession of the mortgaged property only after perfecting the foreclosure proceedings under Regulation XVII of 1806. If Article 135 of the Limitation Act applies to the case we have to decide whether the suit was brought within 12 years of the date when the mortgagor's right to possession determined. Did the mortgagor's right in this case determine on the 28th June 1901, or did it determine only on the expiry of one year from the date of the foreclosure notice? If Article 144 applies, did the possession of the defendant become adverse to the plaintiff on the 28th June 1901, or only on the 7th September 1914? In *Khelut Chunder Ghose* v. *Tarachurn Koondoo Chowdry* (10) it was held that under an English deed of mortgage a suit to recover

(1) 57 P. R. 1908; 115 P. W. R. 1908.
(2) 65 P. R. 1906; 72 P. L. R. 1907.
(3) 35 P. R. 1894.
(4) 35 Ind. Cas. 275; 94 P. R. 1912; 178 P. W. R. 1912; 237 P. L. R. 1912.
(5) 22 W. R. 90; 14 B. L. R. 87.
(6) 12 C. 614; 10 Ind. Jur. 458; 6 Ind. Dec. (N. S.) 418.
(7) 11 A. 144; A. W. N. (1889) 41; 6 Ind. Dec. (N. S.) 520.
(8) 90 P. R. 1895.
(9) (1882) 7 A. C. 235; 51 L. J. Q. B. 367; 46 L. T. 321; 30 W. R. 553.
(10) 6 W. R. 269.

possession was barred unless brought within 12 years from the date of default, and in *Dinonath Gangooly* v. *Nursing Pershad Doss* (5) it was decided that the cause of action arose when default was made and that no new cause of action arose by reason of foreclosure proceedings.

If then Article 135 of the Limitation Act applies to this case, the cause of action arose, *i.e.*, mortgagor's right to possession determined, on the 28th June 1901, and the present suit is barred, and if the mortgagee failed within 12 years to sue for his remedy, it is difficult to see how foreclosure proceedings which were perfected on a date when his mortgage no longer subsisted, can give him a right to bring a suit for possession as full owner under Article 144. If the mortgagor's right to possession determined on the 28th June 1901, within the meaning of Article 135, it is difficult to avoid the conclusion that on that same date the mortgagor's possession became adverse to the mortgagee-plaintiff within the meaning of Article 144.

Now, Regulation XVII of 1806 provides no period within which the mortgagee is to take foreclosure proceedings. On the contrary the Regulation sets forth that whenever the mortgagee is desirous of foreclosing at any time subsequent to the due date, he shall follow the procedure prescribed by the Regulation. In this case indeed what the mortgagor covenanted with the mortgagee amounts to this, that if the mortgage money were not repaid within three years the mortgagee was then to be entitled not to possession but to take out foreclosure proceedings under the Regulation. Can then it be said that the right of the mortgagor to possession of the property determined on the 28th June 1901? On that date no doubt the mortgagee was at liberty to start foreclosure proceedings, but it cannot be said that on that date the mortgagor's right to possession determined. This case, however, is clearly not a case by a mortgagee but a case by a person claiming full ownership, and indeed the mortgage agreement contains no stipulation that the mortgagee shall obtain possession of the mortgaged property in his capacity of mortgagee. It enables him to secure possession only after he has completed his full proprietary title. The conclusion then at which we arrive is, that Article 135 cannot apply to this case and we are driven back upon Article 144. Here again the same question has to be answered, *viz.*, whether the possession of the mortgagor after the 28th June 1901 became adverse to the plaintiff? Now, it is a well-recognized rule that prescription does not begin to run against a person who is unable to take immediate action. Could the plaintiff have launched this suit on the 29th June 1901? It is obvious that the reply must be in the negative, because at that time the mortgage had not been foreclosed, the plaintiff had no right to possession as mortgagee and his status of full proprietor had not been perfected How then must the possession of the mortgagor be qualified after the 28th June 1901? He was not a trespasser for he was in possession as mortgagor and was entitled to remain in possession until he was ousted by the full owner, so that his possession was not an adverse possession but one that could be referred back to a legal beginning. In the case reported as *Khelut Chunder Ghose* v. *Tarachurn Koondoo* (10) there was a clear provision that the mortgagee was entitled to possession immediately on default, so that that authority is of no aid in this case. *Dinonath Gangooly* v. *Nursingh Pershad Doss* (5) is a case which seems to offer a closer parallel with the present case, but in that case it was held that under the mortgage contract the mortgagee was entitled to possession immediately on the occurrence of default in spite of the fact that in order to foreclose he had to follow the procedure laid down in Regulation XVII of 1806. The only respect in which the facts of that case differ from the facts of this case is that in the Calcutta case it was *stipulated* in the mortgage-deed that on failure to repay the mortgage money the rights of the mortgagor would cease and the mortgagee could take possession, whereas in the case before us there is no such provision but the plaintiff is authorised to obtain full possession by applying the procedure of the Regulation; and it remains for consideration whether this difference in the wording of the mortgage-deeds distinguishes the two cases. There

is this further difference between the two cases that the Calcutta case was a suit between the mortgagee and the purchaser of the mortgagor's right and not a suit between the mortgagee and the mortgagor, and the *ratio decidendi* in the Calcutta case was that under the mortgage deed with which that case was concerned the mortgagee had a right of entry immediately on default by the mortgagors. The stipulations in the mortgage-deed before us are that on default the mortgagee shall be at liberty to secure possession by the issue of a notice under the Regulation. Secondly, that if he elects not to do so, the mortgagor will continue to pay him interest until the mortgage is redeemed. In view of these special stipulations we are unable to hold that the mortgagee had a right to immediate possession on the 28th June 1901, or that the possession of the mortgagor was adverse to him after that date, because the mortgage-deed clearly provides *for the continuance of the mortgage even after the date of default.*

The true rule in these cases appears to be that when under the terms of the mortgage-deed the mortgagee is entitled to possession of the mortgaged property without first taking out foreclosure proceedings, the right to possession of the mortgagor determined on the date of default, but where under the terms of the mortgage-deed the mortgagee as such has no right to possession, the right to possession of the mortgagor does not determine and his possession does not become adverse until the foreclosure proceedings have been perfected and the year of grace has expired. Applying this rule to the case before us, we find that the mortgage contract gave the mortgagee no right of entry as mortgagee, that it contemplated the subsistence of the relation of the mortgagor and mortgagee even after the date of default, that the mortgagee was entitled to maintain this relation as long as he pleased and that he had no right to possession until he had perfected his proprietary right. Consequently the possession of the mortgagor did not become adverse to him till shortly before suit.

In this view we must accept the appeal and we decree the claim with costs throughout.

Appeal accepted.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 677 OF 1916.

January 10, 1918.

Present:—Mr. Justice Beaman and Mr. Justice Heaton.

BANI RAMCHANDRA SALVI—DEFENDANT—APPELLANT

versus

JAYAWANTI GOVIND PANDIT—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), ss. 23, 24—Public policy—Compounding felony—Unlawful consideration—Specific performance of agreement to sell land.

The plaintiff sued for specific performance of a contract by which the husband of the defendant agreed to convey to her certain land for a consideration of Rs 150. Annexed to the contract was a term that, in the event of a criminal prosecution for criminal breach of trust instituted by the plaintiff against the said intending vendor not being withdrawn, the contract was not to be enforced.

Held, (1) that if the concluding term of the contract had been complied with or could be complied with, then part of the consideration was void on the ground of being opposed to public policy. [p. 567, col. 1.]

(2) that if the term could not be complied with, then the whole contract became unenforceable for failure of an essential condition and that in either view the suit must be dismissed. [p. 567, col. 1.]

No one can contract on the footing of part of the consideration being the compounding of a felony. [p. 567, col. 1.]

Second appeal from the decision of the First Class, Subordinate Judge, Ratnagiri, in Appeal No. 145 of 1915, confirming the decree passed by the Subordinate Judge, Devrukh, in Civil Suit No. 184 of 1914.

Mr. *D. W. Pilgamkar*, for the Appellant.

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

JUDGMENT.

BEAMAN, J.—The plaintiff sued for specific performance of a contract by which the husband of the defendants agreed to convey to her certain land for a consideration of Rs. 150. Annexed to the contract was a term that in the event of a criminal prosecution for criminal breach of trust instituted by the plaintiff against the said intending vendor not being withdrawn, the contract was not to be enforced. The explanation briefly is this. The plaintiff had previously sold this land to Ramchandra. The agreed price was Rs. 250 in all. Ramchandra advanced to the plaintiff Rs. 115 to pay off a mortgagee and a further sum of Rs. 135 of which Rs. 100 at any rate was either taken back by Ramchandra or deposited with him by

the plaintiff. Admittedly the plaintiff retained Rs. 35, which, with the Rs. 115 paid to the mortgagee, makes Rs. 150. In respect of the other Rs. 100 she complained that after she had deposited it with Ramchandra he criminally misappropriated it, in the sense that he withheld it and denied her right to obtain it from him. That was the origin of the criminal prosecution.

It is perfectly clear from the agreement upon which this suit is brought, Exhibit 27, that Ramchandra, husband of the defendant, virtually admitted the truth of the allegations made by the plaintiff and was ready to make complete reparation in the term of this agreement, provided that the criminal law stayed its hand. Thus all the equities are clearly on the side of the plaintiff. If she cannot enforce this contract, she must lose her land and she must lose the Rs. 100, part of the consideration of which Ramchandra had defrauded her. It appears that pursuant to this agreement the plaintiff did make an application to the Magistrate to withdraw the prosecution. As, however, the offence charged was not compoundable, it is clear that unless the Magistrate had failed in his duty or mistaken the facts, it no longer lay in the power of the plaintiff to affect the course of the trial. Just about that time, however, the Magistrate was transferred and the case was delayed. Before it was resumed Ramchandra died. There was another person Dinkar, co-accused with the defendant, and we are told, though we can find no proof of the fact, that the prosecution against Dinkar was dropped.

Now, upon these facts we have to determine whether the contract, Exhibit 27, can be specifically enforced. It is pretty clear that if the concluding term had been complied with, or could have been complied with, then part of the consideration would have been void on the ground of being opposed to public policy. No one may contract upon the footing of part of the consideration being the compounding of a felony. But assuming that this term could not have been complied with, then the whole contract becomes equally unenforceable for failure of an essential condition. So that in either view it is very clear upon an understanding of the facts and the terms of the contract that the plaintiff cannot have it specifically enforced.

There are other considerations which may be drawn from other principles of contract which are equally fatal to it; as for example, the provisions of section 24 of the Indian Contract Act; for having regard to the actual nature of the condition which the plaintiff undertook to fulfil, the result that that condition was impossible from the first makes the contract void.

Speaking for myself I much regret that the plaintiff should have been misled into framing her contract in this way, since, as I have indicated, the result is certainly one of great hardship to her; but I see no alternative upon the plain law of the case than to hold, as I have indicated above, a view in which I believe I have the complete concurrence of my learned brother, and so to reverse the decree of the Courts below and dismiss this suit; but bearing in mind the hardship of the case and the probable ignorance of the plaintiff which has led her into this unfortunate position, I would make both the parties bear their own costs throughout.

HEATON, J.—I agree with the order proposed and I fully agree that it is an unfortunate thing that this claim has to be dismissed. But it must be dismissed because the contract, specific performance of which was sought by the plaintiff, is one which, on the face of it, is opposed to public policy. The contract, which is for the sale of land by Ramchandra to the plaintiff at a stated price, recites that "you (*i. e.*, the plaintiff) have filed a complaint for criminal breach of trust against me and Dinkar in the First Class Magistrate's Court at Chiplun." A complaint of criminal breach of trust of a kind that can be compounded. Then the contract ends by saying: "This contract is not to be in force if the complaint is not withdrawn." That seems to me to be, unmistakably on the face of it, an illegal contract. However unfortunate the result, we have to give effect to law.

Decree reversed.

DAROGA RAUT v. PAREMA KUER.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No 231 OF 1917.

February 2, 1918.

Present:—Mr. Justice Roe.

DAROGA RAUT—PLAINTIFF—APPELLANT

versus

Musammat PAREMA KUER—DEFENDANT—RESPONDENT.

Court Fees Act (VII of 1870), Sch. I, Art. 1, Sch. II, Art. 17—Cross-objection—Court-fee payable.

There is no reason to assume that the words "or cross-objection" have been omitted from Article 17 of Schedule II of the Court Fees Act. Therefore, a cross-objection in a suit for a declaration must bear *ad valorem* Court-fee under Article 1, Schedule I of the Court Fees Act.

The Taxing Officer made the following reference to the Taxing Judge:—

A cross-objection in this appeal has been filed, on which a valuation of Rs. 250 has been put and a Court-fee of Rs. 10 has been paid. The cross-objection has been properly valued and if this had been an appeal, the proper Court-fee would have been Rs. 10 under Schedule II, Article 17 of the Court Fees Act, the relief being only declaratory. Schedule II, Article 17, however, does not deal with cross-objections, so it appears an *ad valorem* Court-fee should be paid. The same difficulty arose in the case of *Lakhan Singh* v. *Ram Kishen Das* (1). In that case Tudball, J. found that Article 17, Schedule II of the Court Fees Act, did not apply to cross-objections and that an *ad valorem* Court-fee must be paid. He remarked that there was possibly an oversight at the time when Act V of 1908 was passed, in not having added the words "or cross-objection" to Article 17 of the Act. As things stand, therefore, it would appear that the *ad valorem* Court-fee must be paid.

JUDGMENT.—I think it is rash to assume that an item has been omitted from a schedule by an oversight. It seems to me logical to say that if a party who has been refused an order altering a summary decision or entry in a register or a declaratory decree or an order setting aside an award or an adoption is aggrieved by such an order, he should file an appeal against that refusal. It is as reasonable to say that the words "cross-objection" have been deliberately omitted from Article 17, as it would be obviously right to say that the words

(1) 43 Ind. Cas. 179; 15 A. L. J. 886; 40 A. 93.

REHMAT-UN-NISSA BEGUM v. PRICE.

"written statement, pleading, set-off or counter-claim" have been deliberately omitted from that Article. There is in the result of this conclusion no hardship. An unsuccessful litigant genuinely desirous of one of the reliefs contemplated by Article 17 is at liberty to file an appeal forthwith irrespective of any action that may be taken by his adversary, and pay on the appeal a Court fee of Rs. 10. If he asks for such a relief only because his adversary has preferred an appeal, he will be required, if his own appeal is time-barred, to pay an *ad valorem* fee. If his appeal is not time-barred, he should seek his remedy by a regular appeal, not by a cross-objection.

PRIVY COUNCIL.

APPEAL FROM THE BOMBAY HIGH COURT.

December 13, 1917.

Present:—Lord Buckmaster, Sir John Edge, Sir Walter Phillimore, Bart., and Sir Lawrence Jenkins.

REHMAT-UN-NISSA BEGUM AND OTHERS—APPELLANTS

versus

PRICE, SINCE DECEASED, AND OTHERS—RESPONDENTS.

Contract Act (IX of 1872), ss. 252, 254 (6)—Partnership—Dissolution, right to, how far affected by terms of partnership contract—Court, power of, to decree dissolution.

A partner's claim to a decree for dissolution rests, in its origin, not on contract, but on his inherent right to invoke the Court's protection on equitable grounds, in spite of the terms in which the rights and obligations of the partners may have been regulated and defined by the partnership contract. [p. 571, col. 1.]

It is not, therefore, a contravention of section 252 of the Contract Act for a partner to seek dissolution, or for the Court to decree it, though the partnership agreement contemplates the continuance of the partnership beyond the date at which the suit is instituted. It is to meet the precise predicament of a partnership not terminable at will that the Court's power to decree dissolution is conferred in the events enumerated in section 254 of the Contract Act. [p. 571, cols. 1 & 2]

Appeal from a decree of the Bombay High Court (Sir Basil Scott, C. J., and Davar, J.,) dated the 8th September 1914, varying a decree of Macleod, J., dated the 28th March 1914.

REHMAT-UN-NISSA BEGUM v. PRICE.

FACTS of the case are sufficiently stated in their Lordships' judgment. Briefly, the appellants' predecessor, Nawab Kamal Yar Jung, had entered into a partnership with respondents for the quarrying and supply of stone to be used by respondents in constructing certain docks at Bombay. The partnership agreement provided that the partnership should continue until the supply of stone for the docks was completed. The partnership, however, resulted only in losses, and on that ground the Nawab sued for a dissolution. Macleod, J., decreed his suit, but this decision was reversed on appeal by Scott, C. J. and Davar, J. They held that *Couvas ee Nanabhoy* v. *Lallbhoy Vallubhoy* (1) established the proposition that parties when entering into a partnership agreement may so stipulate as to relinquish their right of dissolution in the ordinary way and postpone that right till the expiration of a period or the completion of an adventure: that that case was before the Contract Act, but that section 252 of the Contract Act laid down the same rule: that the parties here had expressly stipulated that the partnership should continue till the supply of stone for the docks had been completed. They added that even if they had a discretion to declare the partnership dissolved, they would not have exercised it in plaintiff's favour. The docks being by this time completed, they did not dismiss the suit, but held that plaintiff was not entitled to a declaration that the partnership came to a termination before the termination of the adventure, and directed that partnership accounts be taken up to the end of the construction work of the docks.

Hence this appeal.

Mr. *Upjohn*, *K. C.*, and *Sir W. Garth*, for the Appellants.—Under section 254 (6) of the Indian Contract Act a partner may sue for dissolution of partnership when the business of the partnership cannot be carried on except at a loss. There are no circumstances here to justify the finding that the parties agreed to renounce the right of dissolving in case of loss. On a proper construction of the articles of agreement the appellants did not relinquish their statutory right to apply to dissolve the partnership in that case. *Cowasjee Nanabhoy* v. *Lallbhoy Vallubhoy* (1) does not lay down that partners can contract themselves out of that right. To the contrary effect *vide* Lindley on Partnership, page 658.

On the question of discretion, there is nothing in the facts which disentitles appellants to the benefit of the Statute. Macleod, J., exercised his discretion rightly in plaintiffs' favour and the Appellate Court had no sufficient reason for interference with it.

Messrs. *P. O Lawrence*, *K. C.*, *L De Gruyther* and *E. B. Raikes*, for the Respondents.—The Appellate Court were right in saying this was not a contract which one party could determine merely because the business was being carried on at a loss. The articles show that there was an agreement that the partners would not take advantage of their statutory right to apply for dissolution. Whatever power the Court had to dissolve, the discretion not to dissolve has been exercised rightly and properly by the Court of Appeal.

Mr. *Upjohn*, *K. C.*, replied.

JUDGMENT.

SIR LAWRENCE JENKINS.—This is an appeal from a decree of the High Court at Bombay in its Appellate Jurisdiction, dated the 8th September 1914, varying a decree of that Court in its Original Jurisdiction passed on the 28th March 1914. The suit is for a dissolution of partnership. The original plaintiff was Nawab Kamal Khan, but he has died in the course of the suit and the present appellants are his representatives. The defendants, his partners, are the respondents in this appeal. The partnership was constituted on the 11th March 1908, and its terms are contained in an instrument of that date. To appreciate its purpose and legal effect it will be convenient to describe briefly the events that led up to its execution. The defendants, a firm of contractors, had undertaken the construction of the New Alexandra Dock in the island of Bombay, and they required for the work a large supply of granite and other stone. They accordingly made two contracts in 1906 for this supply, and in both of them

(1) 1 B. 468; 3 I. A. 200; 3 Suth. P. C. J. 326; 3 Sar. P. C. J. 645; 11 Mad. Jur. 392; 26 W. R. 78; 1 Ind. Dec. (N. S.) 309 (P. C.).

the Nawab was either directly or indirectly interested.

For reasons which need not be discussed, the supply of granite and stone under these contracts was so unsatisfactory that the defendants' manager complained, and declared that he would be compelled to look elsewhere if he could not get delivery according to contract.

In the end an arrangement was made for cancellation of the two contracts and the release of all claims for their breach by the Nawab and those interested with him, and for the formation of a new partnership between the Nawab and the defendants for the quarrying and supply of the requisite granite and other stone. The defendants insisted that the Nawab should be a sleeping partner without any voice in the control and conduct of the business, so his advisers naturally demanded the insertion in the partnership instrument of a provision which would secure him against the risk of extravagant working.

To this the defendants assented, and a clause was inserted which ultimately became the 25th in the instrument as executed. It is this clause that has given rise to much of the present dispute.

In the instrument, which is expressed to be made between the Nawab, of the one part, and the defendants (thereinafter called the contractors), of the other part, after a narrative of the events leading up to the partnership, it is recited that "for the purpose of carrying out the said terms and conditions and of working the said quarries and producing stone and granite therefrom, and rendering the said quarries remunerative and profitable to the parties thereto, and in consideration of the advances to be made by the contractors," it had been arranged that the agreement should be entered into.

The instrument then provided that the Nawab and the defendants should be interested in the working of the quarries at Lingampalli and Dharur, and should share the profits and losses half and half (clause 1); that the granite and stone produced from the quarries should be furnished to the defendants for their works at the dock in accordance with their requirements and sent, delivered, and paid for as therein provided (clause 3); that the working of the quarries and the partnership should continue until the supply of granite or other stone for the construction of the docks was completed, and that the partnership should then terminate and be wound up (clause 4); that the expenditure incurred in managing and supervising the quarries should not exceed the proportion of 10 per cent. on the cost of the work, including all charges (clause 17); that the royalty should be one of the expenses of working the quarries, to be defrayed out of the partnership funds or the income earned (clause 22); and "that the average rate of expense per cubic foot at which the stone has hitherto been quarried, exclusive of management and superintendence, shall not be exceeded in future except under extraordinary circumstances, when the rate of expense may be increased by 10 per cent." The work contemplated by the partnership was carried on, but with the one unvarying result of annual loss, which amounted to upwards of three lakhs of rupees on the 30th June 1910. In these circumstances the present suit was instituted in October 1912, praying for a dissolution on the ground that the business of the partnership had been, and only could be, carried on at a loss.

In the plaint extravagant charges of fraud were made, but they have been abandoned. While groundless charges of this type are to be deprecated, and may well attract the consequence of an adverse order as to costs, their Lordships cannot accede to the suggestion, somewhat faintly made, that the Nawab had by these charges forfeited his right to the protection of the Court if he otherwise had a good cause of action.

The matters now in contest are (1) whether the suit is premature; (2) what is the "average rate of expense" mentioned in clause 25 of the partnership instrument; and (3) have there been "extraordinary circumstances" within the meaning of that clause?

The Court of first instance decided in the Nawab's favour on the first and second of these points, and adversely to him on the third. The Appellate Bench's decision was wholly adverse to the Nawab, but as the work on the docks had been completed before the hearing of the appeal, the Court directed that partnership accounts should be taken from the 11th

March 1908 up to the end of the construction work of the docks.

The Court of Appeal's decision that the Nawab when he filed his suit was not entitled to claim a dissolution, was based on the continuance of the partnership involved in the terms of the partnership agreement and on section 252 of the Contract Act. And the Court proceeded to express the opinion that, even if it had jurisdiction, it would have refused to declare the partnership dissolved at any period earlier than the completion of the work. The first and the more extreme of these propositions was not seriously pressed in argument before this Board, nor indeed could it be.

It is beyond controversy that at the institution of this suit the business of the partnership could only be carried on at a loss. This is conclusively shown by the firm's balance sheets, the profit and loss account for the period from the 1st March 1908 to the 30th June 1912, and the admission in the defendants' written statement. The condition described in section 254 (6) of the Indian Contract Act, 1872, is thus established, and it is provided that in this event the Court may, at the suit of a partner, dissolve the partnership. What, then, is there in the circumstances of this case to deprive the Court of its jurisdiction or the plaintiff of his right to seek the Court's assistance?

Their Lordships are unable to agree with the High Court's view that there is anything in section 252 that constitutes a bar; it appears to them to be directed to something wholly different.

A partner's claim to a decree for dissolution rests, in its origin, not on contract, but on his inherent right to invoke the Court's protection on equitable grounds, in spite of the terms in which the rights and obligations of the partners may have been regulated and defined by the partnership contract.

It was not, therefore, any contravention of that section for the plaintiff to seek a dissolution, or for the Court to decree it, though the partnership agreement contemplated the continuance of the partnership beyond the date at which the suit was instituted. No man can exclude himself from the protection of the Courts, and yet, if the view of the Appellate Bench is to prevail, this is what the Nawab has done, for a decree for dissolution would be the protection appropriate in the circumstances of this case. It is no answer to say that this partnership was not terminable at will; it is to meet that precise predicament that the Court's power to decree dissolution is conferred in the events enumerated in section 254. For a partnership terminable at will no such provision would be required.

Their Lordships, therefore, are unable to affirm the decision of the Appellate Bench as to the competence of the suit. But this leaves open the question whether the Court's discretion should be exercised for or against the Nawab's claim. The Appellate Bench decided adversely to it, and it was urged in argument against interference with this decision that it is opposed to sound practice for an Appellate Court to substitute its discretion for that of the Court from which an appeal has been preferred. The justice of this argument is undoubted, but it was at least as relevant before the Appellate Bench as it is before this Board. And yet the Appellate Bench did not hesitate to express its readiness to substitute its discretion for that of the original Court, although in the view it took of the Court's jurisdiction the question could not arise.

In these circumstances the real question is whether there was or is any justification for questioning or disturbing the discretion exercised by the original Court when it passed the decree for dissolution in the Nawab's favour. It cannot be said that the Court acted capriciously or in disregard of any legal principle in this exercise of its discretion. On the contrary, there are elements in the case which can fairly be regarded as ample warrant for the first Court's decision, and for this it is enough to point to the dual position of the defendants, which brought their interests as contractors into sharp conflict with their duties as partners of the Nawab, and also to the prominence given in the recital to the common purpose that the quarries should be remunerative and profitable to the partners.

Their Lordships, therefore, hold that there is no sufficient ground for disturbing the original decree so far as it pronounced for a dissolution.

The next inquiry involved in this appeal is as to the amount of the average rate of expense prescribed as a limit by clause 25 of the partnership instrument. This clause was inserted as a protection for the Nawab; it in effect imposed a limit on expenditure by the controlling partners, and the measure of that limit was the rate of expenditure in the past.

It had originally been arranged that the rate should be embodied in the document. Its ascertainment had been entrusted to Mr. Chukerbutty on behalf of the Nawab, and Mr. Stuart on behalf of the defendants, but they were unable to agree to a figure in time for its inclusion in the engrossment.

On the 10th March 1905, however, the two representatives agreed to a figure, and the contest is as to what the figure covered. On the same day Sturat wrote on behalf of the defendants and sent to the Nawab a letter in the following terms:—

"We beg to confirm the rate agreed upon with Mr. Chukerbutty this day as referring to clause No. 25 in the proposed agreement between you and ourselves, *viz*, Bombay Government, rupee 1, annas 7, per cubic foot for all labour on granite for quarrying, dressing, and hauling to station."

On the 11th the partnership instrument was executed by the Nawab at Hyderabad and from an endorsement it appears that it was read over and in erpreted to him by Chukerbutty. It probably had been previously signed by or on behalf of the defendants at Bombay, though no distinct proof as to this has been brought to their Lordships' notice.

On the 14th March the Nawab wrote to the defendants as follows:—

"In reply to your letter dated the 10th regarding the working expense of granite stone at Lingampalli, I beg to point out the rate of 1/7 rupees was arrived at on calculation on wrong basis. This has got to be revised on actual working before it can be acceded to."

Here it becomes necessary to refer to an admission made in the course of the suit and contained in a letter of the 30th July 1913 written by the plaintiffs' attorneys to the defendants' solicitors. It is expressed to be in confirmation of what had passed between Counsel for the parties at a meeting on the previous day and after stating that "with a view to shortening proceedings" certain charges were abandoned, it runs as follows:—

"We also give notice that for the above reasons and for the purposes of this suit only our client admits that at or about the time of signing the partnership agreement . . . . it was agreed between the parties that the cost of working the quarries should not exceed the rate of 1 7 rupees (British currency) per cubic foot of stone. We think it right to add that this admission must not be taken as an admission that the said rate included only the items apparently contended for by the defendants as shown in the accounts submitted by them to our client."

This admission is of vital importance: it controls this branch of the case, and narrows the region of enquiry. Not only does it decisively affirm and place beyond controversy the fact that there was an agreement and that according to that agreement the rate was not to exceed 1 7 rupees, but it excludes the possibility of any objection to its admissibilty under section 91 or 92 of Evidence Act. The one qualification is that the rate did not only include the three items of quarrying, dressing, and hauling. All, therefore, that has to be considered and determined is whether under the agreement between Chukerbutty and Stuart three items only or more than three items were covered by the accepted rate of 1/7 rupees. It is beside the point to speculate as to whether this figure was assessed in error; for if error there was, the proceedings are not aptly framed for its correction.

On the question whether, in the agreement between Chuckerbutty and Stuart, these three items and these alone were included, the evidence stands thus. The letter of the 10th March is explicit on the point; it states that the 1/7 rupees were for these three items and for nothing else. It was written and sent on the very day the agreement was made and just after Chukerbutty had left, so there would be no room for forgetfulness in the matter. Nor is it reasonable to suppose that Stuart would have at once sat down and deliber-

ately given a false version of the agreement. And then there is the significant circumstance that the agreement was subsequently signed by the Nawab without any protest or repudiation of the terms contained in the letter, and this was done in the presence of Chukerbutty, who, it is sworn, was always first consulted by the Nawab before signing anything, and who on this occasion acted as interpreter. It is true that on the 14th the Nawab wrote objecting to the letter of the 10th, but his objection was not that no agreement had been made in the terms stated by Stuart, but that the calculation had been on a wrong basis. And then there is the evidence of Stuart. He declares that the rate agreed upon between Chukerbutty and himself was 1 7 rupees per cubic foot, and that the letter of the 10th March correctly states the agreement. His veracity has not been impugned, but it has been strenuously contended on behalf of the Nawab that in view of the figures in Exhibit 27, the estimate of cost of stone prepared by Mr. Gay, and of Stuart's evidence as to the use made of those figures in arriving at the rate on which he and Chukerbutty ultimately agreed, it is impossible that the rate of 1 7 rupees could have been for the three items of quarrying, dressing, and hauling only, and that it must also have included loading, depreciation, royalty, quarry expenses, and incidentals.

Their Lordships recognise the force of this criticism, and realise that the coincidence of the figures in Exhibit 27 with this contention is worthy of consideration. But at the same time they feel that it would be easy to attribute too much weight to it, and more particularly as Stuart's evidence was given in answer to interrogatories and cross-interrogatories administered on commission, so that there was no opportunity of giving the examination a direction which would have elucidated the full significance of answers which now remain obscure. In the circumstances it is at least as probable that the estimate of 1/7 rupees was limited to the three items as the result of a compact between Chukerbutty and Stuart reached by accommodation or possibly even in error, as that the agreed rate of 1/7 rupees was not limited to the three items. As it is involved in the Nawab's admission of the 30th July 1913 that there was an agreement for a rate of 1/7 rupees, and the only evidence on the record is that this rate covered the three items and no more, in the absence of contradiction by Chukerbutty or any one else able to speak to the point, their Lordships hold that this must be accepted, and the decision of the Appellate Bench on this point upheld.

It only remains to consider the defendants' contention that they had established such "extraordinary circumstances" as would justify the increase of the rate as provided by clause 25. The burden of making this good was on the defendants, and the question is, whether they have succeeded in this. What then are the "extraordinary circumstances?" The only direct evidence is that of Gay, and all that can be spelt out of his evidence is that the circumstances occasioning greater expenditure were (1) the preparation of culvert stones; and (2) the importation of labour. The first of these cannot be regarded as an extraordinary circumstance, for the schedule to the partnership instrument shows that it must have been within the contemplation of the parties when the contract was made.

So there only remains the importation of labour. This may have occasioned an increase of expenditure, but it certainly is not shown that it was an extraordinary circumstance that should raise the limit on the rate of expense prescribed in clause 25. This importation was due to an extension of the quarrying operations and was a normal development of the business made by the defendants to suit their own convenience and meet their requirements, not as partners of the Nawab, but as contractors engaged on the construction of the dock in Bombay.

Their Lordships, therefore, hold that no "extraordinary circumstances" within the meaning of clause 25 have been proved.

Their Lordships will accordingly humbly advise His Majesty to allow this appeal and to direct that the decree of the Appeal Court should be set aside and that of the original Court restored, (1) with the variation that so much thereof as orders that in taking the account thereby

directed "the Commissioner do allow for the costs of quarrying provided for in clause 25 of the partnership agreement for the Lingampalli quarries rupee one and annas five per cubic foot exclusive of management and supervision, and add thereto annas two for royalty" be omitted, and that in lieu thereof it be ordered and decreed that "the rate for the purpose of clause 25 of the partnership agreement was and shall be rupee one and annas seven per cubic foot for the cost of the quarrying of the Lingampalli quarries mentioned in the plaint in the suit, and that this rate covers only the expenses of labour on quarrying and dressing the stones and hauling the same to the railway station, and that neither royalty nor any depreciation of plant or machinery is included in the rate so fixed;" and (2) with the further variation that the declaration "that the defendants are justified in adding ten per cent. for extraordinary circumstances under the said clause 25 of the said agreement" be also omitted. Their Lordships recommend an order in the above form, as they do not wish to interfere with the discretion exercised by the original Court in its direction as to costs; and as to the costs of this appeal and the appeal to the High Court, they will recommend that there be no order save that each party bear his own.

Appeal dismissed.

Solicitors for the Appellants.—Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondent.—Messrs. *Grundy, Kershaw, Samson & Co.*

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 2033 OF 1916.

April 22, 1918.

Present:—Mr. Justice Scott-Smith.

UDMI AND OTHERS—DEFENDANTS—APPELLANTS

versus

MUNSHI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Punjab Tenancy Act (XVI of 1887), s. 59—Occupancy tenancy—Joint tenants—Survivorship, right of—Tenants recorded as having defined shares, effect of.

The right of a landlord to claim the extinction of an occupancy right when there are joint tenants does not arise on the death of one of them, as they collectively constitute a single tenant and the right continues to exist in the survivor or survivors. [p. 576, col. 2.]

Agar Singh v. *Dhana*, 6 P. R. 1902 Rev.; 11 P. L. R. 1903, followed.

The fact that the occupancy tenants are recorded as having defined shares in the tenancy does not make any difference and does not affect the right of survivorship. [p. 576, col. 2.]

Chanda Singh v. *Jiwan Singh*, 42 Ind Cas. 87; 6 P. R. 1917 Rev.; 5 P. W. R. 1917 Rev., followed.

Second appeal from the decree of the District Judge, Karnal, dated the 5th May 1916, reversing that of the Munsif, 1st Class, Sonepat, District Rohtak, dated the 30th November 1915, dismissing the claim.

FACTS appear sufficiently from the judgment.

Rai Sahib Lala *Moti Sagar*, for the Appellants.—In this case the plaintiffs base their claim on two alternative grounds. *First*, that they are entitled to succeed under section 59 of the Punjab Tenancy Act; *secondly* that the tenancy is joint and that they are entitled to succeed to Mamraj's share by survivorship. Under section 59 of the Tenancy Act it is necessary to prove that the common ancestor of the plaintiffs and of Mamraj occupied the land in dispute. Both the Courts below have held that the plaintiffs have failed to prove occupation by the common ancestor, so that that finding is conclusive in second appeal. As regards the second ground of claim the lower Appellate Court has gone hopelessly wrong. It has found that the tenancy in dispute is a joint tenancy. That is wrong. In this tenancy the shares of the parties are defined, whereas in the case of a joint Hindu family there are no defined shares.

[SCOTT-SMITH, J.—Askaran and Surta acquired the tenancy jointly.]

The only question before your Lordships is whether the tenancy in dispute is a joint tenancy. Referred to *Mohru* v. *Mutsaddi* (1), *Agar Singh* v. *Dhana* (2) and *Kahn Singh* v. *Hardit Singh* (3).

[SCOTT SMITH, J.—*Agar Singh* v. *Dhana* (2) is not very much in point. In that case

(1) 109 P. R. 1894.
(2) 6 P. R. 1902 Rev.; 11 P. L. R. 1903.
(3) 109 P. R. 1908; 46 P. W. R. 1907.

there had been partition. *Kahn Singh* v. *Hardit Singh* (3) referred to mortgages.]

The principle is the same. The conception of joint tenancy is peculiar to the Hindu Law and to the English Law. *Munni* v. *Umrao Singh* (4).

[SCOTT SMITH, J.—That is not in point either.]

If the tenancy had been joint, then on the death of Mamraj the property should have gone to the plaintiffs. The fact that *Musammat* Bholi succeeded to her husband's share shows that the tenancy was not joint.

[SCOTT-SMITH, J.—In the case of the death of one joint tenant does not his son succeed to his share?]

No.

Mr. *Zafrullah Khan*, for the Respondents.—It has been urged for the appellants that the tenancy in dispute is not joint because the shares of the parties therein are defined, and also because if the tenancy had been joint *Musammat* Bholi would not have succeeded to her husband's share. Now a joint tenancy in the Punjab is not the same thing as a joint estate under Hindu Law or English Law. It is a peculiar kind of tenancy in which, *as against the landlord*, the whole body of tenants constitutes one tenant, so that so long as any of the tenants or the heirs of any of them are in existence, the landlord cannot come in and there is no room for the application of section 59 of the Tenancy Act. On the other hand, as between the tenants themselves the rule of survivorship has no application and on the death of a co-sharer in the tenancy his heir or heirs succeed to his share in the tenancy. The principles of Hindu Law or of English Law have no application to such a tenancy. *Mohru* v. *Mustaddi* (1), cited by the Counsel for the appellants, supports my contention. See the remarks of Roe, J., on page 420.* *Agar Singh* v. *Ithana* (2) is not against me. In the present case there has been no partition or division of the tenancy. On the contrary there is joint cultivation.

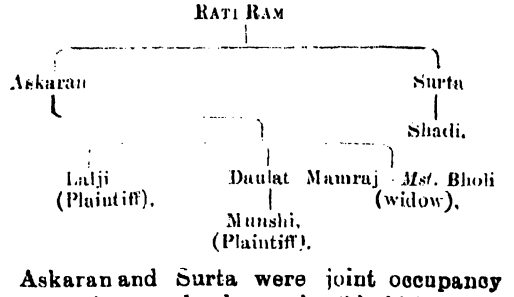
[SCOTT-SMITH, J.—But the shares are defined.]

Yes, but that makes no difference. In every joint tenancy the Revenue Authorities are bound to define the shares. The test is whether the *khata* is joint or divided. If there is a single *khata* the tenancy is joint, even if there is separate cultivation by agreement among the co-sharers. See *Chanda Singh* v. *Jiwan Singh* (5). That was a much stronger case in favour of the landlords than the present one. In that case the tenancy had been purchased by two persons in equal shares. Their shares were defined and there had been separate cultivation. Even then it was held that in default of actual and effective partition the tenancy continued to be joint as against the landlord. Here there is one *khata* and joint cultivation.

As regards the succession of *Musammat* Bholi to her husband's share, I have already explained that in a joint tenancy of this kind the rule of survivorship does not apply as among the co-sharers.

Rai Sahib Lala *Moti Sagar*, in reply.

JUDGMENT.—In this case plaintiffs-respondents claim to succeed to certain occupancy land left by *Musammat* Bholi, widow of Mamraj. The pedigree-table of the plaintiffs and the deceased occupancy tenant is as follows :—



Askaran and Surta were joint occupancy tenants in equal shares in 33 *bighas* 11 *biswas* of land. Mamraj was adopted by Surta after the death of his son Shadi, and succeeded to Surta in the occupancy tenancy. Upon Mamraj's death without issue Bholi succeeded to a life-interest. She having now died the plaintiffs base their claim on two grounds :—

(1) that the land was occupied by Rati Ram, the common ancestor of themselves and of Surta, and

(2) that they are entitled to succeed by right of survivorship.

(4) 1 Ind. Cas. 720; 39 P. R. 1909; 59 P. L. R. 1909; 55 P. W. R. 1909.

(5) 42 Ind. Cas. 87; 6 P. R. 1917 Rev.; 5 P. W. R. 1917 Rev.

*Page of P. R. 1891—*Ed.*

The Courts below have concurred in holding that it is not proved that Rati Ram occupied the land and this decision is final. The lower Appellate Court, however, differing from the first Court, held that plaintiffs were entitled to succeed to the land in dispute by right of survivorship.

The landlords have filed a second appeal to this Court and it is contended on their behalf that Mamraj and the plaintiffs were not joint tenants but only tenants-in-common and that amongst tenants-in-common the principle of right of survivorship does not obtain.

In support of this contention Counsel has referred to *Mohru* v. *Mutsaddi* (1), *Agar Singh* v. *Dhana* (2), *Khan Singh* v. *Hardit Singh* (3) and *Munni* v. *Umrao Singh* (4). Counsel for the respondents on the other hand relies upon *Agar Singh* v. *Dhana* (2), *Chanda Singh* v. *Jiwan Singh* (5) and also refers to certain remarks in *Mohru* v. *Mutsaddi* (1) at page 420 *Mohru* v. *Mutsaddi* (1) is not quite on all fours with the present case. What was decided there was that as between the tenants themselves the principle of survivorship did not operate, so as to exclude the reversioners of a deceased tenant who would otherwise be entitled to succeed in accordance with section 59 of the Punjab Tenancy Act. As pointed out by the Financial Commissioner in *Chanda Singh* v. *Jiwan Singh* (5), what was really held in the Full Bench ruling of 1894 was that *as regards the landlord* the joint tenants of a holding, even though it was not held by a common ancestor, are to be regarded as a single tenant and that as long as any of them or the descendants of them survive, the landlord cannot claim the share of any tenant whose line has died out. The Financial Commissioner held that as partition in the case before him had not been effected, the tenancy as a whole continued *as against the landlords* to be the property of the surviving tenants. If this decision is correct, the plaintiffs in the present case were entitled to succeed to the land in dispute according to the principle of survivorship. *Khan Singh* v. *Hardit Singh* (3) is not on all fours with the present case. The facts there were as follows:—The landlords of the land in dispute (represented by the defendants) executed a mortgage in favour of three persons, Khan Singh, Nihal Singh and Kishen Singh. Under the terms of the mortgage-deed the land was mortgaged to each mortgagee in specified shares, each mortgagee receiving a third share in the entire property. It was further provided in the deed that if the mortgagors did not redeem the said land within two years, the mortgagees were to be entitled to occupancy rights. Some years subsequent to the mortgage it was held, upon the landlords suing to redeem the mortgage, that the mortgagees had acquired occupancy rights in the land. It was held by the Chief Court that as the mortgage was effected in defined shares in favour of three persons, the mortgagees were not joint tenants within the legal meaning of that expression, and that being so the principle of survivorship did not apply. In that case each mortgagee received a third share in the entire property and each acquired occupancy rights in a 1/3rd share. They did not acquire joint occupancy rights and, therefore, they could not be considered to be joint tenants. In *Agar Singh* v. *Dhana* (2) it was held that as section 59 of the Tenancy Act deals only with the question of succession and does not affect the ordinary rule of survivorship between joint tenants, the right of the landlord to claim the extinction of an occupancy right where there are joint tenants does not arise on the death of one of them, as they collectively constituted a single tenant, and the right continues to exist in the survivor or survivors. As pointed out by the Financial Commissioner in *Chanda Singh* v. *Jiwan Singh* (5), the fact that the occupancy tenants are recorded as having defined shares in the tenancy does not make any difference and does not affect the right of survivorship.

It has been held in the present case that the tenancy was jointly acquired by Askaran and Surta and there has been no partition thereof. In my opinion the decision of the lower Appellate Court that plaintiffs are entitled to succeed by right of survivorship to the share left by *Musammat* Bholi is in accordance with the previous authorities and especially with *Chanda Singh* v. *Jiwan Singh* (5). There is no authority exactly on all fours which sup-

ports the arguments of appellant's Counsel that the principle of survivorship does not apply where the tenants are recorded to hold defined shares in the joint tenancy.

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

Appeal dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 47 OF 1917.

January 21, 1918.

Present:—Sir Stanley Batchelor, KT., Acting Chief Justice, and Mr. Justice Kemp.

NAGAR KASHI PATEL AND ANOTHER—DEFENDANTS—APPELLANTS

versus

BAI DHULI—PLAINTIFF—RESPONDENT.

Bombay Bhagdari and Narvadari Act (V Bom. of 1862), s. 3—Award deciding recognised sub-division of Bhag, validity of.

An award the result of which would be to effect further division in a certain recognised sub-division of a Bhag is void under section 3 of the Bombay Bhagdari and Narvadari Act. [p. 577, col. 2.]

The substance and effect of the transaction is what must be looked to for the purpose of determining whether it is within the mischief which the Legislature had in view in passing the Bombay Bhagdari and Narvadari Act. If the transaction clearly amounts to an alienation of an unrecognised sub-division of a share in a *vatan*, its real nature cannot be disguised by calling it a compromise. [p. 578, col. 1.]

Second appeal from the decision of the Joint Judge, Ahmedabad, in Appeal No. 146 of 1916, confirming the decree passed by the Subordinate Judge, Borsad, in Suit No. 377 of 1914.

Mr. *G. N. Thakor*, for the Appellants.

Mr. *N. K. Mehta*, for the Respondent.

JUDGMENT.

BATCHELOR, AG. C. J.—Omitting any reference to certain allegations, which are not now material, the substance of the plaint was a prayer to recover from the defendants possession of the two Survey Nos. 196 and 208, on the ground that the original owner of them was the plaintiff's brother, Fakir Garbad, and that the plaintiff was both his heiress under Hindu Law and his legatee under a Will; that the defendants being distant cousins of Fakir Garbad took from the plaintiff a certain deed of gift, Exhibit 16, in respect of these fields; but that that deed was void, and of no effect, under the terms of section 3 of the Bhagdari and Narvadari Act (Bom. Act V of 1862). The lower Courts have decided this latter point in favour of the plaintiff, and the defendants bring the present appeal.

Mr. Thakor on their behalf contends that section 3 of the Bhagdari Act does not apply to such a case as we have here, where a dispute between the plaintiff and the defendants regarding their claims to inherit to Fakir Garbad was settled by reference to arbitrators, who awarded the two Nos. 196 and 208 to the defendants. Admittedly the result of this award, if it were allowed to stand, would be to effect further division in a certain recognised sub-division of a Bhag. But the learned Pleader's contention here is that there is nothing in the Bhagdari Act to prohibit the taking by inheritance of an unrecognised portion of a Bhag, and if that is so, the Court should hold in this case that the properties were given to the defendants, not by alienation from any acknowledged owner, but in satisfaction of the defendants' right to succeed to Fakir Garbad.

The learned Pleader began his argument by referring to *Veribhai* v. *Raghabhai* (1), a decision of Mr. Justice Melvill and Mr. Justice Kemball. It was there held that there was nothing in the Bombay Bhagdari Act which debarred a Civil Court from making a decree for the partition of Narvadari land among the Bhagdars, even though the effect of that partition would cause a further division of recognised sub-divisions of Bhags. I think, however, that that is a case of which the authority ought not to be extended, for if I read rightly Mr. Justice Melvill's judgment, the Court's decision turned less upon a rigorous interpretation of section 3 of the Bhagdari Act than upon an assurance that the particular partition there sought by the plaintiffs would not be objected to by the Revenue Authorities. The Court, therefore,

(1) 1 B. 225; 1 Ind. Dec. (N. S.) 150.

apparently thought that there would be no harm in giving the plaintiffs the partition for which they prayed, leaving them to run their risks with the Revenue Authorities. On the other hand, the decision in *Jethabhai* v. *Nathabhai* (2) appears to me directly in point here. That was a case where one Kashibhai held a recognised sub-division in a Narva. After his death and the death of his widow the plaintiffs alleged that they had inherited the property as heirs of Kashibhai. This led to disputes between the plaintiffs and the defendants, and ultimately a suit was brought. The suit failed. But before the period for appeal expired, the parties effected an amicable settlement which was embodied in Exhibit 44 in the suit. Mr. Justice Chandavarkar, in delivering the Court's decision, says:—

"The first question is—whether Exhibit 44 had the effect of alienating a portion of a Bhag or share in the Narva other than a recognised sub-division of such Bhag or share and was on that account void within the meaning of section 5 of Bombay Act V of 1862?

"It is argued for the plaintiffs that Exhibit 44 is not affected by that section, because, it is urged, it was a compromise entered into for the settlement of a *bona fide* dispute between the parties. The answer to that, however, is that the result of the compromise was to dismember Survey No. 275, which comprised 4 acres and 8 *gunthas*, and to give to the plaintiffs 2 acres and 4 *gunthas* out of it. In other words, by Exhibit 44 was carved out of the Narva a sub-division which did not exist at the date of the transaction as 'a recognised sub-division.' Whether we call it a compromise or a partition or by any other name, the effect of the transaction was the same. The substance and effect of the transaction is what must be looked to for the purpose of determining whether it is within the mischief which the Legislature had in view in passing the Act in question. If the transaction clearly amounts to an alienation of an unrecognised sub-division of a share in a Narva, its real nature cannot be disguised by calling it a compromise."

(2) 28 B. 309 at p. 404; 6 Bom. L. R. 428.

The facts there were indistinguishable in substance from the facts now before us, and the decision of the Bench in that case is binding upon us. Speaking for myself, I agree with that decision, and it must, I think, be applied to the facts in this appeal. For these reasons, I would affirm the lower Appellate Court's decree and dismiss this appeal with costs.

KEMP, J.—I agree.

Appeal dismissed.

PATNA HIGH COURT.
CIVIL REVISION NO. 107 OF 1917.
May 16, 1917.
Present:—Mr. Justice Sharfuddin and Mr. Justice Roe.

CHANDRABATI KUAR—
APPLICANT
versus
THE COLLECTOR OF DARBHANGA—
DEFENDANT—RESPONDENT.

Court Fees Act (VII of 1870), Sch. III, Annexure B (4)—Probate duty—Trusts created by Will, whether liable to duty.

The deduction allowed under Schedule III, Annexure B, item (4), for property held in trust not beneficially, applies only to property which the testator was possessed of or entitled to not beneficially but as trustee for any other person or persons and not to trusts created by the Will of the testator. [p. 579, col. 2; p. 580, col. 1.]

Civil revision against an order of the District Judge, Darbhanga, dated the 19th January 1917.

Mr. *Lachmi Narain Singh*, for the Appellant.

Mr. *Sultan Ahmad* (Government Advocate), for the Respondent.

JUDGMENT.

SHARFUDDIN, J.—This application was ordered to be heard first with regard to the question whether this Court had jurisdiction or not to interfere with the order passed by the District Judge on the application of the petitioner for a reduction in the Court-fees charged as probate duty on a sum equal to the capitalised value of Rs. 150 per mensem.

It appears that one Chandi Prasad Singh died leaving a Will; and also leaving two widows and a mother. In

the Will the deceased appointed the senior widow as the sole executrix; and it was provided in the Will that the junior widow was to get an annuity of Rs. 50 a month and the mother an annuity of Rs. 100 a month.

The petitioner made a valuation of the nett value of the property of the deceased and the Collector of Darbhanga generally accepted and approved of the valuation, but he disallowed the reduction as observed above. The learned District Judge agreed with the Collector on this point, and from the order of the District Judge the present application is made.

The present application is under section 115 of the Code, and the question for determination is whether under section 115 we can interfere with, and set aside, the order of the District Judge. There can be no doubt that the District Judge had full jurisdiction to pass the order that he did. No doubt, if the District Judge had been guilty of passing a totally perverse order we might have been justified in interfering with it; but the order that he has passed was passed after careful consideration of the Act and we, therefore, hold that this Court has no jurisdiction to interfere with his order.

Apart from this consideration, however, the application must also fail on its merits.

The contention of the applicant is that, inasmuch as a charge has been made on the income of the estate to the extent of Rs. 150 a month, this should be treated as a debt, and that, therefore, in accordance with Schedule III, Annexures A and B of the Court Fees Act, a deduction should have been allowed.

Annexure A of Schedule III deals with the valuation of moveable and immoveable property of a deceased person; and at the bottom of the annexure it is provided that a deduction should be made on account of the items mentioned in Annexure B, and these items are:—

(1) Amount of debts due and owing from the deceased, payable by law out of the estate;

(2) Amount of funeral expenses;

(3) Amount of mortgage incumbrances;

(4) Property held in trust not beneficially or with general power to confer a beneficial interest;

(5) Other property not subject to duty.

There can be no doubt that these charges have to be deducted in assessing Court-fees.

It is contended that the fourth item of Annexure B relates to property held in trust under the Will not beneficially to the interest of the executrix of the Will. In my opinion, the trusts here referred to are trusts held not beneficially by the testator during his lifetime, but trusts created by the Will. That being the view I take, I must hold that the Court-fee chargeable should be calculated on the nett value of the whole estate which is the subject of the Will.

On behalf of the petitioner reliance is placed on the decision in *In the goods of Rushton* (1). That was a reference made by the Taxing Officer to the Chief Justice of Calcutta, and it appears from the report that the order made must have been passed in Chambers as nobody appeared in the matter. The decision is quite contrary to that in *In the goods of Ram Chunder Doss* (2). Another decision relied upon on behalf of the applicant is that in *Raj Kumari Bhubaneshwari* v. *Collector of Gaya* (3). Reliance is also placed on the decision in *In the goods of Harriett Teviot Kerr* (4). That was not a case of annuity and what was held was that the Court-fee payable upon the property under the Act is to be calculated upon the nett value of the estate after the deduction of debts from the gross value of the estate. In the present case there was no debt. If there had been a debt or a non-beneficial trust, created in the life-time of the testator, no doubt under the Act a deduction would have to be made; but this is not a case in which there is any such debt or trust. Therefore, I hold that on the merits even applicant has no case.

(1) 3 C. 736; 1 Ind. Dec. (N. S.) 1051.
(2) 18 W. R. 153; 9 B. L. R. 30.
(3) 21 Ind. Cas. 975; 41 C. 556 at p. 562; 18 C. W. N. 153; (1914) M. W. N. 13; 26 M. L. J. 56; 19 C. L. J. 136; 12 A. L. J. 69; 15 M. L. T. 87; 16 Bom. L. R. 95; 40 I. A. 236 (P. C.).
(4) 21 Ind. Cas. 502; 18 C. W. N. 121; 18 C. L. J. 308.

The application is, therefore, rejected.

ROE, J.—I agree. The deduction allowed under Schedule III, Annexure B, for property held in trust, not beneficially, undoubtedly applies only to "property which a deceased person was possessed of or entitled to not beneficially but as trustee for any other person or persons." [*see* Financial Resolution No. 2004, dated the 14th July, 1871, quoted at page 153 of Sutherland's Weekly Reporter, Vol. XVIII.]

Application rejected.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 996 OF 1916.

December 17, 1917.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Batchelor.

BALKRISHNA SUMBHAJI GHATE—PLAINTIFF—APPELLANT

versus

DATTATRAYA MAHADEV GHATE—DEFENDANT—RESPONDENT.

Pensions Act (XXIII of 1871), s. 4—Suit for declaration of ownership in respect of share in vatan, *maintainability of—Certificate of Collector, necessity of.*

A suit for a declaration that the plaintiff is the owner of a certain share in a *kulkarni vatan* falls within the purview of section 4 of the Pensions Act and is not maintainable without the Collector's certificate.

Second appeal against the decision of the District Judge, Ratnagiri, in Appeal No. 331 of 1915, reversing the decree passed by the Subordinate Judge, Devgad, in Civil Suit No. 314 of 1914.

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

Mr. *S. Y. Abhyankar*, for the Respondent.

JUDGMENT.—The plaintiff sued to have it declared that he was the owner of a ten-pies share out of a one-anna eight-pies share, and a still larger share standing in the name of the defendant in the Kulkarni Vatan of the village of Mutat. The share was in land revenue assigned for the purpose of supporting the office of Kulkarni. Section 4 of the Pensions Act provides that no Civil Court shall entertain any suit relating to any grant of land revenue conferred or made by the British or any former Government, whatever may have been the consideration for any such pension or grant, and whatever may have been the nature of the payment, claim or right for which such pension or grant may have been substituted.

The applicability of this section to cases of the description which we now have before us has been considered in various reported judgments of this Court, notably in *Babaji Hari* v. *Rajaram Ballal* (1) and *Dwarkanath Amrit* v. *Mahadev Balkrishna* (2). Both judgments emphatically assert the necessity of applying the section without modification to all suits of this nature. In *Balvant Ramchandra* v. *Secretary of State* (3) the section was very exhaustively discussed, together with the authorities which have accumulated upon it, in the judgment of Mr. Justice Batty and in that judgment will be found an express acceptance of the conclusions arrived at by the Court in *Babaji Hari* v. *Rajaram Ballal* (1). It is, however, said that those conclusions are inconsistent with the judgment of Sir Charles Sargent in *Govind Sitaram* v. *Bapuji Mahadeo* (4). That judgment, as shown in *Dwarkanath* v. *Mahadev* (2), related to a case expressly provided for by the Vatan Act, in which the Legislature contemplated that a decree of a Court should be obtainable, for it was a case in which the plaintiff's status as Vatandar was challenged, and the Court held that that being so, his right of access to the Civil Court was not to be ousted merely because the greater part of the remuneration for the Vatan service consisted of a money grant from Government. Here we are not concerned with any question of disputed status. The plaintiff is a member of a Vatan family who by reason of his membership has been able to acquire by purchase a certain share in the Vatan property, and his suit now relates to the share of revenue assigned for the Vatan, a suit relating to which falls within the purview of section 4 of the Pensions Act. We, therefore, affirm the decree of the lower Appellate Court and dismiss the appeal with costs.

Appeal dismissed.

(1) 1 B. 75; 1 Ind. Dec. (N. S.) 50.
(2) 17 Ind. Cas. 631; 14 Bom. L. R. 933; 37 B. 91.
(3) 29 B. 480; 7 Bom. L. R. 497.
(4) 18 B. 516; 9 Ind. Dec. (N. S.) 853.

SULTAN AHAMED v. ABDUL GANI.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2300 OF 1915.

February 25, 1918.

Present:—Mr. Justice Richardson and Mr. Justice Walmsley.

SULTAN AHAMED—PLAINTIFF—APPELLANT,

versus

ABDUL GANI AND OTHERS—DEFENDANTS—RESPONDENTS.

Muhammadan Law—Marzul-maut, *doctrine of, applicability of*—Waqf—Tauliatnama *appointing successor to* mutwalli, *validity of*—*Muhammadan Endowments Committee at Chittagong, whether statutory body*—Mutwalli, *appointment of.*

In the case of a gift or other voluntary disposition of property under the Muhammadan Law the doctrine of *marzul-maut* only applies when the gift is made during such illness. [p. 582, col. 2.]

If a person holding the office of *mutwalli*, to which is attached the right of appointing a successor under the Muhammadan Law or under any general law applicable to the topic, freely executes a *tauliatnama* as a testamentary document for appointing a successor, while he is of sound disposing mind, its validity cannot be questioned. [p. 582, col. 2.]

The Muhammadan Endowments Committee at Chittagong is a statutory body and its recognition, where such recognition is necessary, of a person as the true and rightful *mutwalli* of a mosque, to which Regulation XIX of 1810 applied before its repeal by Act XX of 1863, is authoritative. [p. 583, col. 2.]

Appeal against the decree of the District Judge, Chittagong, dated the 28th of May 1915, reversing that of the Officiating Subordinate Judge of that District, dated the 19th of September 1910.

FACTS appear from the judgment

Babu *Dhirendra Lal Kastgir* (with him Babu *Tarakeswar Mitter*), for the Appellant.—Plaintiff sued as a Mutwalli of a mosque for recovery of *khas* possession. Plaintiff's case is that the disputed property was made Wakf by Nawab Yasin Khan and his predecessors. In 1765 Lutfulla was Mutwalli; he was succeded by his eldest son Diamulla. In 1804 Diamulla appointed his grandson Tofel Ali as Mutwalli. This Tofel Ali in 1850 appointed his minor grandson Abdul Sobhan as Mutwalli. This Abdul Sobhan after holding the office of Mutwalli for many years executed a document called *tauliatnama*, by which he appointed the present plaintiff Sultan Ahmad as his successor. Plaintiff also bases his claim on the rule of primogeniture.

The appointment of the plaintiff as Mutwalli by the *tauliatnama* of 1902 executed by Abdul Sobhan is legal and valid, because the *tauliatnama* is a valid document of a testamentary character and has been executed out of free will. So the plaintiff is a *de jure* Mutwalli. The doctrine of *marzul-maut* is not applicable here. The Muhammadan Endowments Committee of Chittagong has recognised plaintiff's appointment. Moreover the plaintiff is in receipt of Government pension in his character of a Mutwalli and this shows that he has been recognised by the Government.

Babu *Charu Chandra Sen* (with him M. *Nuruddin Ahmed*), for the Respondent.—The rule of primogeniture has not been proved in the present case. Plaintiff's case is absolutely based on the *tauliatnama* of 1902. Abdul Sobhan while in health could not legally appoint plaintiff as Mutwalli. He could be appointed only during Abdul Sobhan's death bed illness. Evidence establishes that Abdul Sobhan was not suffering from *marul maut* at the time of the plaintiff's appointment as Mutwalli. Plaintiff's appointment was invalid because Abdul Sobhan could not transfer the Mutwallishiip during his lifetime without permission from the Judge. The Muhammadan Endowments Committee of Chittagong is not a legally constituted body and has not been proved to possess any statutory power to recognise Mutwallis and, therefore, its recognition is of no avail. The appointment of Abdul Sobhan was illegal as he was a minor in 1850 at the time of his appointment. A minor cannot be appointed Mutwalli. So the appointment of plaintiff is not legally valid. Receipt of Government pension does not create any valid right as a Mutwalli, nor does it validate an invalid appointment Plaintiff is receiving it as a *de facto* Mutwalli and that will not make him a *de jure* Mutwalli.

JUDGMENT.—This is an appeal from the judgment and decree of the District Judge of Chittagong, dated the 29th May 1915. The appellant is the plaintiff and the suit has a somewhat chequered history. It was brought to recover possession of certain lands which the plaintiff claims as part of the Wakf properties appertaining to a mosque in the district of Chittagong of which he is the Mutwalli. The trial Court made a decree in favour of the plaintiff. That decree was upheld by the

lower Appellate Court; but on remand by this Court the suit has been dismissed. All the material issues which arise in this case have been decided in the plaintiff's favour except the issue whether he is the *de jure* Mutwalli of the mosque. On this question the learned District Judge has come to a conclusion adverse to the plaintiff. That conclusion, however, is based on a misapplication of Muhammadan Law to the facts of this case. The endowment is one of very old standing. It was apparently in existence when the District of Chittagong was taken over by the East India Company. There was a measurement of the district in the year 1764, when a person named Lutfulla was the Mutwalli. It appears that certain lands belonging to the mosque were then resumed by the Revenue Authorities and in their place a monthly grant of Rs. 52-14-0 was made to the Mutwalli which is still at the present day being paid. In the year 1837, another measurement of the District was carried out. On that occasion other lands were resumed, which were re-granted in whole or in part as a Taluk at a nominal rent to the then Mutwalli Tofel Ali. This Taluk which comprises the land in dispute was afterwards held and treated as part of the property of the mosque. Tofel Ali appears to have been succeeded by his grandson Abdul Sobhan in the year 1850. Abdul Sobhan held the office for many years. On the 30th June 1902 six or seven months before his death he executed a document described as a *tauliatnama*, by which he designated the present plaintiff, Sultan Ahmad, as his successor.

The case for the plaintiff is that during Abdul Sobhan's incumbency two persons were appointed to act as Naib Mutwallis to whom the management of the endowment was entrusted. It is alleged that by their contrivance the Taluk was allowed to fall into arrears of revenue. At the sale which followed in 1881 it was purchased by the Naib Mutwallis themselves in the name of a third person as *benamdar*, from whom they subsequently obtained a deed of release. The defendants Nos. 1 to 5 in the suit are the present representatives of the two Naib Mutwallis. The defendant No. 6 holds a lease of the land in suit from the defendant No. 1.

As I have said, all material questions of fact, pure and simple, have been decided in favour of the plaintiff, but while no one disputes that he is the *de facto* Mutwalli, it has been held that he has failed to establish a *de jure* title.

The learned District Judge has considered that question with reference solely to the *tauliatnama* of the 30th June 1902. Even as to that document he finds that it was duly executed and that Abdul Sobhan was not at the time insane as the defendants contended, but was in possession of his mental faculties. The learned Judge has reached his conclusion by applying to the case the doctrine of *marzul-maut*. His view is that the *tauliatnama* is void and of no effect because it was not executed by Abdul Sobhan on his death-bed or while he was suffering from what is termed a death-bed illness or mortal sickness. But in the case of a gift or other voluntary disposition of property, the doctrine of *marzul-maut* only applies when the gift is made during such illness. The learned District Judge apparently had in mind a rule that a Mutwalli cannot ordinarily transfer his office during his lifetime [*Wahid Ali* v. *Ashruff Hossain* (1), *Salimulla Bahadur* v. *Abdul Khayer Mohammad Mustafa* (2)], but may do so on his death-bed (Ameer Ali, 3rd Edition, page 346). Let it be assumed that such a rule correctly represents the Muhammadan Law. It still remains that the *tauliatnama* is capable of being, and should be, construed as a document of a testamentary character, speaking as from the moment of death. If that be its true significance, it is clearly unnecessary to consider what precisely is the meaning of the term *marzul-maut* under the Hanifi law by which the parties are said to be governed. An office to which is attached the right of appointing a successor is well known to the law. If Abdul Sobhan had such a right or power either under the Muhammadan Law or under any general law applicable to this topic and if he freely executed the *tauliatnama* as a testamentary document, while he was of sound disposing mind, its validity cannot be questioned

(1) 8 C. 732; 10 C. L. R. 529; 4 Ind. Dec. (N. S.) 473.
(2) 3 Ind. Cas. 419; 37 C. 263; 11 C. L. J. 304; 14 C. W. N. 497.

[*Sayad Muhammad* v. *Fatteh Muhammad* (3), *Sayad Abdula Edrus* v. *Sayad Zain* (4)].

There is evidence on the record that Abdul Sobhan was himself appointed Mutwali by a *tauliatnama* executed by his predecessor. In the course of the argument reference has been made to a *robakari* dated the 2nd January 1851 under the signature of the Commissioner of the Division, which purports to confirm Abdul Sobhan's appointment as Mutwalli under a *tauliatnama*, dated the 15th September 1850. This *robakari* was issued under the authority of Regulation XIX of 1810, to which it refers and under which religious endowments were controlled by the executive authorities.

But it is not necessary to determine on this occasion whether the Mutwalli of this endowment has the right of appointing his successor or to insist on the efficacy of the *tauliatnama* in the plaintiff's favour.

Nor would it be proper for this Court in second appeal to lay down the rule by which succession to this office is governed. The deed, if any, by which the endowment was created is not forthcoming and the rule depends on evidence relating to the practice or usage which has prevailed in the past. The plaintiff is apparently the lineal descendant of Lutfulla, the earliest Mutwalli of whom any mention is made, and his pedigree lends some colour to the suggestion that succession to the office is regulated by the rule of lineal primogeniture, or at any rate that regard is had to that rule. But the question must be left open for future discussion should it again arise.

I turn to a part of this case which the learned District Judge has entirely neglected. It is not disputed that the plaintiff is in receipt of the Government stipend to which I have referred. That in itself is something, but it further appears that before sanctioning the payment of this allowance to the plaintiff the Collector referred the matter to the Muhammadan Endowments Committee of the District of Chittagong. The letter which the Committee addressed to the Collector, dated the 17th June 1903, is on the record. It contains a clear recognition of the plaintiff's title to the office. Now, the fact that the endowment is one of the description mentioned in section 3 of the Religious Endowment Act of 1863 (Act XX of 1863) is shown by the reference in the *robakari* of 1851 to Regulation XIX of 1810. The endowment is clearly a mosque or religious institution to which the Regulation applied before it was repealed by the Act. By section 7 of the Act the control of such endowments was transferred to the Committees to be appointed under that section, "which were to take the place and to exercise the powers of the Board of Revenue and the local agents under the Regulation." The Muhammadan Endowements Committee at Chittagong is, therefore, a statutory body and its recognition of the plaintiff as the true and rightful Mutwalli, if such recognition be necessary, is authoritative.

It is not suggested that there has ever been any dispute as to the right of succession to this office, such as would require the intervention of the civil Court under section 5 of the Act. In fact there is no other claimant to the office in the field and the whole discussion has an air of unreality. Whatever test be applied the plaintiff satisfies it. If he required appointment by his predecessor he was so appointed. If the office is hereditary and the *tauliatnama* was a gratuitous or superfluous act on the part of Abdul Sobhan, it indicates at least that in the latter's opinion the plaintiff was entitled to succeed. The plaintiff has been recognised as Mutwalli by the Endowments Committee: he is in receipt of the Government stipend and is in fact in possession of the office.

The conclusion of the District Judge rests entirely on a mistaken view of the law. There is no evidence by which it can be supported. The evidence is all the other way and the only conclusion of which it admits is a conclusion in favour of the plaintiff. In my opinion the judgment and decree of the District Judge must be discharged and the decree of the Munsif restored and affirmed.

As the defendant No. 6 stated through his learned Pleader that he would not

(3) 22 I. A. 4; 22 C. 324; 6 Sar. P. C. J. 515; 11 Ind. Dec. (N. S.) 218.

(4) 13 B. 555; 7 Ind. Dec. (N. S.) 368.

contest this appeal, the plaintiff's costs of the appeal must be paid by the defendants Nos. 1 to 5.

As to the costs below, the plaintiff is entitled to his costs in those Courts as against all the defendants.

Appeal accepted.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 1061 OF 1916.

January 15, 1918.

Present:—Mr. Justice Beaman and Mr. Justice Heaton.

RANGBHAT RAMCHANDRABHAT—DEFENDANT—APPELLANT

versus

SITABAI BANDBHAT—PLAINTIFF—RESPONDENT.

Hindu law—Self-acquired property, whether can be converted into joint family property.

A member of a joint Hindu family who has acquired property of his own may convert it into joint family property in the ordinary sense of the term and thereafter all the members of the family will have the same rights in it as though it had been acquired originally by their joint exertions or descended to them from a common ancestor. [p. 584, col. 2.]

Second appeal from the decision of the District Judge, Dharwar, in Appeal No. 139 of 1914, confirming the decree passed by the Subordinate Judge, Gadag, in Suit No. 195 of 1913.

Mr. *S. Y. Abhyankar*, for the Appellant.

Mr. *H. B. Gumaste*, for the Respondents.

JUDGMENT.

BEAMAN, J.—The point argued in this appeal arises in this way. Ramchandrabhat, the father of the appellant and of the husband of the respondent, acquired certain property in such a manner as to make it admittedly his own self-acquired property. Thereafter, the Courts below have found, by his own volition and intention he converted it from self acquired property into joint family property between himself and his two sons, Rangbhat and Bandbhat. In 1898, after the property had thus received the impress of joint family property, Rangbhat, the appellant, separated from his father and brother. In the partition, the Court finds, this property was taken into calculation and Rangbhat's share given him on that basis. Thereafter, Bandbhat and his father Ramchandrabhat constituted a joint Hindu family in respect of the residue of the property in their possession. On Ramchandrabhat's death Bandbhat took the whole and on his death his widow, the respondent, takes a life-estate.

The case for Rangbhat is that as the property was self-acquired, it was impossible for Ramchandrabhat by any act of volition to convert its character into that of joint family property. And he relies on the text of the Mitakshara and a decision in the Calcutta High Court. *Jasoda Koer* v. *Sheo Pershad Singh* (1). I am, however, of opinion that in neither case is the classification exhaustive. I see no difficulty in principle in holding, as I believe this Court has repeatedly held, that a member of a joint Hindu family who has acquired property of his own may convert it into joint family property in the ordinary sense of the term and that thereafter all the members of the family will have the same rights in it as though it had been acquired originally by their joint exertions or descended to them from a common ancestor. If there is really no difficulty in that view, then nothing is left to argue about. The facts have been found by the lower Appellate Court and it is only on the ground that those facts involve a legal impossibility that Mr. Abhyankar has constructed his argument. For my part I think that that argument is altogether too technical. In the very common case of a Hindu who has acquired considerable property before the birth of any children, suppose three sons are born to him and during their lifetime he deliberately associates them with himself in the enjoyment of all the property he had acquired, thus converting its character into joint family property, it is not denied that on his death they would receive it in the character of joint ancestral family property. But in such a case they acquire no interest in it merely by birth. And that is in effect exactly the case with

(1) 17 C. 33; 8 Ind. Dec. (N. S.) 561.

which we are dealing here; for although these sons may have been born at the time Ramchandrabhat obtained this property, this, in my opinion, makes no difference in principle. It is indeed apparently conceded that Rangbhat and Bandbhat would have inherited this property on the death of Ramchandrabhat as joint ancestral family property. But it is urged that the separation of Rangbhat from Ramchandrabhat and Bandbhat cannot in any way affect the devolution of the remaining property treated as joint family property in the hands of Ramchandrabhat and Bandbhat and that Rangbhat must, on the death of Ramchandrabhat, succeed with Bandbhat equally to all this property as joint ancestral family property. That, however, is a principle which ignores altogether the prior conversion of the property from self-acquired into joint family property, a principle to which, as I have said, this Court I believe has repeatedly given effect.

In this view of the case there will be no difficulty in arriving at the conclusion reached by the lower Appellate Court on the facts that the family of Ramchandrabhat, Rangbhat and Bandbhat was joint in respect of the whole of the property before the separation of Rangbhat in 1898 and that thereafter the remainder of the property possessed jointly by Ramchandrabhat and Bandbhat was taken by survivorship on the death of Ramchandrabhat by Bandbhat alone and on his death his widow would necessarily have a life-estate to which the reversionary interest of Rangbhat should be postponed. That being my view, this appeal fails and should be dismissed with all costs.

HEATON, J.—I agree. The only point in the case put forward by the appellant, which seemed to me to need serious consideration, was the point that whatever Ramchandrabhat had intended or attempted to do, it was impossible for him to convert his self-acquired property into joint family property of himself and his sons. This is the first time, so far as my recollection goes, that I have heard this argument put forward. But there are many cases which have been decided in this Court, and in some of them I have taken part, in which self-acquired property has been held to be converted into joint family property; and as an instance of this we have the case of *Laldas Narandas* v. *Motibai* (2). As I am quite clear in my own mind that the practice of this Court for many years has been to recognise the possibility of converting self acquired into joint family property, I do not propose to deal with the argument that this supposed possibility is contrary to the principles of Hindu Law. I do not think it is contrary to the principles of Hindu Law; but having regard to the practice of this Court I do not think it is necessary to elaborate the reasons for which I think so. I think the appeal should be dismissed with costs.

Appeal dismissed.

(2) 10 Bom. L. R. 175.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 280 OF 1917.

January 16, 1918.

Present:—Mr. Lindsay, J. C.

GANESH PRASAD AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

Sheikh KHUDA BAKHSH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Easements Act (V of 1882), ss. 4, 12, 15, 28—'Land,' meaning of—Easement, acquisition of—Evidence of user prior to statutory period, admissibility of—'As of right,' meaning of—Tenants of dominant tenement, user by, effect of—Artificial structure—Easement over roof, whether can be acquired—General right of easement, for sitting, drying clothes, etc, validity of—Right of way, delineation of.

In disputes relating to acquisition of easements evidence of user prior to the statutory period is admissible. [p. 587, col. 2.]

Artificial structures such as flat masonry roofs of shops are land within the meaning of that expression as used in section 4 of the Easements Act and easements can be acquired over them. [p. 588, col. 1.]

The user of an easement without any one's permission and without interference on behalf of the servient owner amounts to user 'as of right.' [p. 588, col. 1.]

User of the servient tenement by tenants of the dominant owner who are in occupation of the premises is, for the purpose of acquisition of an easement, as good as user by the dominant owner himself. [p. 588, col. 1.]

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A general right of easement to use a roof as a place for sitting or as a place for drying clothes or for other purposes of this nature can be acquired under the Easements Act. [p. 588, col. 2.]

Where the area over which an easement of way has been acquired is small and the points of egress and ingress are fixed, it is not necessary for the Court to delineate the particular portion of the ground which persons enjoying the easement are entitled to use. [p. 588, col. 2; p. 589, col. 1.]

Appeal against the decree of the District Judge, Lucknow, dated the 15th May 1917, confirming that of the Munsif, Lucknow, dated the 16th January 1917.

Babus *Ishwari Prasad* and *Ram Bharose Lal*, for the Appellant.

Babu *Lachhman Prasad Varma* and Mr. *P. Koul*, for Respondent No. 1.

JUDGMENT.—The dispute in this case is with regard to a right of easement, and the facts which it is necessary to consider may be briefly stated as follows.

The plaintiffs are the owners of a number of shops situated at the north end of a row of shops in the Chauk in the Lucknow city. To the west of this row of shops are certain houses one of which belongs to the first defendant in the case, namely, Khuda Bakhsh. This house is in the occupation of the second defendant Pandit Chhamapat, who is a tenant of the first defendant. The upper storey of this house looks out upon the roofs of the shops in front and it is with reference to a right of easement over the roofs of the shops belonging to the plaintiffs that the present dispute has arisen. According to the allegations in the plaint the second defendant Chhamapat carries on business as a physician (*vaid*) and interviews his patients and dispenses medicine to them in the upper storey of the house which he rents from the first defendant. It is alleged in paragraph 3 of the plaint that these patients pass to and fro over the roofs, although there is another way of access to the premises in the occupation of the second defendant. In the fifth paragraph of the plaint it is alleged that this passing to and fro of persons who go to consult the second defendant has caused damage to the plaintiffs and the prayer was for a perpetual injunction. The particular nature of the relief sought is set out in the 7th paragraph of the plaint. The Court was asked to issue an injunction (1) restraining the defendants themselves from passing over the roofs, (2) to prevent them from using the roofs in any way, and (3) to restrain them from allowing their relations, visitors, customers and others from passing over the roofs. The plaintiffs also asked the Court to define the right of way, if it were found that the defendants were entitled to any such right.

In the written statement it was set out that the house belonging to the first defendant consisted of two parts which were entirely separate: one of these, the lower storey, having access to it from one direction, the other, the upper storey, having access to it over the roofs of the row of shops which lie to the west. It was pleaded that the only way of getting to the premises occupied by the defendant No. 2 as tenant was along the roofs in question. It was further stated that these premises had been in possession of the defendants and their predecessors for a period of over a hundred years and that the persons who had occupied the house had always enjoyed various rights by way of easement, namely, rights of way, of air and of light and also a right to use the roof in front of the upper storey in various ways for the convenience of the defendant's premises.

Both the Courts below have found in favour of the defendants, and the plaintiffs' suit has been dismissed.

The plaintiffs come here in second appeal, and a great many pleas have been raised on their behalf for the purpose of showing that the decisions of the Courts below are erroneous. The case has been contested at great length and there has been a good deal of what appears to me to be irrelevant argument in the matter with reference to the rights claimed by the defendants. The Munsif who tried the case has written a very long and careful judgment and he has referred in detail to the large volume of oral evidence which was placed before him. Practically all the witnesses were persons of respectability and both the Courts below have accepted their statements as true. It is only necessary, therefore, for me to mention briefly what the purport of the defendant's evidence is.

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It is proved by the statements of some of the witnesses whose memories go back for a very long period that the premises belonging to the defendants have been continuously occupied for very many years past. One of the witnesses, an old man named Hazari Lal whose age is given as 98, deposed that he had known the house occupied by the defendants since before the time of British rule. He states that he remembers it being occupied by one Ghulam Mohammad who originally owned it. According to his story Ghulam Mohammad carried on a dyeing business there and used the roof in front of the premises for the purpose of his trade. He used to spread clothes out to dry and he kept there the receptacle which he used for the purpose of dyeing. After Ghulam Mohammad his son carried on the same business, and there is other evidence on the record to show that it was from Ghulam Mohammad's son that the first defendant Khuda Bakhsh purchased the property. Another witness corroborated this evidence. He spoke from a recollection of 50 years and deposed to having seen the customers of Abdullah, the son of Ghulam Mohammad, use a right of way to these premises. He also saw Abdullah using the premises for the purpose of his trade. Then there was evidence to show that next door to the defendants' premises and on the south side of it was another building which for a considerable number of years was used as a Sub-Post Office. The third witness for the defendant Hanuman Prasad has been the Post Master and he deposed to people having a right of way over the roofs in order to gain access to the Post Office. This evidence, of course, does not relate strictly to the premises in dispute, but I think the learned Munsif was right in holding it to be admissible for, as he says, it renders probable the story that people had a right of way also to the defendants' premises which were the next on the north side.

There is also evidence on the record to prove that another house to the south of this Post Office has also been used for the purpose of trade and that access to it was also obtained by a staircase leading from the street over the roof of the row of shops situated to the west. As regards this latter building there was also evidence on the record to show that the occupier of it was successful in an action which he brought for the disturbance of his right of easement. Other witnesses were called who deposed to what had taken place during the occupation of the defendants' premises by successive tenants. Some of these tenants appear to have used the premises for purposes of residence, others including the second defendant and a predecessor of his, a compounder named Parsotam, have been using the house in question for the purposes of their business. Altogether this evidence to my mind establishes clearly that for a very long period, much in excess of a period of 20 years before the suit, there has been a continuous user of the roofs of this row of shops, including the roofs of the plaintiffs' shops, by persons occupying the defendants' premises or by other persons who have come there on the invitation or by the license of the defendants or of the persons who, previous to them, were in occupation. The evidence which the plaintiffs put forward was discarded by the lower Courts as being of practically no value as compared with the evidence led by the defendants.

I turn now to the various points which are raised in the memorandum of appeal which has been filed on behalf of the appellants. In the first ground of appeal it is stated that as the defendants themselves admitted that they did not come into possession with a perfected easement it was necessary for them to prove that the user during the period of 20 years odd prior to the suit was continuous and was always of the same nature. As regards this the only observation to be made is that, so far as the right of way is concerned, a sufficient continuity has been clearly established by the evidence of the defendants' witnesses whose testimony relates to a period of practically 60 years. A right of way is a discontinuous easement and it would not be possible for the purpose of establishing such a right to show that the right has been exercised at every moment of time during the statutory period. It was argued indeed that any evidence relating to a point of time pervious to 20 years odd before the filing of the suit was irrelevant. But this argument cannot be allowed. It was certainly admissible for the purpose of showing that the alleged user of the roofs during the statutory period prior to the suit was probable and that the evidence which was led to prove the user was reliable.

Another point taken in the second paragraph of the memorandum of appeal is that the Court below failed to distinguish between a license and an easement and that it should have also held that no easement could be acquired with regard to an artificial structure such as a roof. This argument must fail in view of the definition of the expression "land" as set out in section 4 of the Easements Act (V of 1882). According to the explanation to that section "land" includes things permanently attached to the earth and it is idle to contend that a shop with a flat masonry roof on the top of it is not a thing which is permanently attached to the earth. For the purpose of determining whether or not a right of easement exists the roof of the plaintiffs' shops must certainly be treated as "land."

Then again it is said that the Court below was wrong in holding that the user of the roofs was not as of right. As to this the evidence is perfectly clear. A number of witnesses have disposed that no one's permission was ever asked for leave to use the roofs in question. That is the meaning of the expression "as of right." The witnesses all say that the persons who used the roofs for the purpose of getting to the defendants' premises did so without any reference to the owner of the shops, and there is also reliable evidence on the part of one or two witnesses who were once employed by Ali Naki Khan, the owner of the shops, to show that no interference with the exercise of this right of passage was ever attempted on behalf of the owner.

Then again it has been argued that because the premises have for practically the whole of the time been let out to tenants, the exercise of a right of way by tenants was not on behalf of the owners of the property and consequently the defendants had failed to show that any right of easement had been acquired. This argument is altogether beside the mark, for it is obvious from a perusal of section 4 of the Easements Act that a right of easement may be acquired either by an owner or by an occupier

A further point has been raised to the effect that the period of enjoyment of the right by one tenant could not be tacked to the period of enjoyment of another tenant. This argument is erroneous. The fact that the premises have not been in the occupation of the same persons all along is immaterial and it does not matter what the number of tenants may have been, because the Act says (see section 15) that where a right of way or any other easement has been peaceably and openly enjoyed by any person claiming title thereto as an easement and as of right, without interruption and for 20 years, the right to such easement shall be absolute. For the purposes of the section therefore it clearly makes no difference whether the right has been asserted by successive tenants of the dominant heritage.

Next it has been argued that the user claimed by the defendants does not constitute an easement at all. This argument seems to relate to that portion of the evidence in which the witnesses said that in addition to the right of passage the occupants of the defendants' premises had used the roof in grant of those premises for other purposes, namely, as a place for sitting or as a place for drying clothes or for other purposes of this description. It cannot, in my opinion, be argued that such user cannot amount to an easement, having regard to the expression "beneficial enjoyment" as defined in section 4 of the Act. According to the language of the section the expresstion "beneficial enjoyment" includes possible convenience, remote advantage and even a mere amenity; and so it appears to me that any user deposed to by the defendants, which can rightly be deemed to have been for the convenience of the persons occupying the defendants' premises and for the fuller enjoyment of those premises, must be deemed to be an easement within the meaning of the Act.

Then it is said that if the Courts below found that there was a right of way, it was their duty to define it and that it should not have been held that the defendants had a right of way over the entire surface of the roofs. This argument has, in my opinion, been well met by the observations of the learned Munsif in his judgment. He points out that the evidence establishes that the right of way exists between two fixed points, namely, the head of the staircase or steps which gives access to the roof and the doors of the premises occupied by the defendants. The roof of these shops after all is a very small area and in the circumstances I do not think the plaintiffs were

entitled to call for a delimitation of the particular portion which the customers and others who frequent the premises of the defendants were entitled to use, all the more so as the defendants have, in my opinion, established not only a mere right of way but the right to use the whole extent of the plaintiffs' roofs in front of their premises for other purposes of convenience.

These are the principal points which have been argued before me on behalf of the appellants. It seems clear to me for the reasons I have given that the appeal must fail and that the plaintiffs' suit was properly dismissed. All the evidence in the case shows that the rights of easement claimed by the defendants are used for purposes connected with the enjoyment of the dominant heritage; and referring to illustration (*b*) to section 21 of the Easements Act it is apparent that these rights may be claimed not only by the owner or occupier of the premises but by the members of their families, their guests, lodgers, servants, workmen, visitors and customers. User to this extent has, in my opinion, been amply established by the evidence led for the defendants. In cases where it is necessary to determine the extent of an easement which has been acquired by prescription, there is no way of ascertaining the extent of the easement except from what has been done. I have already summarized the evidence led by the defendants and it appears to me that it has established fully the various rights which the defendants claimed in respect of the roof of the plaintiffs' shops.

For these reasons the appeal fails and is dismissed with costs.

Appeal dismissed.

PATNA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 246 OF 1917.

February 8, 1918.

Present:—Mr. Justice Chapman and Mr. Justice Atkinson.

MAHABARAT DUTTA—APPELLANT

versus

SURJA KANTA DE—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXI, r. 57—Attachment in execution—Sale proclamation, improper statement of value in—Sale set aside—Attachment, whether revives

Where a sale is set aside for any reason other than default on the part of the decree-holder, the attachment, which has been obtained prior to the first sale being set aside, revives to support a second or subsequent application for execution and no fresh attachment is necessary. In other words, once an attachment is properly and legally obtained and the property attached is put to sale and the sale is afterwards set aside, the antecedent attachment revives and by reason of its revival supports a second application for leave to issue execution, unless the ground upon which the sale was set aside was default on the part of the decree-holder. [p. 591, col. 2, p. 592, col. 1.]

Obiter dictum.—When the parties are seriously at issue with regard to the valuation of the property offered for sale, it is the duty of the Court to go into the matter and determine the value in a judicial manner. [p. 590, col. 2.]

Miscellaneous appeal against an order of the District Judge, Manbhum, dated the 12th September 1917, modifiying that of the Subordinate Judge, Purulia, dated the 4th August 1917.

Mr. *Abani Bhusan Mukerjee*, for the Appellant.

Mr. *Naresh Chandra Sinha*, for the Respondent.

JUDGMENT.

ATKINSON, J.—This application, by way of miscellaneous appeal and revision, comes before us from the order of the District Judge of Purulia, dated the 12th of September 1917. It is necessary shortly to state the facts for the purpose of considering the legal question which arises for determination.

On the 19th of August 1912, the plaintiff obtained a money decree jointly against the defendant and others, and on the 8th of October 1912, a portion of the defendant's property was attached, namely, a house in which the judgment-debtor resided. On the 15th of May 1916, the judgment-debtor's house so attached was sold in execution of the decree. On the 27th of May 1916, an application was made to set aside the sale and the Subordinate Judge, before whom the application came, dismissed the application on the 29th of July 1916; and on the 10th of November 1916 there was an appeal from the order of the learned Subordinate Judge. The sale was set aside by an order of the Appellate Court on the ground that the valuation had not been properly ascertained and stated in the sale proclama-

tion. Subsequently a fresh application for leave to issue execution was presented and the same property was again offered for sale. With regard to this application two objections are urged. One is that the second application for execution was illegal, inasmuch as there had not been a second attachment of the judgment-debtor's property; that the first attachment had expired or elapsed and that before a second execution could issue there must be a new and fresh attachment of the property in suit. The second ground taken was that the valuation had been improperly stated. We are only concerned in this appeal with the first contention put forward by the learned Vakil for the defendant-judgment debtor, namely, whether or not the first attachment expired and could not be revived by reason of the order of the Appellate Court setting aside the sale. No case has been cited before us to justify the proposition put forward by the learned Vakil for the judgment-debtor. There seems to be a great deal of authority strongly in favour of the view that the mere setting aside of a sale does revive an antecedent attachment and that it becomes unnecessary to issue a second attachment, and that a second execution can issue based upon the prior attachment made before the sale was set aside. It is necessary to consider what the law and the practice was before Order XXI, rule 57, was enacted. Prior to that time there was a doubt as to whether in the case of an application for execution being dismissed for default of the decree-holder the antecedent attachment was revived to support a second application for execution. Order XXI, rule 57, has set that doubt at rest, because it expressly provides that where default is made by the decree-holder and the application for execution is dismissed by reason of such default, that then the attachment which has been made ceases to be of any force. In the present case, however, no default on the part of the decree-holder can be relied upon and the ground upon which the sale was set aside was, not by reason of any default on the part of the decree-holder, but by reason of the Court not having performed its duty in a judicial way, namely, having failed to assess the value of the property upon a right principle. The learned Judge in the lower Appellate Court has relied upon *Shiam Lal* v. *Roshan Lal* (1) for the purpose of showing that when the parties are seriously at issue with regard to the valuation of the property offered for sale, it is the duty of the Court to go into the matter and determine the value in a judicial manner. With that view we agree; but as the matter does not expressly arise for our decision, it is unnecessary to do more than to express our concurrence with the opinion of the learned Judge. What we have to consider in this case is the law with regard to the question whether upon the setting aside of a sale the antecedent attachment is revived so as to support a second application for execution. In *Gunno Singh* v. *Muddun Mohan Singh* (2) it is distinctly laid down that where an attachment is once legally obtained it revives upon the reversal of the sale in execution. The learned Judges who decided that case were Loch and Norman, JJ., and it is desirable to quote one or two passages from their Lordships' judgment; at page 28 their Lordships say: "After considering the subject in all its bearings as put before us by the Pleaders of either party, we come to the conclusion that the effect of the late Sudder Court's decision of the 22nd of November 1857 was only to declare the sale to be null and void, but without prejudice to the attachment or other proceedings in execution which had been rightly and legally performed. We think that, by the setting aside of the sale, the parties were simply remitted to the position in which they stood immediately before the sale, and, therefore, that the attachment must be deemed to have revived."

Their Lordships then refer to a case of the Privy Council and quote from the judgment of their Lordships of the Privy Council a passage which seems to me to be very important. It runs as follows :—

"It would be contrary to general principles and a senseless addition to all the vexations and delay in the course of procedure to hold that, when for any reason, satisfactory or not, the execution of a final decree in a suit fails or is set aside, and the proceedings as regards that execution are taken

(1) 35 Ind. Cas. 230; 14 A. L. J. 363.
(2) W. R. (Gap.) 26.

off the file, the whole suit is discontinued thereby, and the further proceedings for the same purpose are to be considered as taken in a new suit."

Having quoted the above passage from the judgment of the Privy Council their Lordships proceed: "And we think that, were it otherwise, great injustice would be done to the judgment-creditor. For what is the position he would find himself in on the reversal of a sale, if all the steps he had properly taken in execution were to go for nothing? It would be this. The creditor, after publicly attaching the property and thereby declaring to all the world that he had made it legally liable for the satisfaction of his debt, and taking every necessary step for the sale of the property, would find, in the event of the sale being set aside for some flaw in the proceedings with which he had nothing to do and over which he had no control, that a third party, a stranger to him, had, with the view of assisting the judgment-debtor to set aside the sale, purchased from the judgment-debtor the whole or a part of the property, and on the reversal of the sale holds him at arm's length and tells him: 'True, you made this property legally liable for your debt; but owing to a flaw in the subsequent proceedings, the sale was invalid; I took advantage of this defect, purchased the property, assisted in getting the sale reversed, and now you must look elsewhere than to this property for the satisfaction of your claim'".

These observations apply with equal force to the facts of this case. They clearly indicate the view which their Lordships took with regard to the revival of an attachment where a sale is set aside in an execution proceeding. Likewise the law will be found stated in *Gossain Munraj Pooree* v. *Deen Dyal Lall* (3). In that case Mr. Justice Phear, a most distinguished and able Judge, stated as follows: "At the time he attached (*i. e.*, the properties), then his judgment-debtor had the rights of a mortgagor over it according to the very case of the present plaintiffs, *i. e.*, he had an equity of redemption which it was competent to the defendant No. 1 to sell after attachment. The attachment remained in being, and a sale of part of the property was held in December 1868. That sale was afterwards set aside on the ground of irregularity by a decree of the High Court. But obviously, as we think, the setting aside of that sale for irregularity under the circumstances which occurred did not displace the attachment. The property was still left in the condition of attached property and liable to be sold under the attachment if the judgment-creditor went regularly to work for that purpose." So also in *Mahomed Warris* v. *Pitambur Sen* (4) the learned Chief Justice Couch dealing with this matter said: "A suit was brought and the plaintiff obtained a decree establishing his right, namely, a right to attach the property showing that the order for the release of the property from attachment was improper. The effect of that decree must be to revive the attachment, or rather not to revive the attachment, but to set aside the order of release which had been made, and therefore to make the property still subject to the attachment, to restore the state of things that had been disturbed by the order of release." Although the term 'release' is used in that decision, its principle applies to the facts of the case before us. Another authority to which I desire to refer in this connection is *Aziz Bux* v. *Kaniz Fatima Bibi* (5). In that case their Lordships were considering whether or not the case before them was within the provisions of Order XXI, rule 57, and their Lordships there decided that the particular act by reason of which the sale was set aside in that case was not one due to the default of the decree-holder and that rule 57 of Order XXI only had application to a case in which a sale is set aside or the proceedings in execution are dismissed by reason of the default of the decree-holder. Accordingly they held in that case that inasmuch as the proceedings were dismissed or set aside not by reason of default of the decree-holder, that, therefore, the prior attachment revived upon the sale being set aside. So far as we have been able to trace the authorities, it is quite clear that the law and practice has always been that where a sale is set aside for any reason other than default on the part of the decree-

(3) 20 W. R. 19 at p. 20.

(4) 21 W. R. 435.

(5) 15 Ind. Cas. 49; 34 A. 490; 10 A. L. J. 48.

holder, the attachment which has been obtained prior to the first sale being set aside revives to support a second or subsequent application for execution and no fresh attachment is necessary.

In Woodroffe's Code of Civil Procedure there is a passage at page 963 which says that "revival of execution proceedings will not revive the attachment so as to prejudice the rights of strangers who have in the interval acquired an interest in the property." The only authority cited for this proposition is *Sasirama Kumari* v. *Meherban Khan* (6). This was a judgment of Mookerjee and Coxe, JJ., but that case, in our opinion, is essentially different in its facts from the present one. That case dealt with an attachment before judgment; and it seems to us that different considerations apply to an attachment before judgment and an attachment after judgment and decree. Moreover, so far as we can see, what that case decided was that no attachment shall revive so as to prejudice a third person, and that in itself clearly distinguishes that case from the one now before us.

We are of opinion that once an attachment is properly and legally obtained and the property attached is put up to sale, and the sale is afterwards set aside, that then the antecedent attachment revives and by reason of its revival supports a second application for leave to issue execution, unless the ground upon which the sale is set aside is default on the part of the decree-holder.

For these reasons we are of opinion that the learned Judge was right in arriving at the conclusions at which he has arrived and that he very properly dismissed the judgment-debtor's objections. Accordingly we dismiss this appeal with costs. The Rule which was issued in this matter (namely, Civil Revision No. 299 of 1917) is also discharged.

CHAPMAN, J.—I agree.

Appeal dismissed.

(6) 9 Ind. Cas. 918; 13 C. L. J. 243.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 803 OF 1916.

January 9, 1918.

Present:—Mr. Justice Beaman and Mr. Justice Heaton.

HARIRAM KISNIRAM—DEFENDANT—APPELLANT

versus

SHIVBAKAS RAMCHAND—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art 120—Landlord and tenant—Trespass by tenant—Injunction, suit for—Limitation.

In 1893 defendant, who was the tenant of a house, built his own house on the adjoining land and constructed a staircase which was supported by a pillar driven into land belonging to the house of which he was the tenant. In 1905 the plaintiff took a permanent lease of the latter house and in 1912 he asked the defendant to pull down the staircase. The latter refused and the plaintiff then brought a suit for a mandatory injunction directing the defendant to remove the staircase:

Held, that the suit was barred by limitation under Article 120, Schedule I of the Limitation Act. [p. 594, col. 1.]

Second appeal from the decision of the Assistant Judge, Dhulia, in Appeal No. 72 of 1915, reversing the decree passed by the Subordinate Judge, Bhusawal, in Civil Suit No. 361 of 1913.

Mr. *Coyajee* (with him Mr. *J. B. Mehta*), for the Appellant.

Mr. *K. H. Kelkar*, for the Respondent.

JUDGMENT.—Adopting the findings of fact such as they are of the Courts below, it appears that in 1893 or thereabouts, roughly nineteen years before suit, the defendant was a tenant, at any rate, of the house of which the plaintiff has now taken a permanent lease. While a tenant he built his own house on the adjoining land and put up a staircase which is the subject-matter of this suit. In all probability the pillar, driven into the land supporting the stair-case, was contemporaneous with the rest of the structure, though the plaintiff has contended, or, at any rate, suggested, that this pillar was put up by his immediate predecessor-in-title only some nine years before suit. In 1905, the plaintiff took a permanent lease of the house which had been in the defendant's occupation in 1893. He alleges that in 1912 he asked the defendant to pull down the staircase. The defendant refused. Hence his cause of action. He prayed for a mandatory injunction directing the defendant to remove the staircase. The defendant re-

plied that the land over which the staircase hung and upon which it was supported by the pillar just mentioned was his own. And the lower Appellate Court has confined its judgment to a trial of the issues: (1) whether the land under the staircase belonged to the plaintiff or the defendant; and (2) if to the plaintiff, whether the defendant has acquired an easement in the nature of a right to maintain his staircase in its present condition. This overlooks many material points and presents the case, in my opinion, in an altogether wrong light. If we assume that the construction of the staircase in 1893 by the defendant was an act done to the detriment of his landlord's title and without his landlord's knowledge and consent, then I should be inclined to say that this was a trespass and in no sense an easement, and that the plaintiff's right would have been finally barred by twelve years' adverse possession. If, however, it were contended that so long as the defendant remained a tenant of the plaintiff's predecessor-in-title his act in building the staircase and supporting it on his landlord's land ought not to be regarded as adverse to his landlord's title, it might be relevant, if not important, to know when the defendant ceased to be a tenant of the plaintiff's predecessor in-title. Upon this point the Courts give us no definite information. It is, however, clear and certain that for more than nine years before suit the tenants of the premises now occupied by the plaintiff realised the existence of and possibly the inconvenience occasioned to them by this staircase.

Now, at that time it is clear that it must have been standing either by the license of the plaintiff's predecessors in title or adversely to them. And in either event it is pretty clear that unless the license were specifically conditioned by some such terms as that the defendant on demand would remove the staircase, the plaintiff would have had to bring a suit of this nature within six years under Article 120 of the 1st Schedule to the Indian Limitation Act. This he admittedly has not done and it is no sufficient ground for decreeing his claim that the lower Appellate Court has found that the land under the staircase belonged to him. I am not prepared to say with certainty that the trespass has continued for more than twelve years, and, therefore, that the defendant has acquired the ownership of the land underlying the staircase, though I think this is in all probability the truth of the case. But I have no hesitation whatever in saying that in any view the plaintiff's present claim is time-barred. Further, even were it not, it is a claim without any foundation; for upon the view most favourable to him, there was acquiescence from the first and therefore no mandatory injunction of the nature he has prayed could have been granted to him. The defendant's staircase could hardly be treated as in the nature of an ordinary easement and, therefore, the true nature of the contest was, I should have thought, rooted in trespass, and the proper period of limitation is twelve years from the time the defendant's possession became adverse.

Now, both the Courts below have found that the staircase was put up nineteen years ago, and, therefore, the presumption, in my opinion, would certainly be that from that date the possession was adverse. I have hesitated to state that conclusion definitely because of some considerations which have been suggested from the Bench in the course of the argument, considerations lending colour to the possibility at any rate that the possession may have been permissive. But there is only one ground upon which the plaintiff could possibly succeed and overcome the three main difficulties I have indicated, and that is, that the defendant erected the staircase upon a definite agreement with his landlord, plaintiff's predecessor-in-title, that whenever called upon to do so he would pull the staircase down. That never appears to have been the plaintiff's case, and it is on the face of it extremely improbable that any person situated as the defendant was would have consented to such an agreement, for after building the staircase at considerable expense he might have been called upon a month later to pull it down.

We have been asked to remand the case for a finding upon this question, but doing so would, in my opinion, be little less than a direct invitation to perjury. It would

be making an entirely new case for the plaintiff and a case which, having regard to ordinary human conduct amongst people of this class, is so improbable as to be almost negligible.

In my opinion, then, the only proper decree to be made was that of the Original Court, and I think that the decree of the learned Judge of first appeal ought to be reversed and the decree of the Trial Court restored with all costs upon the plaintiff throughout.

HEATON, J.—I agree that the decree of the first Court should be restored. The suit is one for an injunction and nothing else; and on the facts found it is brought more than six years after the date at which it could have been brought. Therefore, the suit is time-barred in virtue of Article 120 of the 1st Schedule to the Indian Limitation Act. The circumstances of the case do not, to my thinking, suggest any good reason why we should allow a remand for the purpose of enabling the plaintiff to hunt about to see whether he can find some reason, possibly produce some evidence, to show that after all the suit might not be time-barred.

Decree reversed.

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPLICATION No. 56 OF 1918.

March 14, 1918.

Present:—Mr. Lindsay, J. C.

Mirza MOHAMAD ASKARI—DEFENDANT—APPLICANT

versus

LALU—PLAINTIFF—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXII, rr. 4, 9—Appeal—Death of respondent—Legal representative not brought on record—Abatement of appeal—Application to set aside abatement—Sufficient cause—Ignorance of appellant.

It is the duty of a person who is prosecuting an appeal to keep himself informed of the existence of his adversary, and unless special reasons are shown why this duty has not been performed, an application to set aside an abatement of the appeal by reason of the legal representative of a deceased respondent not having been brought upon the record within the period of limitation allowed for that purpose should not be entertained [p. 595, col. 1.]

A mere plea of the ignorance of the appellant that a respondent had died is not a sufficient cause for setting aside an order of abatement under Order XXII, rule 9 of the Civil Procedure Code. [p. 595, col. 1.]

In cases of this kind the question of sufficient cause should be determined with reference to the facts of each case. [p. 595, col. 1.]

Application for setting aside the order of abatement passed by the Judicial Commissioner on 30th January 1918, on Miscellaneous Application No. 4 of 1918, for substitution of parties in Second Civil Appeal No. 286 of 1917.

Mr. *P. C. Gupta*, for the Applicant.

Babu *Ram Chandra*, for the Opposite Party.

JUDGMENT.—This is an application under Order XXII, rule 9, for the purpose of having set aside an order passed by me on the 30th of January 1918, by which it was directed that the applicant's appeal should abate.

The facts are that the appeal was drafted in the month of May 1917. The memorandum was submitted to the Assistant Registrar of this Court for examination on the 25th May 1917 but it was not actually filed in Court until the 23rd of July 1917, upon which date an order was passed that the case was to be put up under Order XLI, rule 11. Subsequently having been put up under that rule it was directed that notice should go. A date having been fixed and notice having been sent to the respondent, the process-server reported that the respondent had died about the month of June 1917. It was on these facts that the order for abatement was made; and now the case for the applicant is that he can show sufficient cause for not having made his application for substitution of parties within the period of six months fixed by the law of limitation.

His case is that he lives in the city of Lucknow, that respondent lived in the town of Kursi in Bara Banki which is not more than 18 or 20 miles away. It is admitted, moreover, by the applicant's learned Counsel that his client is the Zaminder of a village which is situated not very far from the town of Kursi.

On the other hand an affidavit has been filed on behalf of the opposite party and with it has been exhibited a certain letter, said to have been written by the Mukhtar of

the applicant in which he addressed the son of the deceased respondent in the month of October last and from the language of which it appears that the Mukhtar was very well aware of the fact that the respondent Lalu had died. The applicant who is here in person denies that this letter was written by any agent of his. The law on the subject has been considered in a ruling to which the learned Counsel for the opposite party has referred me, to be found in 24 Indian Cases at page 275 [*Govind Prasad* v. *Ganga Prasad* (1)]. That is a ruling of a Judge of this Court and it follows a judgment tobe found in the Punjab Record for 1911 Case No. 60 [*Mir Nawab* v. *Hardeo* (2)].

Mr. Gupta has drawn my attention to another Bench case of the same Court in which the law has been laid down in a different sense. It seems to me that in cases like this the question of sufficient cause is to be determined with reference to the facts of each case. I agree with Mr. Piggott in thinking that a mere plea of ignorance of the fact that the opposite party had died is not a sufficient cause for setting aside an order of abatement. It surely is the duty of the person who is prosecuting the appeal to keep himself informed regarding the existence of his adversary ; and unless special reasons are shown why this duty has not been performed, I think applications of this kind should not be entertained. Following the principle laid down by Mr. Piggott in the case cited by the opposite party I hold that no sufficient cause is shown.

I dismiss the application with costs.

Application dismissed.

(1) 24 Ind. Cas. 275.

(2) 12 Ind. Cas 871; 60 P. R. 1911; 42 P. L. R. 1912; 288 P. W. R. 1911.

MADRAS HIGH COURT.
FULL BENCH.

SECOND CIVIL APPEAL No. 1465 OF 1916.

March 13, 1918.

Present:—Sir John Wallis, KT., Chief Justice, Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

SAMINATHA AIYAR—PLAINTIFF —APPELLANT

versus

GOVINDASAMI PADAYACHI AND OTHERS—DEFENDANTS NOS. 3, 4 AND 5) —RESPONDENTS.

Madras Revenue Recovery Act (II Mad. of 1864), *ss.* 44, 59, 63—*Regulation X of* 1831, *s.* 2—*Sale of minor's property for arrears of revenue—Suit to set aside sale, absence of, effect of—S.* 59 *of Act II of* 1864, *applicability of, to cases governed by Regulation X of* 1831—*Regulation X of* 1831, *applicability of, to* ryotwari *estates of minors—Registry in name of minor's mother, effect of.*

A sale of a minor's property under the Madras Revenue Recovery Act is not a proceeding to which section 59 of the Act is applicable so as to compel the aggrieved parties to sue within 6 months of the sale. Section 59 is inapplicable to cases protected by Regulation X of 1831. [p. 599, col. 1.]

Regulation X of 1831 does not only apply to such estates of minors as are ordinarily taken charge of by the Court of Wards; Ryotwari lands owned by minors also come within the protection of the Regulation. [p. 598, col. 2.]

Krishna v. *Mekamperuma*, 10 M. 44; 3 Ind. Dec. (N. S.) 781, distinguished.

Where the *patta* erroneously stands in the name of the minor's mother, that fact does not preclude the minor from invoking the aid of Regulation X of 1831. [p. 598, col. 2.]

Subramania Chetty v. *Mahalingaswami Sivan*, 3 Ind. Cas. 624; 33 M. 41; 19 M. L. J. 627; 6 M. L. T. 198, distinguished.

Per *Spencer*, J.—Section 2 of Regulation X of 1831 includes the estates of minor sole proprietors not under the charge of the Court of Wards. This section and the preamble to the Regulation and the foot-note to section 20 of Regulation V of 1804 make it clear that the prohibition extends to minors' estates of every description not subject to the jurisdiction of the Court of Wards. The section does not apply to minor members of a joint Hindu family governed by the Mitakshara Law, who have by birth merely an undivided interest in the estate. [p. 599, col. 2.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Tanjore, in Appeal Suit No. 25 of 1916, preferred against the decree of the Court of the District Munsif, Valangiman, in Original Suit No. 40 of 1912.

This second appeal coming on for hearing on the 17th December 1917, upon perusing the grounds of appeal, the judgments and decrees of the lower Ap-

pellate Court and the Court of first instance, and the material papers in the suit and upon hearing the arguments of Mr. *S. Panchapakesa Sastri*, for the Appellant, and of Mr. *S. Muthiah Mudaliar*, for Respondents Nos. 1 and 3 and the 2nd respondent not appearing in person or by Pleader, the Court (Seshagiri Aiyar and Bakewell, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH.

The facts of the case are not in dispute. The appellant, plaintiff, was taken in adoption by a Ryotwari land-holder. The *patta* for the lands in dispute stood in his name. After his death, the *patta* was transferred to the name of the adoptive mother. She did not pay the Government revenue, and the lands were brought to sale and purchased by the 2nd defendant. The suit is to recover possession. The Subordinate Judge has found that there was no fraud on the part of the 1st defendant in allowing the property to be sold for arrears of revenue. We accept that finding. He has further found that the suit is barred by limitation as it was brought more than six months after the plaintiff attained his majority; *vide* section 59 of the Madras Revenue Recovery Act.

The main argument before us was that section 59 of the Act has no application to the facts of this case. The property was admittedly sold when the plaintiff was a minor. Regulation X of 1831, section 2, enacts that no property of a minor shall be sold for arrears of revenue. Section 63 of Act II of 1864 provides; "Nothing in the Act shall be held to bar the operation of the provisions of Regulation V of 1804 and of Regulation X of 1831 in respect to the sale of lands of minors and other disqualified land-holders." It seems, therefore, clear that the sale of the land was without jurisdiction. Section 44 of the Act, which permits a sale for non-payment of revenue, must be read subject to section 63 of the Act which in terms preserves to minors the rights they enjoyed under Regulation X of 1831. It was, however, held in *Raja Goundan* v. *Raja Goundan* (1) that a sale of a minor's property under Act II of 1864 is covered by section 59 of the Act. Reliance was placed in that judgment upon *Gobind Lal Roy* v. *Ramjanam Misser* (2). In this latter case the Judicial Committee had to deal with a case to which the provision of the Bengal Revenue Recovery Act was applicable and they pointed out that irregular as well as illegal sales should be appealed against to the Commissioner. We do not think that pronouncemant is any authority for the proposition that a sale which is prohibited by a legislative enactment should be regarded as a proseeding *intra vires* the powers of the Collector so as to invite the provision of section 59 of the Act.

The next point is whether the present sale is not against the provision of Regulation X of 1831. It was contended on the authority of *Krishna* v. *Mekamperuma* (3) that the estate of the minor referred to in the Regulation must be of such magnitude and importance as can be managed by the Court of Wards. Regulation V of 1804, which was in force when Regulation X of 1831 was passed, makes no reference to the extent of the property which alone can be taken under the control of the Court of Wards.

Ordinarily, no doubt, the Court will not interfere with private management where the estate is not considerable; but there is no ground for saying that the Regulation provides only for a particular class of estates. In our opinion, *Krishna* v. *Mekamperuma* (3) is not reconcilable with the language of either Regulation V of 1804 or of Regulation X of 1831. Moreover, there is no evidence in this case that the authorities considered that the estate should not be taken up by the Court of Wards. It does not follow that because the Court did not take up the management, it would not have done so, if appealed to.

Mr. Muthiah Mudaliar next argued that as the *patta* stood in the name of the adoptive mother and as she was the defaulter, the property was rightly sold under the Act. Section 2 of Regulation X of 1831 speaks of the estate having come to the minor by inheritance, and prohibits the

(1) 17 M. 134; 4 M. L. J. 85; 6 Ind. Dec. (N. S.) 92.

(2) 21 C. 70; 20 I. A. 165; 17 Ind. Jur. 536; 6 Sar. P. C. J. 356; 10 Ind. Dec. (N. S.) 679.

(3) 10 M. 44; 3 Ind. Dec. (N. S.) 781.

sale of such an estate. The provision for sale where the *pattadar* makes default cannot be spelled out of this Regulation. It is true that *Subramania Chetty* v. *Mahalingaswami Sivan* (4) holds that the Revenue Authorities are not bound to give notice to the real owner, so long as the *patta* stands in the name of some other person. That was a case of vendor and purchaser. There has been no similar decision in the case of father or mother and son. *Subramania Chetty* v. *Mahalingaswami Sivan* (4) refers specially to Regulation XXVI of 1802, which relates to the case of a purchaser not taking steps to have the registry transferred to his name. Moreover, it is doubtful whether in the face of section 2 of Regulation X of 1831 the provision of Act II of 1864, which enables a sale where the person in whose name the *patta* stands makes default in the payment of revenue, are applicable to the sale of properties belonging to minors.

As there are earlier decisions of this Court which we think require reconsideration, we have resolved to refer the following questions for the opinion of the Full Bench:—

(1) Whether a sale of a minor's properrty under Act II of 1864 is a proceeding to which section 59 of the Act is applicable so as to compel the aggrieved parties to sue within 6 months of the sale?

(2) Whether Regulation X of 1831 only applies to such estates of the minors as are ordinarily taken charge of by the Court of Wards?

(3) Whether the fact that the *patta* stood in the name of the mother of the minor, precludes the latter from invoking the aid of Regulation X of 1831?

This second appeal came on for hearing before this Full Bench on 4th and 5th March 1918.

Messrs. *T. R. Venkatarama Sastri* and *S. Panchapakesa*, for the Appellant, argued that section 44 of the Madras Revenue Recovery Act must be read with section 63, whereunder the rights of minors under Regulation X of 1831 are preserved. Minor's properties, whether Ryotwari or under the jurisdiction of the Court of Wards, cannot be the subject of sales under Act II of 1864. The fact that the *patta* stood in the name of the minor's mother will not make her the defaulter, as minors' estates form an independent class intended for special treatment.

Mr. *S. Muthia Mudaliar*, for the Respondents, argued that a minor's Ryotwari lands are not an 'estate' within the meaning of Regulation X of 1831. *Krishna* v. *Mekamperuma* (3). The prohibition of sale does not extend to them.

As the *patta* stood in the mother's name, she was the defaulter and Act II of 1864 does not take account of the real ownership. The real owner cannot insist on notice of sale *Subramania Chetty* v. *Mahalingaswami Sivan* (4). The sale was, therefore, rightly held.

OPINION.

WALLIS, C. J.—I do not think that the decision in *Krishna* v. *Mekamperuma* (3) is any authority for the proposition mentioned in the Order of Reference. In that case, a sale of a permanently settled *mitta* at a time, and in respect of arrears which accrued due, when some but not all of the joint proprietors were minors, was held not to be prohibited by Regulation X of 1831. The learned Judges were of opinion that an estate so owned was not one of which the Court of Wards could have assumed management under Regulation V of 1804, and that Regulation X of 1831 only applied to estates "which might have but had not been taken under the Court of Wards". Regulation V of 1804 imposed no restriction on the Court of Wards with reference to the nature of the minor's property, and consequently the reasoning of the learned Judges in *Krishna* v. *Mekamperuma* (3) has no bearing on the present case where the sole owner of the land is a minor. It has, however, been strenuously contended before us that, as the minor's lands are Ryotwari, they are not an estate within the meaning of Regulation X of 1831, and that the sale of Ryotwari lands during minority is not prohibited by the Regulation. The estates of minors under the management of the Court of Wards had been protected from sale for arrears of revenue by Regulation V of 1804, and Regulation X of 1831 recites that doubts had been entertained as to the liability of

(4) 8 Ind. Cas 624; 33 M. 41; 19 M. L. J. 627; 6 M. L. T. 188.

the estate of a minor not taken under the management of the Court of Wards to be sold for arrears of revenue. The doubts must have arisen with reference to section 5 of Regulation XXVI of 1802, which empowered the Collector "where lands may be attached for arrears of revenue" to cause the lands of the defaulting proprietor to be sold. This Regulation must be read with Regulations XXV and XXVII of 1802 which were passed on the same day. It is, no doubt, true, as appears from sections 1 to 3 of Regulation XXV, that it was then the intention to fix a permanent assessment on all lands liable to pay revenue to Government but this was to be a gradual process, and the intention was soon abandoned. The provisions of Regulation XXVI, however, are not limited to such cases. The preamble recites the necessity that the property of landed estates being Malguzari, or paying revenue to Government; should in the event of default be liable to sale for the purpose of making good the public revenue assessed on such lands, and shows that it was not intended to limit the power of sale to cases of permanently settled lands only. By section 2 the Collectors are required to keep public registers for the purpose of registering the landed property paying revenue to Government; terms which are perfectly general, as are also the terms of the succeeding sections. Section 5 confers a power of sale where lands may be attached for arrears of revenue and the subject of attachment for arrears of revenue was dealt with by the succeeding Regulation XXVII of 1802. In that Regulation again proprietor was defined so as to include "all actual proprietors of land who pay the revenue assessed upon their estates immediately to Government." Regulation II of 1806, which provided for the establishment of Zillah or District Courts in Districts in which the Permanent Settlement had not been introduced, enacted in clause 4 that "in cases where the engagements may be contracted with the *ryots* or individual occupiers of land they shall be regulated by the Regulations of A. D. 1802 and by such subsequent Regulations as may particularly apply to them." Section 6 also provided that Regulations XXVII and XXVIII should be extended to all Districts in which Zillah Courts might be established under the Regulation and should be, observed by Collectors as well as Zemindars or farmers in their engagements with the *ryots* or immediate occupiers of the soil. The necessity for this provision, so far as Collectors are concerned, is not apparent, but, however this may be, this express extension of Regulation XXVII cannot be construed as meaning that Regulation XXVI was not to apply to Ryotwari lands. It has always been treated as applicable to them. *Seshagiri* v. *Pichu* (5), *Secretary of State* v. *Ashtamurthi* (6), *Subramania Chetty* v. *Mahalingaswami Sivan* (4). It is no doubt true that sales of Ryotwari lands for default of payment of revenue were at first rare, and that the coercive process provided by Regulation XXVII was usually resorted to, a procedure, it may be observed, which might eventuate in sale. There is, therefore, no foundation for the contention that Ryotwari lands owned by minors do not come within the protection of Regulation X of 1831 and the answer to the second question is that there is no such distinction as suggested.

As regards the third question, the answer must be in the negative. It was the duty of the responsible officer under Regulation XXVI of 1802 to register the plaintiff as the owner on his father's death, and the fact that he erroneously registered the widow of the deceased cannot affect the plaintiff's rights, and would of itself render the subsequent sale for arrears of revenue in question void as regards the minor, apart altogether from the Regulation, as held in *Secretary of State* v. *Ashtamurthi* (6).

In *Subramania Chetty* v. *Mahalingaswami Sivan* (4), the Bench of three Judges were dealing with a case where the registered proprietor had transferred his interest but the transfer had not been registered and was, therefore, void as against Government by the provisions of section 3 of Regulation XXVI, and the registered proprietor was, therefore, held to be the defaulter under the Revenue Recovery Act. That decision does not apply to the present case.

(5) 11 M. 452; 4 Ind. Dec. (N. S.) 315.
(6) 13 M. 89; 4 Ind. Dec. (N. S.) 772.

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The answer to the first question must also be in the negative. Section 63 of the Revenue Recovery Act II of 1864 provides that nothing therein shall be held to bar the operation of the provisions of Regulation X of 1831 in respect to the sale of lands of minors and other disqualified proprietors. This clearly renders the provisions of section 59 of that Act inapplicable to cases protected by Regulation X of 1831, and it is unnecessary to rely on the further ground that, even in the absence of section 63, the provisions of section 59 would not apply to lands exempted from sale by Statute.

SADASIVA AIYAR, J.—I agree.

SPENCER, J.—I agree as to the answers to be given to the questions in the Order of Reference. I must confess to having been a little puzzled by the form in which the second question has been put. It would indeed be strange if the scope of an enactment were to be limited by notions of what is a considerable estate or of what estates are ordinarily taken charge of by the Court of Wards, seeing that 'ordinary' and 'considerable' are relative terms. No doubt it is within the discretion of the Government, upon receiving the reports of Collectors, to decline to order the Court of Wards to superintend particular estates of incapacitated proprietors (*vide* Chapter III of Madras Act I of 1902). But I can find no authority for the suggestion that an estate must be of any definite size or must not be an estate of *ryotwari* lands in order to give the Court of Wards jurisdiction over it.

In Regulation V of 1804 the only description given of the estates to which the Regulation applies is that they must be estates of land or other property paying revenue directly to Government. This would include the holding of a minor *ryotwari pattadar*. The Regulation provided for the appointment of guardians by the Zillah Court to minors succeeding as heirs to the joint possession of estates; and Regulation X of 1831 extended this provision to the heirs of single as well as joint possessors of estates, but it was afterwards repealed in 1890 by the Guardians and Wards Act so far as it related to the property of minors not under the superintendence of the Court of Wards. This may have been in consequence of the decision *In the petition of Subramanyan* (7) as to the powers of the District Court over minors under Act XIV of 1858. The second section of Regulation X of 1831, which forbade the sale for arrears of revenue, accruing subsequently to his accession, of estates of minors not under the charge of the Court of Wards has remained ever since unrepealed. This includes the estates of minor sole proprietors not under the charge of the Court of Wards, like that of the plaintiff in this suit. This section and the preamble to the Regulation and the foot-note to section 20 of Regulation V of 1804 make it clear that the prohibition extends to minors' estates of every description not subject to the jurisdiction of the Court of Wards, and this answers the second question referred to us. But, of course, if a minor is a member of a joint Hindu family governed by the Mitakshara Law and as such has at birth merely an undivided interest in an estate, no guardian can be appointed by Court as the manager of the family represents the family and to such cases the Regulation will not apply.

Reference answered in the negative.

M. C. P.

(7) 6 M. 187; 7 Ind. Jur. 300; 2 Ind. Dec. (N. S.) 409.

OUDH JUDICAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 305 OF 1917.

March 13, 1918.

Present:—Mr. Lindsay, J. C.

GOPAL—PLAINTIFF—APPELLANT

versus

SARJU—DEFENDANT—RESPONDENT.

Guardian and ward—Guardian spending more than income of estate upon ward, whether entitled to recover excess—Accounts filed by guardian and accepted by Court—Presumption of correctness.

A guardian who, without taking the leave of the Court, chooses to spend upon the ward more than the income of the ward's property is not entitled, after his guardianship has determined, to come forward and sue the ward personally for the excess amount so expended. [p. 601, col. 1.]

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It is the duty of a Court which appoints a guardian to examine into the accounts submitted to it by the guardian periodically to the best of its ability and to satisfy itself that they are properly prepared. A presumption of correctness attaches to such accounts after they have been scrutinized and accepted by the Court. [p. 600, col. 2.]

Appeal against the decree of the District Judge, Lucknow, dated the 25th April 1917, confirming that of the Munsif, South Lucknow, dated the 30th October 1916.

Messrs. *S. N. Sinha* and *R. N. Banerji*, for the Appellant.

Babu *Hari Kishen Dhaon*, for the Respondent.

JUDGMENT.—This is a somewhat peculiar case. The appellant Gopal was for a number of years the duly appointed guardian of the defendant-respondent Sarju. His guardianship came to an end on the 29th of March 1916, when the District Judge, after declaring that Sarju had come of full age, discharged the plaintiff from his office. This present suit was brought by the plaintiff for the purpose of recovering from the minor a sum of Rs. 984-13-6 which he alleged to be due to him on account of his dealings on behalf of the minor during the period of guardianship. In support of his claim the plaintiff put in certain accounts which he had filed from time to time in the Court of the District Judge during the period he was acting as the defendant's guardian. He relied principally upon these accounts for the purpose of establishing his claim to the money in suit; and one of the issues raised in the Court of first instance was whether those accounts were to be presumed to be correct and whether the defendant had a right to impeach their correctness.

The Munsif who tried this suit seems to have been of opinion that there was no presumption in favour of the correctness of these accounts and that the defendant was at liberty to impeach them. He also pointed out that the original accounts had not been produced and he dismissed the suit in accordance with his finding on this issue. He did not deal with any of the other issues which were raised.

The case came up in appeal before the District Judge, and here again the question as to the presumption to be made in favour of the correctness of the accounts filed in the District Judge's Court was brought up for discussion. On this point the learned Judge observes that he does not consider that there could be any presumption against the defendant that the accounts which had been so filed were correct. He pointed out that they were not produced until the plaintiff had been urged to produce them and that on the face of them they appear to be fictitious.

Pausing here I wish to observe that in my opinion the Judge is in error when he states that there is no presumption in favour of the accounts filed by a guardian in the Court which has appointed him. These accounts have been scrutinized by the Court and accepted, and it is indeed strange to find the District Judge now saying that on the face of them they appear to be fictitious, bearing in mind that they are the very accounts which he himself and his predecessor accepted at the time they were filed.

I can hardly think that the learned District Judge means to say that the Court to which the accounts of a guardian are submitted for examination is under no obligation to scrutinize them and satisfy itself regarding their correctness. If the learned Judge entertains any such notion I take the present opportunity of correcting it. It certainly is the duty of the Court which has appointed a guardian to examine into the accounts submitted to it periodically to the best of its ability and to satisfy itself that they are properly prepared. After this I observe the learned Judge has gone on to examine the various items in the account put forward by the plaintiff and has given various reasons (not always good reasons, I fear) for coming to the conclusion that the plaintiff had failed to prove his case.

However, it will not be necessary for me to discuss the various items in the plaintiff's account in view of the argument which has been put forward on behalf of the defendant-respondent. It is clear from the order of a Judge of this Court who appointed the present plaintiff the guardian of the minor that he was to be entitled to a reasonable allowance for the maintenance of the minor. There is certainly nothing in the order appointing him which justifies any claim by the plaintiff for anything more than a reasonable allowance for the maintenance of his ward. So far as I can ascertain, the principal piece of property which belonged to the ward

in this case was a house which brought in a rent of about Rs. 10 or Rs. 11 a month. According to the account submitted by the plaintiff he has been spending sums which were considerably in excess of the income of the property which was under his care; and the question arises whether a guardian who chooses to spend upon the ward more than the income of the ward's property is entitled, after his guardianship has determined, to come forward and sue the ward personally for the excess amount so expended. In my opinion he is not; and if this view of the legal situation of the parties be accepted, there is an end to this case. According to the finding of the learned Judge, which is not seriously disputed here, a reasonable sum for the maintenance of the ward during the period of seven years for which the plaintiff acted comes to about Rs. 420 and in any case to less than a sum of Rs. 500. On the other hand, as the learned Judge points out, the income of the property during this period ought, on the plaintiff's own showing, to have been over Rs. 900. It is said that a number of the items which the plaintiff spent on the minor's behalf were necessary, for example moneys spent upon his marriage ceremonies and moneys spent upon the repairs of the minor's house. The answer to this is that the guardian was under no obligation to incur any expenditure in excess of the income of the property. It is not pretended that the guardian ever consulted the Court before he spent these various amounts, otherwise he might perhaps have been protected, had the Court passed an order authorizing him to raise money for these purposes. But if, without taking the leave of the Court, he has spent money out of his own pocket upon what he believed to be the necessities of the minor he ought not, in my opinion, to be allowed to recover. I think, therefore, that on this ground the decree of the Court below ought to be maintained.

The appeal fails and is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 374 OF 1915.

January 28, 1918.

Present:—Mr. Justice Fletcher and Justice Sir Shamsul Huda, Kt.

Srimoti NEAMATUN NESSA BIBI, WIFE OF HASINUDDIN NAZIR – PLAINTIFF —APPELLANT

versus

GOLAM PANCHATON KAZI AND OTHERS — DEFENDANTS—RESPONDENTS.

Muhammadan Law—Gift—Heba-bil-ewaz—*Condition, invalid, attached to gift—Admission in* solenama *subsequently set aside, evidentiary value of.*

The ordinary rules applicable to gifts apply to the Muhammadan Law, like any other system of law, and one of these rules is that a gift is not invalidated by reason of an invalid condition being attached to it. [p. 603, col. 1.]

Where the conditions laid down in a *heba-bil-ewaz* as to the form of enjoyment of the property cannot under the Muhammadan Law control the form of the gift, the gift is absolute and unqualified [p. 603, col 1.]

An admission by a party to a suit in the written statement and the *solenama* by which the suit is compromised does not lose its evidentiary value on the *solenama* being set aside at the instance of other parties. [p. 602, col 2.]

Appeal against the decree of the Additional Subordinate Judge, Howrah, dated the 24th May 1915.

Babu *Narendra Nath Chowdhury*, for the Appellant.

Mr. *Ashruf Ali Chowdhury*, Babus *Bhabataran Bramochari* and *Sisir Kumar Ghosal*, for the Respondents.

JUDGMENT.

FLETCHER, J.—This is an appeal by the plaintiff against the decision of the learned Additional Subordinate Judge of Howrah dated the 24th May 1915. The plaintiff is a Muhammadan lady. She brought the suit claiming partition of a 2-annas share in the property which she said she was entitled to. The parties are relations. The plaintiff claimed her title under a document called a *heba bil ewaz*, that is, a gift for consideration. The document bore date the 26th *Bysakh* 1303. It was executed by her late father-in law Sujauddin Nazir, who also registered it. There is no doubt about the execution and the registration of the document. The reason why the document was given is stated to be this. The plaintiff married in *Bysakh* 1302 the defendant No. 1, who was the only son of Sujauddin. The dower was

stipulated, according to the Muhammadan marriage register, to be a sum of Rs. 10,000—Rs. 5,000 being prompt and Rs. 5,000 deferred. Only a sum of Rs. 500 was paid at the time of the marriage and it appears from the register that it was the intention all along that the dower payable to the plaintiff was to be secured in a proper manner. So about one year after the marriage Sujauddin executed this *heba-bil-ewaz*. At that time Sujauddin was entitled to a 3-anna 15 *gunda* odd share in Towji No. 95 of the Hooghly Collectorate. By the deed in satisfaction of Rs. 800, a portion of the dower, he made over to the plaintiff a two-anna share out of the 3 anna 15-*gunda* share to which he was entitled. Sujauddin subsequently on the death of his sister inherited another two annas. Immediately following the deed what was done does not appear clear from the evidence, but it is not suggested in this case that the document remained in the possession of Sujauddin. The registered document, so far as appears from the evidence, presumably was made over to the plaintiff. There is a lot of evidence in this case as to whether the plaintiff was actually in receipt of a definite portion of the rent or whether Sujauddin was actually receiving it. These parties were all living in the same house—living presumably on the income of the property—and it would be unusual in a case of that nature for the daughter-in-law to receive from the hands of the father in-law this income of the property that had been given to her in lieu of a portion of the dower, and then to have to pay a portion of it towards the family expenses. But what is important is that on the 4th June 1908 when Sujauddin was alive, the plaintiff applied for and obtained registration of her name in the Collectorate in respect of this two-anna share claiming it under the deed of *heba-bil-ewaz* already mentioned. That seems to me to be an important transaction that had taken place. It was a definite recognition of the gift both by the Collectorate and by Sujauddin. Then we come to an earlier suit. The present defendant No. 12 brought a partition suit in which Sujauddin was impleaded as a defendant. He set up the plea that the suit was defective for want of parties, on the ground that he had given to his daughter-in-law, the present plaintiff, two annas out of his share in satisfaction of a portion of her dower. There was a compromise in that suit and the terms of the compromise provided, although the present plaintiff was not a party to that compromise, that two annas out of Sujauddin's share should belong to the present plaintiff. It is quite true that subsequently that compromise was set aside on the ground that three Pardanashin ladies were not bound by the terms thereof, but still the clear admission made by Sujauddin recognising the *heba-bil-ewaz* cannot be got rid of. The learned Judge's view that, because at the instance of these three Pardanashin ladies who claimed under totally different rights the compromise was not set aside, therefore, the admission of Sujauddin in the written statement and the *solenama* could have no evidentiary value for and against anybody in the world is obviously inaccurate. Then followed the death of Sujauddin. Sujauddin's family consisted of, besides the defendant No. 1 his only son, five daughters. Four of these daughters are defendants in the present case and the defendants Nos. 2 to 8 are the children of the remaining daughter who is dead. The case obviously is one in which these daughters and the children of the dead daughter may no doubt feel a certain amount of disappointment, on the ground that Sujauddin seems to have treated his only son's wife on a more liberal basis than if he had permitted his property to devolve according to the ordinary rules of succession under the Muhammadan Law. But a person may form a deep attachment for his only son and he may wish to benefit that son and may give him a larger share in the property than what the son would inherit, and that is no reason why a deed like this duly executed and duly registered should not be given due effect to. The learned Judge seems to have been misled by an inaccurate reading of the decision of this Court in the case of *Rahimjan Bibi* v. *Imanjan Bibi* (1) That case does not establish the proposition that the learned Subordinate Judge says it does. That case is a very different case, because there the *heba-*

(1) 15 Ind. Cas. 698; 17 C. L. J. 173.

bil-ewaz was never parted with by the donor. Of course in those circumstances where the document was retained by the donor without any evidence that he ever intended to benefit the donee there was no gift, nor was there any possession, either actual or constructive. That was a case where the evidence established clearly that the deed was not acted on. The deed in the present case was no doubt fully acted upon.

Then a point was made on the form of the gift. That turns on the words in the deed as to the nature of the enjoyment which the donee was entitled to have. The terms of the gift are clearly unqualified, because the words are that the donor gives up the entire right, title and interest in the two annas and vests the same in the donee by executing the *hiba-bil-ewaz*. The donor Sujauddin then describes the mode of enjoyment of the gift and he says, "by getting your name registered and by paying the revenue to the Collectorate you with your sons born of your womb out of the loins of my said son and grandsons, etc., in succession shall continue to hold and enjoy the same." It is said that that condition in the gift restricts the former part of the document and, therefore, so controls it that it is a gift of a limited interest not recognised by the Muhammadan Law. But the ordinary rules applicable to gifts apply to the Muhammadan Law like any other system of law, and one of these rules is that a gift is not invalidated by an invalid condition being attached to it. That system has been recognised apparently by the Muhammadan Jurists from the earliest period as cited in Baillie's Digest of Muhammadan Law, Second Edition, page 546. If those conditions as to the form of enjoyment cannot control the form of the gift, it is absolute and unqualified. I think that in this case the learned Judge's finding that this document has not been acted on and was intended to defraud the daughters of the living Muhammadan, who had a right to dispose of his property in any manner he thought fit, cannot be supported. It may be a misfortune to these ladies that their father's affection for his only son was so great that he treated him and his wife on so generous terms that they reduced the share which they would have got by inheritance. But that does not make the document an invalid one. I think that effect must be given to this document, properly executed by the deceased Sujauddin and properly registered and subsequently acted on by registration in the Collectorate and by other acts which leave no doubt in my mind that it was intended by the deceased Sujauddin to pass this property from himself to his daughter-in law, the plaintiff in the present suit. The present appeal must, therefore, be allowed and the judgment of the learned Judge set aside and in lieu thereof there will be a declaration that the plaintiff is entitled to a two-anna share in the property under and by virtue of the *hiba-bil-ewaz* referred to in the plaint and the case must be remitted to the Court of first instance to effect the partition of the plaintiff's share in accordance with that declaration. The costs of this appeal will be borne by the respondents. We assess the hearing fee at three gold *mohurs*. The costs of the Court of first instance will be dealt with by the learned Judge at the time he makes the partition.

SHAMSUL HUDA, J.—I agree.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 205 OF 1917.

February 21, 1918.

Present:—Mr. Lindsay, J. C.

Thakur RAMESHWAR BAKHSH SINGH —DEFENDANT—APPLICANT

versus

Mirza RASUL BEG —PLAINTIFF— OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXIII, r. 1—Withdrawal of suit with liberty to bring fresh suit, application for—Defect curable by amendment of pleadings—Leave, whether should be granted.

An application for leave to withdraw a suit with liberty to bring a fresh suit under Order XXIII, rule 1, of the Civil Procedure Code should not be granted if the defect on the basis of which the leave to withdraw is asked for can be cured by amendment of the pleadings. [p. 604, col. 1.]

Appeal against the order of the Additional Subordinate Judge, Lucknow, dated the 17th September 1917,

Babu *Hari Kishen Dhaon*, for the Applicant.

Babu *Salig Ram*, for the Opposite Party.

JUDGMENT.—This application must be allowed. It seems that a suit was pending in the Court of the Additional Subordinate Judge of Lucknow, the subject-matter of the suit being a small strip of land. The plaintiff claimed possession. The defendant denied the plaintiff's right. A commission was issued to a Pleader of the Court and his report was received. There can be no doubt that, so far as it went and for whatever it was worth, the report of the Commissioner was unfavourable to the plaintiff. Upon this the plaintiff filed an application under Order XXIII, rule 1, asking for leave to withdraw the suit with liberty to bring a fresh suit. I have before me the allegations which were contained in that petition. One was that the suit had been brought on a presumption that the entries in the *khasra* and map were correct and that they correctly showed the position of the plaintiff's house. Another allegation was that it had now become apparent that, although a certain "*gocha*" described as No. 15 was shown in the *khasra*, nevertheless it was not shown in the map. It was alleged, therefore, on these two grounds that the suit could not proceed. Why it could not proceed I cannot imagine. Clearly if there was any mistake in the allegations contained in the plaint which were due to wrong presumptions or wrong information given to the plaintiff, the plaintiff could have applied for amendment of the plaint. However, the Subordinate Judge without giving any reasons for his decision accepted the petition and allowed the case to be withdrawn.

There were no sufficient grounds upon which an application of this kind should have been granted. Mr. Salig Ram who appears for the plaintiff says that his client, if not entitled to possession, might have had a very good case for asking for a declaration of his right of easement. All I have to say is that if he has any such case he can ask for amendment of the plaint and sue for this relief in the alternative. The Court below was not justified in allowing the withdrawal of the suit on the grounds stated; and I, therefore, set aside the order and direct the Court to resume the case at the stage where it was left. The plaintiff will be given full opportunity of amending his pleadings and the other party will be given an opportunity of meeting any new case set up. Costs in this Court will be paid by the plaintiff opposite party.

Order set aside.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 230 OF 1915.

January 25, 1918.

Present:—Mr. Justice Richardson and Mr. Justice Walmsley.

PRAN KRISHNA BHADURI—PLAINTIFF—APPELLANT

versus

KESHAB CHANDRA ROY AND OTHERS—DEFENDANTS—RESPONDENTS.

Partition Act (IV of 1893), s. 4, order under, whether decree—"Court", whether includes Appellate Court—Application under s. 4, when to be made—"Dwelling house," meaning of.

An order made under section 4 of the Partition Act in the course of a suit for partition is a decree within the meaning of section 2, Civil Procedure Code, and is, therefore, appealable. [p. 605, col. 1.]

The word "Court" in section 4 of the Partition Act includes the Appellate Court, which like the trial Court is bound to make an appropriate order under the section upon any member of the family, who is a share-holder, undertaking to buy the share of the transferee. [p. 605, col. 2.]

An application by a member of a family, who is a share-holder in the family dwelling house belonging to the family, under section 4 of the Partition Act need not necessarily be made upon the institution of the suit for partition by a transferee of a share in the house, but may be postponed till after the preliminary decree. The operation of section 4 extends to the appellate stage of the suit. [p. 605, col. 2.]

The word "dwelling house" in connection with its conveyance on partition generally means not only the house itself, but also the land and appurtenances which are ordinarily and reasonably necessary for its enjoyment. [p. 605, col. 2; p. 606, col. 1.]

Appeal against the decree of the Subordinate Judge, 2nd Court, Hooghly, dated the 18th February 1915, reversing the order of the Munsif, Additional Court, Howrah, dated the 28th November 1913, and remanding the case to his Court with certain directions.

PRAN KRISHNA BHADURI v. KESHAB CHANDRA ROY.

Babus *Mohendra Nath Roy* and *Manmatha Nath Roy*, for the Appellant.

Babu *Sib Chandra Palit*, for the Respondents.

JUDGMENT.

RICHARDSON, J.—This is an appeal from an order of the learned Subordinate Judge of Hooghly made under section 4 of the Partition Act (IV of 1893) in the course of a suit for partition. Under section 8 of the Act such an order must be deemed to be a decree within the meaning of section 2, Code of Civil Procedure, so that an appeal lies therefrom to this Court. The property in question is a small property about 15 *cottahs* in area. There are some buildings upon it and a part of the area is occupied by a tank. The property was originally joint property belonging to three brothers. On the 9th October 1911 one of the three brothers (defendant No. 1 in the suit) sold his one-third share to the plaintiff, a stranger to the family. The suit for partition was instituted by the plaintiff on the 27th February 1913 and the preliminary decree was made on the 20th November 1913. Then a Commissioner was appointed, who made a plan and carried out a division of the property which was subsequently adopted by the Court in the final decree which was made on the 28th November 1913. In their written statement the defendants Nos. 2 and 3 (the owners of the remaining two-thirds share of the property) claimed the right to purchase the share sold, but thereafter they seem to have taken no active part in the proceedings up to the final decree. From the final decree, however, they preferred an appeal and in the memorandum of appeal and in the hearing they again claimed and insisted on their right of purchase under section 4 of the Act. The learned Subordinate Judge thereupon made the order under that section to which the plaintiff takes exception. The points raised on behalf of the plaintiff are two in number.

It is contended in the first instance that the learned Subordinate Judge had no jurisdiction, after the final decree in the suit had been made in the trial Court, to make an order under section 4. As to that I agree with the learned Subordinate Judge. The terms of section 4 are quite general. It says that where a share of a dwelling house belonging to an undivided family has been transferred to a person who is not a member of such family and such transferee sues for partition, the Court shall, if any member of the family being a share-holder shall undertake to buy the share of such transferee, make a valuation of such share and so forth. There seems to be no reason why the word 'Court' should be confined to the trial Court and should not include the Appellate Court. The appeal is a continuation of the suit. If the section applies to the Appeal Court, as in my opinion it does, that Court, like the trial Court, is bound, upon any member of the family who is a share holder undertaking to buy the share of the transferee, to make an appropriate order in pursuance of which the steps necessary to carry out the provisions of the section will be taken either in the one Court or in the other.

It has been held in a number of cases that an application under the section need not necessarily be made upon the institution of the suit but may be postponed after the preliminary decree [*Khirode Cha Ghosal* v. *Saroda Prosad* (1)]. If that is so an undertaking to buy given to the Co after the stage at which the prelimina decree is made, may or must be accepted, there seems no reason why the operation of the section should be restricted to the trial stage and should not also extend to the appellate stage of the suit.

Some reliance was placed on section 10 of the Act. That section provides that the Act shall apply to suits instituted before its commencement in which no scheme for the partition of the property has been finally approved by the Court. The section merely defines how far the Act is to have retrospective operation. For the present purpose the section appears to be entirely irrelevant.

The contention, therefore, that the Appellate Court had no jurisdiction in my opinion fails.

The second point turns upon the meaning of the word 'dwelling house' as used in section 4. It has been said that the word 'house' is an ambiguous word and possibly some ambiguity attaches also to the compound word 'dwelling house.' In connection, however, with a conveyance or a partition of a dwelling house, the word will generally

(1) 7 Ind. Cas. 436; 12 C. L. J. 525 at pp. 529, 535.

mean not only the house itself but also the land and appurtenances which are ordinarily and reasonably necessary for its enjoyment [*Khirode Chandra Ghosal* v. *Saroda Prosad* (1)]. As I have said, the area of the whole property is only 15 *cottahs*. There are buildings upon it in which the defendants live, and the learned Subordinate Judge has found that the land which was allotted to the plaintiff in accordance with the Commissioner's report is a curtilage appurtenant to the defendant's house. It is said that this finding rests on no evidence. The learned Subordinate Judge had before him the report of the Commissioner and the Commissioner's map. That being so, it is difficult to say that the learned Judge had before him no materials sufficient in law to support his conclusion.

No objection has been taken to the form of the Subordinate Judge's decree by which the final decree of the trial Court was were aside and the case remitted to that Court shows e dealt with according to the directions Another. To put the matter beyond doubt, it becomy be well to add, as to the costs which "*gochare* been incurred in the trial Court, that the lose costs will be in the discretion of the in Munsif. Subject to this addition to the Subordinate Judge's decree, the appeal should be dismissed with costs, one gold *mohur*.

WALMSLEY, J.—I agree.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 143 OF 1917.

December 3, 1917.

Present:—Mr. Lindsay, J. C.

Syed TASADDUQ HUSAIN—DEFENDANT No. 3—APPELLANT

versus

Syed ASGHAR HUSAIN—PLAINTIFF AND JAGANNATH AND OTHERS—DEFENDANTS Nos. 1, 2, 4 AND 5—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, r. 96—Formal possession, effect of, against stranger to decree—Mortgage decree against mortgagor after sale of equity of redemption—Purchaser of equity of redemption, position of.

Formal possession, the nature of which is described in Order XXI, rule 96, of the Civil Procedure Code, is no possession at all against any party whose rights are not affected by the decree. [p. 607, col. 2.]

J made a simple mortgage of certain groves to *M.* in 1895. In 1907 he transferred the equity of redemption to the plaintiff, who got into possession of the property. Subsequently to the transfer the mortgagee obtained a mortgage-decree against *J.* and in execution purchased the property himself. Formal delivery of possession was made to the mortgagee, who afterwards sold the property to the defendant. The latter dispossessed the plaintiff, who thereupon brought a suit to recover possession of the property:

Held, (1) that the mortgage-decree having been obtained against *J.* after the transfer of the equity of redemption to the plaintiff, the latter was not affected by the decree; [p. 607, col. 2.]

(2) that the delivery of formal possession did not affect the plaintiff who was no party to the decree, and that, therefore, he was entitled to recover possession of the property. [p. 607, col. 2.]

Appeal against the decree of the Officiating Subordinate Judge, Bara Banki, dated the 30th March 1917, confirming that of the Munsif, Ram Sanehighat (Bara Banki), dated 11th December 1916.

The Hon'ble Mirza *Sami Ullah Beg*, The Hon'ble Syed *Wazir Hasan* and Mr. *M. Wasim*, for the Appellant.

Messrs. *Mujtaba Husain and H. N. Misra*, Babu *Bisheshwar Nath Srivastava* and Syed *Ali Mohammad*, for Respondent No. 1.

JUDGMENT.—This second appeal has sprung out of a suit in ejectment brought by the plaintiff-respondent Syed Asghar Husain for recovery of actual possession of certain groves situated in a village called Sewan. There were five defendants impleaded in the case, and it is necessary to set out some of the facts in order to show how these defendants came to be interested in the proceedings. The groves in question belonged to a man called Jagannath, who in the year 1895 made a simple mortgage of them in favour of one Munna Lal. Munna Lal has died since and was represented in the suit by the 4th and 5th defendants Husaini and Hanuman. A suit was brought upon this mortgage and a decree was obtained upon it in the month of November 1908. It is admitted that the only defendant impleaded in that case was the mortgagor Jagannath. After the decree the property was sold in execution and was bought by the representatives of the mortgagee on the 25th of October 1909. Later on, that is to say, in the month of March 1910, formal

delivery of possession was made to the purchasers. The 4th and 5th defendants subsequently sold their rights in the property to the third defendant Syed Tasadduq Husain, who was the principal contesting defendant in the present case and who is the appellant before me. Subsequent to the mortgage which he made in the year 1895, Jagannath sold his equity of redemption in these groves to the 2nd defendant Zakir Husain. This transfer was made in the year 1907, and in the year 1915 Zakir Husain sold his interest in the property to the plaintiff Asghar Husain. The plaintiff came into Court alleging that he and his predecessor-in-title had been in actual possession of the mortgaged property since the date of the transfer of the equity of redemption by Jagannath. It was alleged that subsequent to the 6th of January 1916 the third defendant, that is, Tasadduq Husain, had unlawfully taken actual possession of the property and had cut down 30 trees. The plaintiff claimed that he was entitled to the actual possession of this property and that Tasadduq Husain had no right to actual possession, and he, therefore, asked for a decree for damages in respect of the trees which had been cut down.

It has not been disputed before me that the plaintiff in the present suit is entitled to possession. But the position taken up by the defendant-appellant is that the plaintiff's right is only a qualified right and that as the defendant-appellant is in actual possession of the property, he is not liable to be turned out by the plaintiff until the plaintiff has offered to pay the sum which is due in respect of the charge held by the appellant on the property.

The Courts below have both held that the plaintiff was entitled to actual possession, that the appellant here has no right to actual possession and that consequently the plaintiff was entitled to a decree.

After hearing much argument in the case and considering what judgment should be given, I have come to the conclusion that the decision of the Court below is perfectly correct. The only matter for consideration is which of these two parties is entitled to actual possession of this property. We start with the admitted fact that in the suit which was brought to enforce the simple mortgage executed by Jagannath in the year 1895 the only defendant was the mortgagor Jagannath. It is now clear that at that time Jagannath had disposed of all his interest in the property in favour of the second defendant Zakir Husain, who was the predecessor-in-title of the present plaintiff. It consequently follows that the decree for sale, which was obtained upon the basis of the simple mortgage, in no way affected the rights of the transferee of the equity of redemption and that under the execution proceedings and the delivery of formal possession which took place in the course of these proceedings the representatives of the mortgagee, who had purchased the property in execution, had no right whatever to immediate and actual possession as against the transferee of the equity of redemption. It is now well established that formal possession, the nature of which is described in Order XXI, rule 96, is no possession at all as against any party whose rights are not affected by the decree. This has been laid down in a long series of rulings ; one of these, to which reference may be made, is a decision of the Calcutta High Court reported as *Runajit Singh* v. *Bunwari Lal Sahu* (1). The Courts below have found as a matter of fact that after Jagannath transferred the equity of redemption in the year 1907 the transferee, that is Zakir Husain, was in possession of the property and there is documentary evidence on the record to support this finding. Certain Khasras were produced, which demonstrated that Zakir Husain was recorded as being in actual possession between the Fasli years 1315 and 1320. After the year 1320, for some reason which was not explained to the satisfaction of the Courts below, the entry in the Khasra was altered. There can, I think, be no doubt that the finding as to actual possession is in every way justified. It is to be remembered that the mortgage which was executed by Jagannath in 1895 was a simple mortgage and conferred no right of possession upon the mortgagee. Consequently when Jagannath transferred the equity of redemption in the year 1907, it must be taken that he was entitled to transfer actual possession of the property and that such possession actually followed the transfer, and so it appears to me to be well established that the person in actual possession of this property was the transferee of the equity of redemption and

(1) 10 C. 993; 5 Ind. Dec. (N. S.) 662.

his successor-in-title. As against him, for the reasons I have already given, the formal delivery of possession which was effected in favour of the auction-purchasers was of no avail whatever and did not amount to any disturbance of the possession of Zakir Husain. Now we find it proved that the defendant-appellant is in actual possession of the groves and that he has cut down trees and for the reasons just given, it must be held that his possession is that of a trespasser. He has got no right to resist the claim brought by the present plaintiff for restitution of actual possession. As regards any remedy which the defendant-appellant may have in view of the fact that he is the representative of the auction-purchasers under the mortgage decree, all that need be said is that his rights, whatever they were, have been extinguished by limitation. It is no longer possible for him to bring a suit for sale inasmuch as a period of 12 years has expired. On the other hand, he cannot be allowed by his own wrongful act to take possession and to resist the suit of the plaintiff, who was in actual possession, for the purpose of enforcing any claim he may have had as the representative of the mortgagee. To allow that would be to allow a party to take advantage of his own wrong. I am quite clear, therefore, that the defendant-appellant here has no right to remain in possession of this property and to call upon the plaintiff to redeem it. The case has been properly decided. The appeal fails and is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL APPEAL No. 155 OF 1915

AND

CIVIL MISCELLANEOUS PETITION No. 1008 OF 1917.

December 19, 1917.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Napier.

KATHIRAYASAMI NAICKER—PLAINTIFF—APPELLANT

versus

Dewan Bahadur V. RAMABADRA NAIDU AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 96—Sale in execution of mortgage-decree—Properties not included in sale-certificate, delivery of, to purchaser—Suit by mortgagor for re-delivery, maintainability of—Suit, whether can be converted into application under s. 47

Where, under a sale held in execution of a mortgage decree, lands not included in the sale certificate but which by mistake are assumed to be so included are delivered to the purchaser, the mortgagor cannot claim their re-delivery by a separate suit. The question whether the lands so delivered are correctly included in the sale certificate or not can only be determined by the executing Court on an application under section 47, Civil Procedure Code. [p. 609, col. 2.]

An order directing delivery of possession to a purchaser under Order XXI, rule 96, Civil Procedure Code, is a judicial order. [p. 610, col. 1.]

A suit cannot be treated as an execution application where the effect of doing so would be to prejudice the defendant in his plea of limitation. [p. 610, col. 1.]

Appeal against the decree of the Court of the Temporary Subordinate Judge, Ramnad, at Madura, in Original Suit No. 36 of 1914 (Original Suit No. 68 of 1911 on the file of the Court of the Subordinate Judge, Madura).

Civil Miscellaneous Petition by the appellant in the above Appeal No. 155 of 1915, praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue an order directing that "No. 2802" be amended as "No. 2201" in Schedule "C" of the plaint in the case.

Mr. *K. V. Krishnaswamy Aiyar*, for the Appellant.

The Hon'ble Mr. *S. Srinivasa Aiyangar*, (Advocate-General), (with him Mr. *K. Rajah Aiyar*), for Respondent No. 1.

Mr. *T. Narasimha Aiyangar*, for Respondent No. 2.

Appeal No. 155 of 1915 coming on for hearing on 23rd and 26th of February 1917 before Mr. Justice Abdur Rahim and Mr. Justice Srinivasa Aiyangar and having stood over for consideration till the 7th of March 1917, the Court delivered the following

JUDGMENT.

SRINIVASA AIYANGAR, J.—The plaintiff's father Kadiriyasami on the 15th September 1893 mortgaged to Sabapathi Chetty, the 2nd defendant, what may generally be termed the Zemindari Estate of Doddappa-naikanur. The mortgagee sued to enforce his security in Original Suit No. 3 of 1901 on the file of the District Court of Madura and obtained a decree for sale

on October 1st, 1901. He transferred the decree on May 28th, 1906, to Mr. Ramabhadra Naidu, the 1st defendant, who executed the decree, brought what presumably were the mortgaged properties to sale and purchased them himself after obtaining the necessary sanction from Court. Kadiriyasami Naicker, the mortgagor judgment-debtor, however, died before the final execution and sale. The 1st defendant after his purchase obtained a sale-certificate from Court and got possession of the properties which it was assumed he purchased. The Zemindari of Doddappanaikanoor consists of the 2 villages of Doddappanaikanoor and Sempatty together with their hamlets. In the said two villages there are *ayan punja* garden lands of about 9462 *kulis* (a *kuli* is about 5/7th of an acre) besides waste lands, hills and forests which the mortgagor owned as Zemindar. Besides these, there were *pannai* (home-farm) lands in which the Zemindar was entitled to both the *warams*. The total extent of such *pannai* lands in the Zemindari is in dispute and it is difficult to ascertain it from the evidence on the record.

The question in dispute in appeal is about the extent of *pannai* lands purchased by the 1st defendant in the Court sale. According to the plaintiff, an extent of 226 *kulis*, which at the time of the mortgage to Sabapathi Chetti was admittedly in the possession of one Kamulammal, the widow of the predecessor of Kadiriyasami, was not included in the mortgage or the suit or the decree or the execution-sale and did not pass to the 1st defendant as purchaser; while according to the 1st defendant, the said lands and in fact all the *pannai* lands within the geographical limits of the Zemindari, whether in the possession of Kadiriyasami, the Zemindar, or not, were included in the mortgage and were thereafter included in the suit and the decree and were sold.

[His Lordship next discussed the evidence and concluded:—]

I, therefore, come to the conclusion that the sale did not include the 226 *kulis*, though it is true that the 1st defendant and the mother of the plaintiff were under the mistaken impression that they were so included.

It remains now to deal with another contention of the 1st respondent. Though the sale-certificate did not include the 226 *kulis*, it appears to be true that the lands on which there were encumbrances were placed in the possession of the 1st defendant under section 319 of the old Code of Civil Procedure, by an order of Court—see Exhibit III (*a*) at page 85 of the printed papers. Among the properties so delivered are 63 and odd *kulis* out of the 226 *kulis* subject to encumbrances created by Bommuthayi after the date of the mortgaged decree for the purpose of raising money to pay the mortgagee decree-holder as stated above. The 1st respondent's contention is, whether the sale certificate included these lands or not, inasmuch as by an order of Court the 1st defendant was placed in possession (though such possession was symbolical) of a portion of these lands in the purported execution of the sale-certificate, the only Court which can determine whether the lands so delivered were included in the sale-certificate or not, was the Court which was executing the previous decree; and that can be done only on an application to that Court and not by a separate suit. I think we must give effect to this contention. It has been held in several cases in this Court that questions arising between the decree-holder purchaser and the judgment-debtor as regards the properties directed to be sold by the decree and purchased in execution sale are questions relating to the execution of the decree and must be determined under section 47 of the Code. The latest of such cases is *Gunniah Vencatachalapathy Aiyar* v. *Perumal Iyer* (1). Mr. K. V. Krishnasamy Aiyar for the appellant contends that there is no case in which the question as to what passed under the sale, apart from the question of the validity of that sale, was held to be a matter relating to execution under section 47. That may be so, but I see no reason to think that questions such as we have here are not questions relating to execution. The series of sections relating to obstruction by judgment-debtors, to possession being given to a decree-holder or to a purchaser in execution of a decree

(1) 13 Ind Cas. 133; (1912) M. W. N. 44; 10 M. L. T. 527.

all assume that the judgment-debtor is to come in by way of an application in execution proceedings if he was not satisfied with either the delivery of possession or with the order directing the sale. The order directing delivery of possession to a purchaser under section 319 of the old Code, which corresponds to Order XXI, rule 96, of the present Code, is a judicial order—see *Pran Krishna Dhar* v *Juramoni Chowkidar* (2). The appellant asked that his present suit should be converted into an application under section 47 of the Code. But it is to be observed that any application on the date, when the present suit was instituted, to rectify any error in the proceedings in execution of the mortgage decree would be barred by limitation, as more than three years had elapsed since the date of the order of the delivery of possession, and the Limitation Act of 1908 does not extend the time for making the application on the ground of minority, though under the Limitation Act of 1877 such a disability would be taken into account in computing the period of limitation. In *Chidambaram Chetty* v. *Karuppan Chetty* (3) this Court decided that the new Limitation Act applied to applications of this sort and that a person, who by reason of minority would have an extended period of limitation under the old Act for making an application, cannot after the new Act came into force claim the benefit of the exemption under the old Act.

Following that decision I hold that the plaintiff is not entitled now to ask us to convert his suit into an application.

A technical objection was taken to the frame of the suit by the 1st respondent. It was said that the plaintiff did not ask for possession of these 226 *kulis* of land but asked only for an injunction, and inasmuch as he was not in possession at the date of the suit, his suit should be dismissed as he has not prayed for the proper relief. No such objection was taken in the lower Court and we are not inclined to uphold his contention. If necessary, the plaintiff should be given permission to amend the prayer in the plaint and we think he is in the circumstances of the case entitled to a decree for possession of the lands not covered by the sale to the 1st defendant, except the 68 6 3 *kulis* which the plaintiff is not entitled to recover by a separate suit. The lands so excepted are those described in Schedule D of the plaint. The plaintiff will also be entitled to mesne profits on the lands now decreed to him. That will be the decree in the appeal. The plaintiff and the 1st defendant will pay and receive proportionate costs both here and in the Court below.

I ought to draw attention to the fact that the translation of the portion of Exhibit II (*f*) which contains the description of the properties mortgaged, which is the most important portion for the purpose of this appeal, is incorrect.

ABDUR RAHIM, J.—I agree.

The appeal having been posted to be spoken to on 4th April 1917 and the Miscellaneous Petition coming on for hearing on the same day before Mr. Justice Abdur Rahim and Mr. Justice Srinivasa Aiyangar, the Court made the following

ORDER.—We think it better to have a report after enquiry by the lower Court on the point in dispute between the parties raised in Civil Miscellaneous Petition No. 1008 of 1917, namely, whether "No. 2802" in Schedule C of the plaint is a mistake for "No. 2801" and whether what is claimed in Schedule E is really "No. 2801." Time for the submission of the report will be till the re-opening of this Court after the ensuing summer recess.

In compliance with the above order, the Temporary Subordinate Judge of Ramnad at Madura submitted the following

REPORT.—I have been directed by the High Court to report whether No. 2802 in Schedule C of the plaint is a mistake for No. 2801 and whether what is claimed in Schedule E is really No. 2801.

* * * * * *

On the above evidence, therefore, I have no hesitation in saying that the *paimash* No. 2802 in plaint Schedule C is a clear mistake for *paimash* No. 2801.

The land claimed in Schedule E is waterspread or the tank-bed and the extent

(2) 1 Ind. Cas. 480; 13 C. W. N. 694.

(3 8 Ind. Cas 543; 35 M. 678; (1910) M. W. N. 711; 9 M. L. T. 75.

given is 20 *kulis*. Defence 1st witness, the Karnam, says that the *paimash* No. of the tank bed is 2802 and its extent is 20 *kulis*. So, his evidence places the matter beyond all doubt, and, therefore, what is claimed in Schedule E is really not *paimash* No. 2801 but *paimash* No. 2802. I find the point accordingly.

The Appeal and Civil Miscellaneous Petition coming on for hearing after the return of the report of the Temporary Subordinate Judge of Ramnad at Madura, in compliance with the order of Court dated the 4th April 1917, the Court delivered the following

JUDGMENT.—We accept the finding and the plaint will be amended in accordance with it and the decree will follow.

The appellant will bear the costs of the 1st respondent in this petition.

M. C. P.

Decree modified.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1015 OF 1916.

April 11, 1918.

Present:—Mr. Justice Fletcher and Justice Sir Syed Shamsul Huda, Kt.

SANCHIRAM DE BAHARI—DEFENDANT—APPELLANT

versus

Sreemutty HARA PRIYA THAKURANI AND OTHERS—RESPONDENTS

Landlord and tenant—Lease in consideration of services—Option of landlord to accept money-rent in lieu of services or to eject tenant—Landlord, right of, to eject on tenant's refusal to perform services.

Where a lease was granted prior to the date of the Bengal Tenancy Act in consideration of the tenant undertaking "to render those services which his predecessor had rendered in the house of the landlord's predecessors and to duly perform those which he would be required to do in the landlord's house at the time of marriages", with an option to the landlord, on the tenant's failure to perform the services, to recover Rs. 2 as rent in lieu thereof or to eject the tenant:

Held, that the lease was a perfectly good one and under its terms the landlord was not bound to accept Rs. 2 in lieu of the services, but was competent to eject the tenant, in the event of the latter's refusal to perform the services. [p. 612, col. 2.]

Appeal against the decree of the Additional Subordinate Judge, Chittagong, dated the 27th March 1916, reversing that of the Officiating Munsif, Additional Court, Patiya, dated the 18th November 1914.

FACTS appear from the judgment.

Babu *Mohini Mohan Chakraburtty* (with him Babu *Phanindra Kumar Sinha*), for the Appellant.—Plaintiff's case is that the defendants are her service tenants and that they refused to perform certain services which they were bound to perform according to the terms of a *kabuliyat* executed by the defendants, and, therefore, they are liable to be ejected The defendants pleaded that they were not service tenants but were *mokarari istimrari ryots*. The Trial Court found that the tenancy created was an ordinary one and not a service tenancy and dismissed the plaintiff's suit. The lower Appellate Court decreed the suit, holding that the tenancy was a *raiyati* tenancy with quit rents burdened with service and the performance of services formed the consideration or condition for which the tenancy was created and was not an *abwab*, vague and indefinite.

The *kabuliyat* would show that defendants agreed to pay Rs. 4 for the lands in suit, out of which Rs. 2 was to be paid in cash and for the balance Rs. 2, defendants were to work on *begar* (gratuitous labour) for 4 days in every year and if this *begar* (gratuitous service) were not performed, the plaintiff would be at liberty to realise Rs. 4 in full and also damages. The male as well as the female members of defendants' house from generation to generation would have to perform those services in the house of the plaintiff, as they were doing from before and would also perform services at the time of marriage in the plaintiff's house.

The services reserved are vague and indefinite, because the *kabuliyat* states that the executant is to render those services which he and his females used to render on the occasion of marriage ceremonies. The services claimed by the plaintiff are in the nature of an *abwab*. I rely on a case reported as *Apurna Churn Ghose* v. *Kasam Ali* (1). No doubt, the tenancy came into existence before the passing of the Bengal

(1) 10 C. W. N. 527; 4 C. L. J. 527.

Tenancy Act, but in cases of permanent tenancies created before the Bengal Tenancy Act section 179 of the Act would not empower the landlord to recover any *abwab* from the tenant.

[SHAMSUL HUDA, J.—The *kabuliyat* says: "If you fail to render the gratuitous services on requisition, then I shall be competent to recover the value thereof as a part of the rent."]

[FLETCHER, J.—If on consideration of those services the lease was granted, it is a good lease.]

The rate of interest at the rate of one anna per rupee per month in case of default is exorbitant and ought not to have been allowed by the lower Appellate Court. The rate comes to 75 per cent. and is, therefore, penal. There are cases on this point and I rely on *Upendra Lal* v. *Ataulla* (2) and *Basunta Coomar Roy* v. *Baksu Mollah* (3).

[FLETCHER, J.—The cases cited are under the Bengal Tenancy Act. The question as to rate of interest was not taken before the lower Courts.]

If it is considered penal, it can be reduced here.]

Babus *Khitish Chunder Sen* and *Probhat Chunder Dutt*, for the Respondent, were not called upon in reply.

JUDGMENT.—This is an appeal by the defendant against the decision of the learned Subordinate Judge of Chittagong, dated the 27th March 1916, reversing the decision of the Munsif at Patiya. The suit was brought for ejectment on the ground that the defendant refused to render the services that he was bound to render under the terms of a lease. The case that the defendant set up was that he was not bound to render any services, and the only question is whether on the terms of the lease the defendant is liable to be ejected on refusal to perform the services he agreed to render to the landlord. In the lease, the rent is stated to be Rs. 2 and the supply on requisition of four persons to do gratuitous labour. The lease then recites, "You will regularly render these services which your predecessors have rendered in the house of my predecessors and will duly perform those which you are required to do in my house at the time of marriages". This lease is dated prior to the date of the Bengal Tenancy Act. That such a lease is good there seems to be no doubt where the tenant was given the lease in consideration of his performing certain particular services. There is no reason in this case why, if the tenant does not wish to perform the services, he should not give up possession of the land.

Then it is said that the tenant can get rid of the requisition by paying Rs. 2 in lieu of it.

It is quite true that the lease gives the landlord an option either to recover Rs. 2 as rent if the tenant fails to perform his services or to eject the defendant. The landlord is not bound to accept Rs. 2 under the terms of the lease. He can eject the tenant in the event of the tenant refusing to perform the services. Nothing has been shown to us why a lease in consideration of the performance of such services is not a perfectly good lease.

Then it is said that the contractual rate of interest was penal, namely, the interest which was stipulated for if the defendant made default in the payment of Rs. 2, the money-rent that was reserved by the lease. There is nothing to show that the rate was penal. The contract was made before the Bengal Tenancy Act and the parties were at liberty to make any stipulation they thought fit. Because the interest is high, it does not follow that it is penal. Many contracts contain a stipulation for interest at a rate going to a considerable amount. Because certain learned Judges in one case came to the conclusion that the rate of interest in that particular case was penal, it is no ground for saying that all the rates of interest in other contracts, where the rates contracted for are as high as the one which the learned Judges held to be penal, are also penal. It is not a pure question of law whether the rate mentioned in the contract is or is not penal. It involves a consideration of the facts. No facts were considered in this respect in either of the Courts below and it is much too late now to raise the question as to the rate of

(2) 36 Ind. Cas. 404; 21 C. W. N. 108.
(3) 3 C. W. N. 36; 26 C. 130; 13 Ind. Dec. (N. S.) 687.

interest, which the parties deliberately contracted in 1883, being penal.

The present appeal fails and is dismissed with costs.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 127 OF 1916.

July 19, 1917.

Present:—Pandit Kanhaiya Lal, A. J. C.

Sheikh MUBARAK ALI AND OTHERS —DEFENDANTS—APPELLANTS

versus

Lala GOPI NATH—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), ss. 20, 21—Limitation, saving of—Interest, payment of—Co-mortgagor, payment by, whether binding on other co-mortgagors—Mortgage—Contract giving one of two options to mortgagee—Mortgagee, position of—Waiver as to one option, effect of—Interest, default in payment of, waived, effect of.

Where payment of interest as such is made by one of several co-mortgagors, such payment cannot in view of section 21 of the Limitation Act save limitation under section 20 of that Act except as against that co-mortgagor, unless it is shown that the other co-mortgagors authorised the payment. [p. 614, col. 1.]

A contract which gives the mortgagee one of two options does not bind him to either of them, if he chooses to stick to the other; in other words, it is open to him to waive the benefit of an acceleration, if the contract leaves him such an option; and that option cannot be taken away by Statute, unless there is anything to show that the grant of such an option is illegal or forbidden by law. [p. 615, col. 1.]

For example, where a mortgage-deed provided for the repayment of the principal with interest in 12 years and further stipulated that if the mortgagors failed to pay interest regularly every year, the mortgagee would be at liberty to sue for the recovery of the entire money due on the said deed before the expiry of the period fixed for redemption:

Held, that the mortgagee was at liberty to waive the default in the payment of interest and to wait for the expiry of the period fixed for redemption before bringing his action. [p. 614, col. 2.]

Appeal from the decree of the Subordinate Judge, Lucknow, dated the 30th June 1916.

The Hon'ble Pandit *Gokaran Nath Misra* and Babu *Purtoo Lal* for the Appellants.

The Hon'ble Syed *Wazir Hasan*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff-respondent for the recovery of money due on a mortgage, effected by Mubarak Ali and Waris Ali in lieu of Rs. 1,000 on the 26th April 1895, and a deed of further charge, executed by the same persons for Rs. 300 on the same date. Waris Ali died and is represented by defendants Nos. 2 to 4.

The deeds aforesaid provided for the repayment of the principal sums secured thereby with interest at 14 annas per cent. per mensem, compoundable yearly, within 13 years; and one of the covenants in both the deeds was that if the mortgagors failed to pay the interest regularly every year or to fulfil the conditions comprised in the deeds of mortgage and further charged or transferred the mortgaged property or if the title of the mortgagors was disputed by any claimant or was found defective by reason of the existence of any prior incumbrance on the mortgaged property, the mortgagee shall be at liberty (*ikhtiar hai*) to sue for the recovery of the entire money due on the said deeds before the expiry of the period fixed for redemption.

Mubarak Ali, one of the mortgagors, paid Rs. 250 on the 14th December 1899 about the deed of mortgage and Rs. 41 on the 25th March 1901 about the deed of further charge towards interest as such. These payments are not disputed. The mortgagee alleges that Mubarak Ali also paid on behalf of himself and the heirs of Waris Ali Rs. 30 on account of interest on the deed of mortgage and Rs. 20 on account of interest on the deed of further charge on the 26th May 1907. The defendants deny having made any such payments. The Court below found against them and held that the claim was in any event within time from the date of those payments of interest as such.

The evidence adduced in support of the payments consists of the statements of Lachhman Das, the son of the plaintiff, Kunjan, a servant of his, and Narayan Das, one of his former servants. Their statements are corroborated by the ac-

count-books filed by the plaintiff. In the account-books Rs. 50 are entered as having been paid by Mubarak Ali on behalf of himself and Waris Ali on the 26th May 1907 about the two deeds in suit. The account-books do not say that the said payment was made towards the interest as such; but Mubarak Ali admits in his evidence that he did not pay anything towards the principal money due on the deeds in suit. The irresistible inference, therefore, is, apart from anything which Narayan Das says on the point, that the payment in question was made towards the interest due on the said deeds.

That payment cannot, however, save limitation except as against Mubarak Ali, if the claim was otherwise barred by time, because there is no satisfactory evidence to show that the heirs of Waris Ali authorised the said payment. The decisions in *Krishna Chandra Saha* v. *Bhairab Chandra Saha* (1), *Domi Lal Sahu* v. *Roshon Dobay* (2) and *Velayudam Pillai* v. *Vaithyalingam Pillai* (3) do not apply, because the mortgages in those cases were made by single individuals, and the persons against whom the payments were sought to be proved as saving limitation were persons who had derived their title from the mortgagor. Section 20 of the Indian Limitation Act (IX of 1908) allows a fresh period of limitation to be computed from the time when the interest due on a debt or legacy is paid as such before the expiration of the prescribed period by the person liable to pay such debt or legacy. Where such debt or legacy is payable by several persons either as joint contractors, partners or executors, section 21 declares that nothing in the preceding section shall render one of such persons chargeable only by reason of the payment made by or by the agent of any other or others of them. The suit was filed within 12 years from the date of the expiry of the period fixed for the redemption of the mortgage and further charge, and as regards the heirs of Waris Ali the important question for consideration arises whether the plaintiff was at liberty to waive the default in the payment of interest and to wait for the expiry of the period fixed for redemption before bringing his action.

Article 132 of the Indian Limitation Act allows a period of 12 years from the date when the money sued for becomes due. But no money can become due, where there are covenants of an alternative nature, by reason of the failure of one of them, if the mortgagor chooses to waive its benefit. In *Kishori Mohun Roy* v. *Ganga Bahu Debi* (4), where a mortgage by conditional sale provided that on repayment of the principal but with interest in three years from the date of the mortgage, the land should be re-conveyed to the mortgagor and contained a further covenant that upon default in payment of interest half-yearly, the whole principal and interest should become due, it was held by their Lordships of the Privy Council that the period fixed for redemption of the mortgage was not affected or altered by the covenant in the deed of mortgage making, without reference to redemption, the whole principal become due upon failure to pay interest at a certain time.

The learned Counsel for the defendants-appellants relies on the decision in *Gaya Din* v. *Jhuman Lal* (5), which follows the decision in *Reeves* v. *Butcher* (6). The latter decision, however, rested on the terms of a contract which were of a peculiar nature. The contract there provided that the lender shall not call in the principal sum for a period of five years, if the borrower should so long live and should duly and regularly pay the interest. The binding character of that covenant depended on the borrower not dying earlier and making no default in the payment of the interest due; on the happening of either of those events that covenant became automatically annulled, and the further provision, contained in the deed, authorizing the borrower to call in his money, if default was made in the payment of any quarterly interest, came into operation, as if the former covenant had not been in existence. The decision in *Hemp* v.

(1) 32 C. 1077; 9 C. W. N. 868.
(2) 33 C. 1278; 11 C. W. N. 107.
(3) 17 Ind. Cas. 619; 12 M. L. T. 610; 24 M. L. J. 66.
(4) 28 C. 228; 22 I. A. 183; 6 Sar. P. C. J. 649; 5 M. L. J. 261; 12 Ind. Dec. (N. s) 152 (P. C.).
(5) 28 Ind. Cas. 910; 37 A. 400; 13 A. L. J. 510 (F. B.).
(6) (1891) 2 Q. B. D. 509; 60 L. J. Q. B. 619; 65 L. T. 329; 39 W. R. 626.

Garland (7) arose out of an instalment bond to which Article 75 of the Indian Limitation Act is applicable in India. The provisions of that Article have no bearing on cases governed by Article 132.

A contract which gives the mortgagee one of two options does not bind him to either of them, if he chooses to stick to the other, for as pointed out in *Maharaja of Benares* v. *Nand Ram* (8), to tie up the creditor to a covenant inserted for his benefit, regardless of that to which he agreed for the benefit of the borrower, "would be to punish a creditor for forbearance shown to his debtor and compel him to press his demands at the earliest opportunity and insist upon speedy and full satisfaction of his claim". Section 63 of the Indian Contract Act (IX of 1872) authorizes every promisee either to dispense with or remit wholly or in part the performance of the promise made to him. It is not, it is true, open to him to stop the running of the period of limitation, if it has once started. But if the contract gives him an authority to dispense with or remit the performance of a promise at a specified time or in a specified manner, or an option to refuse to avoid a contract, because a certain promise has not been performed at a specified time or in a specified manner, the limitation would not start running till the contract which he has refused to avoid is not broken; in other words, it is open to him to waive the benefit of an acceleration, if the contract leaves him such an option; and as observed in *Ram Parshad* v. *Qadro* (9), that option cannot be taken away by Statute, unless there is anything to show that the grant of such an option is illegal or forbidden by law, except by a clear and unequivocal declaration of an intent, such as the first portion of Article 75 embodies. In *Juneswar Dass* v. *Mahabeer Singh* (10), where a person engaged to pay the amount borrowed with interest on the day named and hypothecated certain land by way of security, with a condition that in the event of the said land being sold in execution of a decree before the date fixed for redemption, the mortgagee shall be at liberty to sue at once for the recovery of the debt, and before the term fixed for repayment expired, the mortgaged land was sold in execution of a decree obtained by another creditor on a subsequent mortgage, their Lordships of the Privy Council in repelling the plea of limitation observed: - "Their Lordships must not be supposed, in coming to this decision, to give any countenance to the argument of Mr. Arathoon that this suit would have been barred, if the limitation of six years under clause 16 had been applicable to it. They think, upon the construction of this bond there would be good reason for holding that the cause of action arose within six years before the commencement of the suit." Their Lordships were inclined to consider that limitation would begin to run from the date fixed for payment and that the cause of action arose, that is to say, the money became payable, on that date and not on the date on which the hypothecated property was sold in execution. It is true that their Lordships did not consider it necessary to decide that point in the view they took of the period of limitation applicable to the case before them; but as pointed out by Banerji, J., in *Gaya Din* v. *Jhuman Lal* (5), an expression of opinion by their Lordships on a matter of that kind is entitled to great weight. In *Sitab Chand Nahar* v. *Hyder Malla* (11), where a mortgage deed provided for the payment of the mortgage money by four instalments, the plaintiff to be at liberty in case of any default to sue either for the amount of that instalment or for the whole amount due on the bond, Banerji and Rampini, JJ., observed (page 285) that the right to enforce immediate payment on the happening of the first default was optional with the creditor and might be waived, if he chose to do so. In *Nettakaruppa Goundan* v. *Kumarasami Goundan* (12) effect was given to the privilege of the obligee not to exercise the option of payment before the specified date, if the interest was not regularly paid. In

(7) (1843) 62 R. R. 423; 4 Q. B. 519; 3 G. & D. 402; 12 L. J. Q. B. 134; 7 Jur. 302; 114 E. R. 994.

(8) 29 A. 43; 4 A. L. J. 56; A. W. N. (1907) 139.

(9) 40 Ind. Cas. 232; 20 O. C. 132; 4 O. L. J. 341.

(10) 1 C. 163; 25 W. R. 84; 3 I. A. 1; 3 Sar. P. C. J. 58; 3 Suth. P. C. J. 222; 1 Ind. Dec. (N. S.) 105 (P. C.)

(11) 24 C. 281; 1 C. W. N. 229; 12 Ind. Dec. (N. S.) 854.

(12) 22 M. 20; 8 M. L. J. 167; 8 Ind. Dec. (N. S.) 15.

Narna v. *Ammani Amma* (13) it was held that a hypothecatee was not bound to take advantage of a clause in his bond which entitled him to demand the principal money in case the default was made in payment of interest before its due date, and that a suit restricted to a claim to recover the principal and interest at the rate originally agreed upon was not barred by time, if brought within 12 years from the date fixed for the repayment of the principal, but beyond 12 years from the date of the first default in the payment of interest.

The learned Counsel for the defendants-appellants relies on the decision in *Tulshi Ram Shukul* v. *Muhammad Hadi* (14), but the circumstances of that case were similar to those of *Dwarka Prasad* v. *Raja Ram* (15), for the suit in each case was, on the true interpretation of the bond, beyond time even from the date fixed for the payment of the mortgage money. That was the plea raised by the debtor in either of those cases and though the decision in the former of those cases went further than the defence, it made no difference, because on the decision of the question how the period fixed for payment of the mortgage money was to be calculated the suit in either event would have been barred by time.

It is also contended that the principle of waiver recognised by Article 75 of the Indian Limitation Act cannot be extended to Article 132. But the question is not one of extending the principle of that Article but of applying Article 132 in the light of the terms of each contract.

Article 132 cannot supersede or disregard a waiver authorized by contract, where it is made. A person is presumed to act for his own benefit, and the subsequent acceptance of part of the interest by the mortgagee, coupled with the admission of Mubarak Ali that when he made the payment the mortgagee told him that it was not necessary for him to have made the payment and that he could apply the money to his other and more urgent purposes, shows that the mortgagee had deliberately exercised his option and chosen to wait till the time fixed for the payment of the mortgage money had expired. This is the cause of action on which he relied in the plaint and the claim was, therefore, within time.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(13) 35 Ind. Cas. 418; 39 M. 981; 4 L. W. 77; 20 M. L. T. 176; (1916) 2 M. W. N. 125; 31 M. L. J. 865.

(14) 32 Ind. Cas. 551.

(15) 29 Ind. Cas. 980; 13 A. L. J. 486.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 987 OF 1916.

April 11, 1918.

Present:—Mr. Justice Fletcher and Justice Sir Syed Shamsul Huda, Kt.

JOGENDRA NATH MITRA—PLAINTIFF—APPELLANT

versus

APARA PROSAD MUKERJEE—DEFENDANT—RESPONDENT.

Landlord and tenant—Cesses, landlord agreeing to bear, effect of.

Where a landlord let out a tenure at Rs. 90 per annum including the cesses:

Held, that the landlord clearly undertook by contract, as between himself and the tenure-holder, that he would bear the cesses. [p. 617, col. 2.]

Appeal against the decree of the Subordinate Judge, 2nd Court, Burdwan, dated the 29th January 1916, affirming that of the Munsif, 2nd Court at that place, dated the 15th January 1915.

FACTS material to the report will appear from the following extracts from the judgment of the lower Appellate Court:—

The only question in controversy between the parties in this appeal is whether plaintiff is entitled to cesses.

The judgment of the learned Munsif has been read over. The arguments of the Pleaders of both parties were heard. It appears from the *patta* granted by plaintiff's predecessor in interest to the defendant that the latter is to pay an annual *jama* of Rs. 90, including cesses. Apparently, therefore, plaintiff cannot get cesses under the con-

tract. The learned Pleader for the appellant, however, refers me to the decision in the case of *Mohanund Sahay* v. *Saidunnessa Bibi* (1). It appears that the learned Munsif considered the effect of this decision and I quite agree in the view expressed by him. The circumstances which led to the contract embodied in the *patta* are peculiar. It appears that the defendant's father held a *mokurari jama* of Rs. 128 under the plaintiff's predecessor. Owing to the outbreak of malaria of a virulent type among the tenantry many of the tenants died while some deserted the village. Consequently there was a considerable falling off in the income of the defendant's father. He accordingly surrendered the *jama*. The plaintiff's predecessor then remained in *khas* possession for sometime and saw that the income from the tenants was only Rs. 60. He then persuaded the defendant to take fresh settlement at an annual rental of Rs. 90 including cesses. The defendant would sustain a loss of Rs. 30 annually if he agreed to the terms proposed by the landlord, plaintiff's predecessor. If under these circumstances the defendant accepted the lease and the plaintiff's predecessor granted it, can it be reasonably supposed that the intention of the parties to the contract was that the defendant would be called upon to pay the cesses in excess if any imposed in future? In my opinion, having regard to the circumstances under which the lease was accepted by the defendant, the grantor of the lease had no idea of increasing the rent or cesses and that is why the term "there will be no increase or decrease of the *jama* thus fixed" was incorporated in the *patta*. It was stipulated that the *jama* would never be increased. As the *jama* included rent as well as cesses, it was tantamount to an admission of the grantor of the *patta* that neither the rent nor the cesses would be increased.

In this view I dismiss the appeal with costs and affirm the decree of the first Court.

Babu *Bepin Behari Ghose, I*, for the Appellant.—The plaintiff is the appellant in this case, and the appeal arises out of a suit for recovery of arrears of rent and cesses. The defendant holds the land under a *mokarari* lease at an annual rental of Rs. 90 with cesses. While the defendant was holding the lands there was a road-cess re-valuation, in which the valuation was enhanced. The tenant defendant paid cess at the enhanced rate for three years but thereafter he refused to pay the cess at the enhanced rate. The Courts below have erred in holding that the defendant is not liable to pay the cess at the enhanced rate. The parties did not, at the time of the origin of the tenancy, think of the contingency which has now happened, and so the defendant cannot get out of the statutory liability when there is no contract to that effect. Under section 41 of the Cess Act the defendant is liable to pay the enhanced cess claimed, *i.e.*, upon the profits which he is now making. Refers to *Mohanund Sahay* v. *Saidunnessa Bibi* (1).

Dr. *Sarat Chandra Bysack*, Babu *Surendra Nath Guha*, *and* Babu *Norendra Nath Chowdhury*, for Babu *Bepin Behari Ghose II*, for the Respondent, not called upon.

JUDGMENT.—This is an appeal by the plaintiff against the decision of the learned Subordinate Judge of Burdwan affirming the decision of the Munsif of the same place. The plaintiff, who is the landlord, sued for rent the defendant, who was a tenure holder under him. The only question in the appeal as it was in the Courts below is, 'Is the defendant liable to pay the cesses or did the landlord plaintiff undertake by the contract to bear that liability?" It is a perfectly clear case, because the property was let out at Rs. 90 per annum including the cesses. The landlord might wisely or unwisely have agreed to that contract and it may be a misfortune that the cesses have been so considerably increased. But notwithstanding that the landlord clearly undertook by contract as between himself and the tenure-holder that he would bear the cesses. That being so, the view adopted by the learned Judge of the lower Appellate Court is correct. The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 8 C. L. J. 525; 12 C. W. N. 154.

FATEH CHAND v. PARAS RAM.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1796 OF 1917.

March 7, 1918.

Present:— Mr. Justice Shadi Lal.

FATEH CHAND—DEFENDANT—APPELLANT

versus

PARAS RAM AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Easements Act (V of 1882), s. 47—Suspension of easement by agreement, whether extinguishes easement—Transfer, sale in execution, whether is—Rule against perpetuities.

Plaintiff entered into an agreement with one *N*, by which the latter admitted the former's right to discharge rain water on to the latter's house, and the plaintiff agreed not to exercise the right so long as *N.* or his descendants remained owners of the house; if, however, the house was transferred, plaintiff was to resume the enjoyment of the easement. The house was sold in execution of a decree and was purchased by the defendant who had notice of the agreement.

Held, (1) that the sale in execution was a transfer within the meaning of the agreement; [p. 618, col. 2.]

(2) that the plaintiff, having purchased the house with his eyes open, could not be allowed to plead that he was not bound by the contract entered into by his predecessor-in interest; [p. 618, col. 2.]

(3) that the rule against perpetuities had no application to the case. [p. 618, col. 2.]

An easement is not extinguished by cessation of user, where the cessation is in pursuance of a contract between the dominant and servient owners. [p. 618, col. 2.]

Second appeal from the decree of the District Judge, Amballa, dated the 20th April 1917, confirming that of the Munsif, 2nd class, Jagadhri, District Amballa, dated the 10th February 1917, decreeing the claim.

Lala *Jagan Nath* and Bakhshi *Tek Chand*, for the Appellant.

Mr *Jai Gopal Sethi*, for the Respondents.

JUDGMENT.—The facts of the case are correctly stated in the judgments of the lower Courts. Briefly, the plaintiffs' ancestors entered into an agreement on the 31st of January 1866 with one Nanun Singh, the then owner of the house of the defendant, by which Nanun Singh admitted their right to discharge their water through two *parnalas* on to the defendant's house, while the other side agreed not to exerise it so long as Nanun Singh or his descendants remained owners of the house. If, however, the house was transferred, then they would have a right to resume the enjoyment of their easement. The house of Nanun Singh has now been sold in execution of a decree to the defendant-appellant, and it is perfectly clear from the order of the executing Court, dated the 26th April 1916, that the defendant was duly informed of the agreement in question and purchased the property with his eyes open. In these circumstances he cannot plead that he is not bound by the contract entered into by his predecessor-in-interest.

There can be no manner of doubt that this suspension of the user by the dominant owner does not extinguish his right of easement. As pointed out in Goddard on Easements at page 269, a suspension of user by agreement, or the temporary substitution, by agreement or for convenience, of another way for that to which the right is claimed, is not an interruption in the enjoyment which will defeat a claim by prescription, for under those circumstances there is constructive enjoyment of the easement, and such non user will not rebut the presumption of a grant. To the same effect are the remarks at page 569 of the same book, and also the provision in section 47 of the Indian Easements Act, which lays down that an easement is not extinguished, where the cessation is in pursuance of a contract between the dominant and servient owners. In view of these authorities and having regard to the terms of the contract referred to above I am of opinion that the plaintiffs, who suspended the enjoyment of their right in favour of a particular person or his descendants, are entitled to resume it; and that the defendant has really no answer to their claim.

It is argued that the contract infringes the rule against perpetuities, but I fail to understand how the said rule has any application to the temporary suspension of a right which undoubtedly belonged to the plaintiffs. Nor am I prepared to accede to the contention that the word 'transfer' should be restricted to a voluntary transfer, and was not intended to include an involuntary alienation in execution of a decree. It is perfectly obvious that the object of the agreement was to grant a concession to a certain family, and it seems to me that the word *intiqal* is wide enough to include all alienations, whether voluntary or involuntary.

The suit is clearly one for the grant of injunction, and I do not think that the

remedy by way of damages would be equally efficacious. Accordingly I confirm the decree of the lower Appellate Court and dismiss the appeal with costs.

Appeal dismissed.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION SUIT No. 1136 OF 1915.

December 8, 1917.

Present:—Mr. Justice Marten.

KHATUBAI—PLAINTIFF

versus

MAHOMED HAJI ABU AND OTHERS—DEFENDANTS.

Muhammadan Law—Hindu Law—Custom—Halai Memons settled in Kathiawar, whether governed by Hindu Law or Muhammadan Law.

As regards inheritance and succession Halai Memons settled in Porebunder in Kathiawar did not retain Hindu Law at the time of their conversion to Islam, nor have they by immemorial custom adopted Hindu Law. In these matters, therefore, they are governed by Muhammadan Law and not by Hindu Law. [p. 647, col. 2.]

The Hon'ble Mr. *Jinnah* and Mr. *Davar*, for the Plaintiff

Messrs. *Setalvad* and *Desai*, for Defendant No. 1.

Messrs. *Kanga* and *Taraporevalla*, for Defendant No. 2.

Messrs. *Bahadurji* and *Davar*, for Defendants Nos 3 and 4.

JUDGMENT.—In the year 1897 the Government of India, being minded to amend the personal law of Cutchi Memons as regards in particular inheritance and succession, caused a public notice to be inserted in (*inter alia*) the Bombay Government Gazette (Exhibit L) and the Porebunder State Gazette (Exhibit M) with a view to ascertain the wishes of the community on the subject. The notice is issued from the Judicial Department of the Government of Bombay and is described as a "public notice to the Memon community by the Government of Bombay at the desire of the Government of India." In that notice the following passage occurs, *viz.*:—

"The Memon community in India is divided into two sects, the Halai Memons and the Cutchi Memons. The former without exception follow the Muhammadan Law in all respects and are not, therefore, affected by the proposed legislation."

The question I have to decide in the present suit is in effect whether that passage is correct. In other words, are Halai Memons without exception governed as regards inheritance and succession by Muhammadan Law as stated in the notice, or by Hindu Law as is the case with Cutchi Memons? In particular, it will be material to consider whether, as regards this personal law, there is any difference between Halai Memons settled in Bombay and Halai Memons settled in Porebunder and other parts of Kathiawar, which territory is, I assume, included in the expression "India" as used in the passage I have quoted.

The dispute in question arises over the succession to the estate of a Halai Memon named Haji Abu Haji Habib (hereinafter called "the intestate"), who died intestate at Bombay on the 30th November 1914 The intestate left him surviving two married daughters, the plaintiff and one Ayshabai (since deceased), one son, the first defendant Mahomed Haji Abu, and a widow, the second defendant Bibabai. The third and fourth defendants are respectively the husband and the minor child of the deceased daughter Ayshabai.

The plaintiff contends that the estate of the intestate devolves according to Muhammadan Law, in which case she, as a daughter of the intestate, would take 7/32 of the estate. In this she is supported by the third and fourth defendants, who as representing the deceased daughter Ayshabai would take another 7/32, thus leaving 14/32 for the first defendant and 4/32 for the second defendant. On the other hand the first defendant contends that the estate of the intestate devolves according to Hindu Law, in which case he, as the only son of the intestate, would take the whole estate subject to the right of the second defendant to maintenance as the widow of the intestate.

Virtually, however, the contest is between the plaintiff and the first defendant, as the other defendants have only taken a formal part in the trial before me. So

tco as regards Counsel, the fight has been almost wholly conducted by Mr. Davar for the plaintiff and by Mr. Setalvad for the first defendant. It will accordingly be convenient to refer to defendant No. 1 as the defendant.

The intestate's estate is valued at over two and a quarter lacs and consists mainly of property in Bombay, *viz.*, five immoveable properties there valued at Rs. 1,40,000 and a share in a cutlery business there valued at at least Rs. 60,000. The remaining important asset is an immoveable property at Porebunder said to be worth Rs.25,000.

As regards the intestate himself, it is common ground that he was born at Porebunder in the Native State of that name in Kathiawar; that he came to Bombay for business purposes some thirty-three or forty years before his death; that in Bombay he started and developed a lucrative cutlery business, in which at the date of his death he still held a ten annas share; and that he was about sixty-two when he died.

As regards the community from which the intestate came, the following information will be found in Volume VIII, page 162, of the Gazetteer of the Bombay Presidency (1884 Edition) under the heading of "The Musalman population of Kathiawar", *viz.*:

"Memons are a large class in Kathiawar, numbering no less than 58,400. They are of two divisions, Cutchi Memons who are supposed to be the descendants of converted Lohanas and to have come originally from Sind, and Halai Memons the descendants of converted Kachhias. The Halais have an hereditary chief or *mukhi* who lives at Dhoraji. Memons are husbandmen and in towns are dealers in groceries and cloth. As a class they are hardworking and quiet, but rather stolid and apethetic. The two classes do not intermarry; the men of both shave the head and wear beards."

From this statement, it would appear to be erroneous to assume that all Memons in Kathiawar are Halai Memons as the defendant invites me to do. Further, the public notice in the Porebunder State Gazette (Exhibit M) would hardly have been published unless there was a community of Cutchi Memons in that State. I mention this as possibly forming an explanation of some of the decisions in the Kathiawar Courts, where the parties are merely described as Memons and it is not stated whether they are Cutchi Memons or Halai Memons. It would further appear from the above statement, that Halai Memons did not originally emigrate from Sind as Cutchi Memons did, but were local inhabitants of Kathiawar who became converts to Islam. Lohanas, I may explain, are traders (see Gazetteer, page 149) and Kachhias are husbandmen (see Gazetteer, page 143).

The first point that arises for decision is as to whether the onus of proof is on the plaintiff or the defendant. In my judgment it is quite clear that in this Court the onus of proof is on the defendant to show that the succession to the intestate's estate is governed by Hindu Law. Halai Memons are admittedly Muhammadans. *Prima facie*, therefore, Muhammadan Law governs the succession to their estates, and in this respect there is no difference between original believers and converts to Islam: see *Bai Baiji* v. *Bai Santok* (1). Further the actual practice of this Court is in accordance with that presumption, for its records in evidence in this suit (see Summaries, Exhibits A41, A45 and A46) show that for the last sixty years and upwards the estates of Halai Memons have been invariably administered in this Court according to Muhammadan Law. Indeed so far as this Court is concerned, it would appear that hitherto nobody has had the courage even to argue that Halai Memons are governed by Hindu Law, whether as regards succession or anything else.

That Khojas and Cutchi Memons are governed by Hindu Law in matters of inheritance is well known. This is the result of the leading case known as the *Khojahs and Memons' case* [*Hirbae* v. *Sonabae* (2)], which is reported in Perry's Oriental Cases, page 110, and was decided by Sir Erskine Perry in 1847 and has since been frequently followed. But in that very case the learned Judge was careful to distinguish Halai Memons from Cutchi Memons. At page 115, he says:—

"A branch of the caste, the Halai Memons, who are settled in Kathiawar, are said to observe every portion of the Muhammadan Law,

(1) 20 B. 53; 10 Ind. Dec. (N. S.) 594.

(2) 1 Perry's O. C. 110; 2 Morley's Digest 431; 4 Ind. Dec. (O. S.) 103 & 707.

including the injunctions as to the division of an inheritance."

This, it is true, is merely a dictum, as Sir Erskine was not there deciding the case of a Halai Memon; but it is nevertheless a dictum the authorship and age of which must demand respect. Further, the dictum was the result of evidence actually given in the case. Fortunately we have in this Court Sir Erskine's original notes of the evidence, and they are Exhibits P in the present suit. These notes show that three of the Cutchi Memon witnesses, *viz.*, Haji Joosab Haji Belladina at page 55, Haji Fazul Jaffer at page 87, and Haji M. Saccoor at page 91, all testify that Halai Memons unlike Cutchi Momons follow the Muhammadan Law of inheritance and succession. This evidence would appear to be that of deceased persons against their interest, for *prima facie* these witnesses were interested in claiming that Hindu Law was their personal law, and the admission that the other branch of the community of Memons followed a different law was a point in favour of their adversaries. Sir Erskine's dictum is of further importance, as there is no other reported case on the point either in the Privy Council or in any Indian High Court.

I lay stress on this sixty years' practice of the Bombay High Court in applying Muhammadan Law to Halai Memons' estates and on the absence of any reported decisions, as there appears to be a lamentable misunderstanding on these points not only in the Porebunder State Court but also in other Courts in Kathiawar. On this very point I am now considering, *viz.*, the onus of proof, the Huzur Court (which is the highest and final Court in Porebunder State) has decided that a recent Privy Council decision has abolished any distinction between Cutchi Memons and Halai Memons, and that consequently as regards Halai Memons the burden of proof is on those who contend for Muhammadan Law. This decision of the Huzur Court (Appeal No. 37 of 1915-16) is Exhibit 10D and was given by the Sar Nyayadhish (Mr. A. H. Dave) in September 1916, after the present suit had been started, and in direct conflict with a previous decision in 1900 of a former Sar Nyayadhish (Mr. N. R. Majmundar), who had held in Exhibit K (Appeal No. 2 of 1898-99) that the onus of proof was on those who contended for Hindu Law. I wish to speak with all courtesy of the decisions of other tribunals, and nonetheless so because they have been endeavouring to follow what they believe to be the law in Bombay. But it would be quite wrong of me, particularly in a case of this importance, to use language which would imply any doubt on my part as to what has hitherto been decided or not decided in the Bombay High Court or in the Privy Council. The decision which the learned Sar Nyayadhish cites in support of his proposition is *Abdurahim Haji* v. *Halimabai* (3) and the proposition he derives from it is as follows:—

"Here it is quite clear that the distinction between Cutchi Memons and Halai Memons has been done away with and it has been held that all Memons as a general rule are governed by Hindu Law until a custom to the contrary is proved. The onus, therefore, would lie on the other side asserting that Muhammadan Law applies."

This is on page 2 and then on page 3 the learned Judge again says:—

"The recent Bombay High Court decision in *Abdurahim Haji* v. *Halimabai* (3) clearly shows that the distinction between Cutchi and Halai Memons is done away with and that all the Memons as a general rule are governed by Hindu Law save where a local custom to the contrary is proved."

I may observe that the learned Judge was in error in thinking that the decision was that of the Bombay High Court. It was a decision of the Privy Council on appeal from the Court of Appeal for Eastern Africa, but was reported in the Indian Law Reports because of its interest to Bombay lawyers. As regards the case itself, it is sufficient for me to say that it dealt with Cutchi Memons and is no authority whatever on the devolution of the estates of Halai Memons. It is true that the head-note in *Abdurahim Haji* v. *Halimabai* (3) speaks of Memons, but a head-note is not an authority, and it is quite clear not only from the facts of the

(3) 32 Ind. Cas. 413; 43 I. A. 35; 18 Bom. L. R. 635; 30 M. L. J. 227; 20 C. W. N. 362; (1916) 1 M. W. N. 176 (P. C.).

case but also from Lord Haldane's speach and his frequent references to Cutchi Memons that their Lordships were dealing with Cutchi Memons and Cutchi Memons alone, despite some insolated passages where for brevity the expression used was "Memons".

The onus of proof being then on the defendant, what must he prove to discharge such onus? The test laid down by the Privy Council in *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar* (4) is as follows:—

"Their Lordships are fully sensible of the importance and justice of giving effect to long established usages existing in particular districts and families in India but it is of the essence of special usages, modifying the ordinary law of succession, that they should be ancient and invariable and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends."

The decision of the Madras High Court which the Privy Council thus affirmed is reported as *Sivanananja Perumal Sethurayar* v. *Muttu Ramalinga Sethurayar* (5) and the learned Judges said at page 77:—

"What the law requires before an alleged custom can receive the recognition of the Court and so acquire legal force is satisfactory proof of usage so long and invariably acted upon in practice as to show that it has, by common consent, been submitted to as the established governing rule of the particular family, class, or district or country; and the course of practice, upon which the custom rests, must not be left in doubt but be proved with certainty."

In this connection I should state that defendant's Counsel at the outset of the case said that he did not rely on any custom peculiar to this particular family as compared with that of other Halai Memon families in Porebunder.

That being so, I think the defendant must prove, *first*, that the intestate at the date of his death was governed by Porebunder or Kathiawar custom with respect to inheritance and succession among Halai Memons and *secondly*, that such Porebunder or Kathiawar custom, unlike that of Bombay, is to administer Hindu Law in such a case.

My reason for confining the custom to Porebunder or Kathiawar is this: If Bombay is to be included or if to use a colloquial expression the intestate was a Bombay man, it would be quite hopeless to contend that any such custom prevails in Bombay. On the contrary, as I have already stated. Bombay administers Muhammadan Law to Halai Memons. The summary Exhibit A41, I have already referred to, relates to some thirty-nine Probate or Administration grants of Halai Memons dying from 1852 onwards. The summaries Exhibits A45 and A46 relate to some thirty-two suits for administration or partition of Halai Memon estates from 1874 onwards. In all these cases it is Muhammadan Law which is applied, and though in many of them the decrees are by consent, yet one frequently finds that those consent decrees are approved by the Court on behalf of infants, which of course it could not do if Hindu Law applied. Two of the petitions in Exhibit A41, *viz.*, Nos. 27 and 34, are by the Administrator-General of Bombay and in view of Mr. Slater's long experience I attach importance to that. In not one of the seventy-one proceedings contained in the above three Exhibits is there any suggestion that any of the Halai Memons therein mentioned or their ancestors were ever governed by Hindu Law, whether in Kathiawar or elsewhere, or that at any time during their lives there was any change in their personal law of succession from Hindu to Muhammadan consequent upon a migration to Bombay.

It is also in evidence (Exhibit A18) that the defendant has (at a cost of about Rs. 1,450 in merely Court fees and stamps) searched some 412 Probate or Administration grants in this Court between 1799 and 1860. One may, I think, infer that the object of this expensive search was to discover grants by this Court of Halai Memon estates according to Hindu Law, and that as no such grant was put

(4) I. A. Sup. Vol. 1 at p. 3; 14 M. I. A. 570; 12 B. L. R. 396; 17 W. R. 552; 3 Sar. P. C. J. 108; 2 Suth. P. C. J. 603; 20 E. R. 898.

(5) 3 M. H. C. R. 75.

in evidence, it does not exist. So much for the records of the Bombay High Court.

As regards the oral evidence it is also to the same effect. Even the defendant and some of his witnesses admit that Bombay Halai Memons are governed by Muhammadan Law, and the rest of his witnesses state that they do not know what law is applied in Bombay. Indeed defendant's Counsel in opening stated that it was not necessary for him to contend that Halai Memons in Bombay were governed by Hindu Law. At a later stage it appeared that some time might be saved by a frank admission that Bombay Halai Memons were governed by Muhammadan Law. The admission eventually made was, however, half hearted and useless, but it had this result, *viz.*, that plaintiff's Counsel was forced to supplement his oral evidence by his documentary evidence and thus to establish his case on a firmer basis than any mere admissions of Counsel.

Before returning to the question whether the intestate was a Porebunder man and bound by Porebunder custom, there is, I think, an important consequence which follows from my holding that in Bombay Muhammadan Law is applied to Halai Memons, and that is this, *viz.*, that *prima facie* Muhammadan Law is the personal law which those Halai Memons or their ancestors brought with them when they came from Kathiawar to Bombay. That presumption seems to me to follow from the converse presumption, *viz.*, that a Hindu or Muhammadan family migrating from one part of India to another is presumed to retain the personal law by which it was governed in the country from which it started: see *Parbati Kumari Debi* v. *Jagadis Chunder Dhabal* (6), *Abdurahim Haji* v. *Halimabai* (3), Mayne, 8th Edition, page 55.

In this respect Indian law differs considerably from English Law, for under English Law the immoveable property would devolve according to the *lex loci* and the moveable property according to the *lex domicilii*, and in a normal case there would be no difficulty. Here, in Bombay, amongst Hindus and Muhammedans it is the personal law which regulates the succession to immoveables and moveables alike. If then the personal law has to be ascertained, the presumption to be raised will depend on whether the one known quantity is the personal law of the original domicile or that of the new domicile. If it is the former, the person in question will presumably carry his old law with him to the new domicile. If it is the latter, and it is quite clear that he is in fact being governed by the personal law prevalent in the new domicile, then *prima facie* that is the law he brought with him from his old domicile.

The evidence in the present suit shows that there are some 3,000 or 4,000 Halai Memons in Bombay, the majority of whom live in two particular streets. Not one of them has been called to testify that on migration this personal law as regards succession was changed from Hindu to Muhammadan Law. I put the specific question to several of the plaintiff's witnesses and to one of the defendants, and not one of them had ever heard of such a change in any member of their community. Mr. Setalvad in his reply did indeed claim that one such case arose in connection with the father of instance No. 6, but I will deal with that one alleged case later. If then, in the view I take, it must be presumed that the original personal law of those 3,000 or 4,000 Bombay Halai Memons or their ancestors was Muhammadan when they were in Kathiawar, the result is I think to increase the already heavy burden of proof on the defendant. The presumption may, of course, be rebutted by proper evidence like any other presumption, but the evidence to be adduced in support of that rebuttal will require particularly close scrutiny. As far as Kathiawar and Bombay are concerned, the only authority cited to me as an instance of variation of custom is *Ahmedbhoy Hubibbhoy* v. *Cassumbhoy Ahmedbhoy* (7), a case of Khojahs, where it was held that in Bombay a son could not claim partition in his father's life-time, though he might do so in Kathiawar.

Turning now to the first point which the defendant must prove, *viz.*, that the

(6) 29 I. A. 82; 4 Bom. L. R. 365; 29 C. 433; 6 C. W. N. 490; 8 Sar. P. C. J. 205.

(7) 13 B. 534; 7 Ind. Dec. (N. S.) 354.

intestate at the date of his death was governed by Porebunder or Kathiawar custom with respect to inheritance and succession amongst Halai Memons, I think the defendant has discharged the onus of proof and that he is right on this point. I put aside the defendant's story about his father's retirement, for I am satisfied by the evidence of other witnesses and to some degree by the books, Exhibits A42 and A47, that his father continued in business in Bombay up to practically the date of his death. So too I reject a good deal of the defendant's evidence on commission as being exaggerated or unreliable. Witness after witness on commission deposed in chief that the intestate spent most of his time at Porebunder, but on cross-examination could not say how many months each year the intestate spent in Porebunder and Bombay respectively, and was further obliged to admit that he (the witness) was in Africa for years at a time, and presumably, therefore, knew little or nothing about the intestate's movements. But putting all that unreliable evidence aside, there remains, I think, a substratum of fact which is sufficient to show that the intestate did not lose his Porebunder domicile of origin. On this point I think that, as soon as the defendant proves that the domicile of origin was Porebunder, the onus of proof shifts and it is then for the plaintiff to show that the intestate acquired a domicile of choice in Bombay. The intestate went originally to Bombay for business, and I am far from being satisfied that he intended to make Bombay his permanent home. It is true that he had a house and other landed property at Bombay, and that business ties detained him there most of each year, but on the other hand he built a house at Porebunder where he went every year, and it was at Porebunder that all family events took place, such as births, marriages and so on. Porebunder seems to me to have been his real family home. He was a Shethia there as well as at Bombay and while it is quite clear that he was known in Bombay as Porebundervalla (see for instance the conveyance of 9th March 1905 to the intestate), I doubt the accuracy of those few witnesses who say he was known in Porebunder as Bombayvallah. I need not discuss the law of domicile. Its main features are well known and are exemplified in such cases as *Winans* v. *Attorney-General* (8) and *Huntly (Marchioness)* v. *Gaskell* (9). Nor do I overlook the fact that in India for a change of personal law it is necessary to prove not only a change of domicile but also an adoption of the law of the new domicile. In the view, however, which I take it is unnecessary to go into this. In my judgment the intestate lived and died a Porebunder man and was consequently governed by the law of Porebunder at the date of his death.

I must next consider what is the law of Porebunder governing the rights of inheritance and succession to the estate of deceased Halai Memons domiciled in that State This is a question of foreign law and like all questions of foreign law must be proved as a fact. To avoid misunderstanding I may explain that I use the word "foreign" in the sense in which it is frequently used in private international law, *viz.*, as outside the jurisdiction of the Court dealing with the matter. In that sense "foreign" does not necessarily denote even a difference in allegiance. In an English Court, for instance, Scottish law and Scottish judgments may be said to be foreign law and foreign judgments, and *vice versa*. [*Cf.* the argument of Mr. Sergeant as he then was in *Mirrlees Charity, In re Mitchell* v. *Attorney-General* (10).] As is pointed out, however, in the cases cited in *Trufort, In re, Trofford* v. *Blanc* (11), evidence as to foreign law is often unsatisfactory and one is left to ascertain that law as best one can. To some degree that remark applies here, for the defendant's evidence, although voluminous, is of a character to invite close criticism whether one looks at his expert or other oral evidence or at the Court decisions which he relies on.

(8) (1904) A. C. 287; 73 L. J. K. B. 613; 90 L. T. 721; 20 T. L. R. 510.
(9) (1906) A. C. 56; 75 L. J. P. C. 1; 94 L. T. 33; 22 T. L. R. 144.
(10) (1910) 1 Ch. 163; 79 L. J. Ch. 73; 101 L. T. 549; 26 T. L. R. 77.
(11) (1887) 36 Ch. D. 600 at p. 611; 57 L. J. Ch. 135; 57 L. T. 674; 36 W. R. 163.

Before turning to that evidence, however, I think it useful to say something of the earlier conditions of Kathiawar, for as I have already pointed out, the custom which the defendant sets up must be proved to be ancient and invariable.

Turning then again to Volume VIII of the Bombay Gazetteer, I find this written at page 324 under the heading "Justice" with reference to the condition of affairs in 1842:—

"'Of civil or criminal law,' wrote Captain, afterwards Sir George, Jacob in 1842, 'the people of Kathiawar have no idea, nor do they seem sensible of the want; but such is ever the case in barbarous communities. Each caste manages its affairs by *panchayats* or councils, where the leading men resemble some of our own select vestries in meeting to talk and eat at their neighbour's expense. The result is generally a fine on the offending party, also to be laid out in eating, besides any mode of adjustment that may be decided on...'":—

Then at the bottom of the page.

"The above was written twenty-two years after the Gaikwar had handed over the general control of the tributaries in Kathiawar to the British Government. What the state of the judicial administration of the province was at the beginning of the century (*i.e.*, 1800) may be gathered from the reports of Colonel Walker. 'The administration of justice amongst the Marathas,' he writes, 'was entirely neglected. Nothing can exceed the confused and indistinct notions which they entertained on this head...Almost every crime was commutable for money, and fines were considered a regular branch of the revenue. The only object the Maratha Government had in view in Kathiawar was the collection of tribute. It consistently disregarded all other branches of administration, and left the chiefs' both large and small, to deal with their subjects as they chose.'"

Turning to page 326 the Gazetteer proceeds:—

"These rough methods of obtaining justice were resorted to because there were no tribunals to which the injured could apply for redress, or any chance of cases being decided by the chief to which they applied. There were no Courts, no definite procedure, and no desire to see justice done between man and man. Cases were occasionally referred for arbitration, and when the chief interfered, he administered justice principally through a system of ordeals and oaths..."

Then again at page 332:—

"Since 1863 the Chiefs' Civil and Criminal Courts have gradually improved in efficiency. Previous to 1863 Courts of Justice hardly existed. There was no regular procedure and no constituted Courts. Any crime could be commuted for fine, and sentences of imprisonment depended entirely on the caprice of the chief. By degrees regular Courts were instituted; the farmer of revenue no longer assumed judicial power. Courts of first instance were subject to Courts of Appeal; Codes based on the model of the British Penal and Criminal Procedure Codes were drawn up in the larger and more advanced States...Private property became more respected; complaints of loss by individuals began to be listened to; travellers could journey without an armed escort, and with much less fear than formerly of being molested and robbed."

At page 333, after citing statistics of civil and criminal suits down to 1882, the Gazetteer proceeds:—

"These tables show that there is a considerable amount of work done in the State Courts and that they are freely resorted to. A comparison with the remaks quoted at the beginning of this chapter shows what a vast improvement has taken place in the judicial administration of the country, and consequently in the social condition of the people, during the last forty or more correctly during the last twenty years" (*viz.*, from 1864 to 1884).

Now these extracts show that there is a considerable practical difficulty in the defendant's way, for down to a comparatively recent date there are no Courts to whose records he can resort as showing what the devolution of property has been amongst the Halai Memons in Porebunder or elsewhere in Kathiawar. Further, if the country was in such a lawless state as that depicted in the Gazetteer, and I think I must presume that that statement is substantially accurate, it seems to me to increase the difficulty in proving an ancient and invariable special custom of inheritance distinguishing Halai Memons from other Muhammadans. I re-

cognise on the other hand that the absence of early records assists the defendant to some degree, because it affords some explanation why his evidence is substantially confined to quite recent instances of devolution. On the whole, however, I think that these extracts as to the early history of Kathiawar tell against the defendant rather than in his favour.

As regards the status of Porebunder State and its Courts, I think it is sufficient to say that Porebunder State is now a first class State in Kathiawar and is outside the King's Dominions, and that the decisions of its Courts are final and there is no appeal to the Privy Council. This appears from *Hemchand Devchand* v. *Asam Sakarlal Chhotamlal* (12), a most interesting and instructive case as to the history of the Kathiawar Courts, where the Privy Council held in effect that the jurisdiction exercised in the Courts of the Political Agent and Assistant Political Agents in Kathiawar was political rather than judicial (see pages 25-29): that consequently the decisions of those Courts were not, strictly speaking, judicial decisions and accordingly appeals lay not to the Privy Council but to the Governor of Bombay in Council and from him to the Secretary of State in Council. On page 24 it is stated that in the cases which fall within the power of the Chiefs (as, *e. g.*, Porebunder) their decision is final and no judicial appeal lies to any Biritish authority. The use of the word "judicial" may leave open the possibility of an appeal to the Governor in Council, and in the present case it was suggested that the defeated party in Exhibit 10D had presented or proposed to present such an appeal. I need not, however, deal with that question.

As regards the Porebunder Courts themselves, the Court of first instance appears to be the Munsif's Court, the Appeal Court to be that of the Nayayadhish and the final Court is styled the Huzur Court. The President or Chief Judge of the Huzur Court is, I understand, called the Sar Nyayadhish. According to the evidence of Mr. Varajlal Ranchodji, a Porebunder Pleader called on behalf of the plaintiff, the Porebunder Courts decide cases on the authority of Bombay, Madras and other Indian High Courts, and they also follow their own judgments. (See questions 30 and 31.) They have, however, no law reports of their own, and consequently one has to ascertain the facts and decisions as best one can from such judgments on the Court records as are exhibited in evidence in the present case.

Turning next to the evidence, I may explain that the defendant's witnesses on commission are described as Exhibit Com. 1, Exhibit Com. 2, and so on, following the order of the depositions, and that any exhibit of each such witness is Exhibit Com.1A, Exhibit Com. 1B, or Exhibit Com. 2A, Exhibit Com. 2B and so on, as the case may be. Unfortunately this order is one numeral different from that on commission and, therefore, the commission numbers and exhibit marks must be disregarded. The rest of the defendant's exhibits are described in the usual way for defendants. *viz.*, Exhibit 1, Exhibit 2 and so on, but in cases where several exhibits relate to the same subject-matter they have the same numbers but a different lettering. Thus the Porebunder litigation over the estate of Haji Kasam Haji Khan Mahomed, and to which I frequently refer in this judgment, is Exhibit 10A, Exhibit 10B and so on. As regards the five most important pedigrees, (*viz*, Exhibit 13A, B, etc.) individuals on each pedigree bear separate numbers. Thus the intestate is No. 16 on pedigree Exhibit 13B; and the above Haji Kasam is No. 4 on pedigree Exhibit 13A and is also No. 13 in the table of instances hereinafter mentioned.

As regards the plaintiff's exhibits they first exhaust the alphabet, and then go back to A with the addition of consecutive numbers, *e.g.*, Exhibit A37, Exhibit A38 and so on. Possibly if preparation had been made for this deluge of exhibits a simpler classification might have been devised, but once started it was impracticable to alter.

15. Dealing with the evidence itself, one usually expects foreign law to be proved by expert evidence, unless it is practicable (which is not the case here) to proceed by letters of request addressed to the foreign tribunal. The only expert called by the defendant is Mr. N. J. Maru (Exhibit Com. 12), who is a retired Judge. His evidence

(12) 33 I. A. 1; 8 Bom. L. R. 129; 10 C. W. N. 361; 3 A. L. J. 250; 33 C. 219; 3 C. L. J. 395; 16 M. L. J. 115; 1 M. L. T. 115 (P. C.).

does not, however, satisfy me on the point. It is practically confined to two decisions. One is Exhibit 8, a decision of his own in 1896 when Munsif, and the other is Exhibit 10D which I have already mentioned. The reader of those exhibits can see for himself how those two decisions were arrived at, and Mr. Maru's evidence does not, I think, profess to assist one in that respect. Further Mr. Maru is inaccurate in stating (question 6) that after his decision in 1896 it was taken for granted by all the Porebunder Courts that Porebunder Memons were governed by Hindu Law, for Exhibit K (which I have already mentioned) shows that in 1900 the Sar Nyayadhish decided that Muhammadan Law applied, and he accordingly reversed the decision of the then Munsif to the contrary effect and commented very severely on the unsatisfactory way in which the case had been dealt with in the Court below.

As regards the plaintiff's witness Mr. Varajlal Ranchodji, he was only asked in cross-examination as to the general effect of the decisions in the Porebunder Courts and in the Courts of the Political Agent at Rajkot, which are reported in the Kathiawar Law Reports. Here again the decisions in question are exhibited: and I think he is accurate in saying that in Porebunder there is a conflict of decisions but the latest (*viz.*, Exhibit 10D) is that Hindu Law governs Halai Memons.

Mr. Setalvad has, however, urged strenuously that the solution of the question as to what is the law of Porebunder is quite easy. One has merely to look at the latest decision in the Huzur Court, *viz.*, Exhibit 10D, and see and apply the result arrived at irrespective of the reasoning or the mode by which that result has been reached. In my opinion this proposition is utterly unsound. It is a misuse of authority—foreign or home—to apply a decison blindfold without knowing the fact or the steps by which it has been arrived at. In the present case Exhibit 10D, which is the latest decision in the Huzur Court, is the Appeal No. 37 of 1915-16 decided in September 1916, which I have already commented on. Now that decision is based in part on a finding as to what was the law as laid down by the Privy Council or in Bombay. That finding was, therefore, so far as the Porebunder Court was concerned, a finding as to foreign law and, therefore, a finding of fact. But as I have already pointed out, that finding of fact was erroneous for the foreign law in question (*viz*, Bombay Law) is the exact opposite of what the Huzur Court thought it to be. Moreover, that erroneous finding of fact had the serious result that the onus of proof was thereby thrown on the wrong party, and it was in that way that the actual decision was arrived at, *viz.*, that Hindu Law applied. Under these circumstances it seems to me that I ought not to accept Exhibit 10D as conclusive of the law of Porebunder. A judgment based on facts A and B is not necessarily an authority on facts A and C. If, therefore, the foreign law is in fact not B but C, how can one say what the decision of the tribunal would have been if the foreign law had been proved to them to be C and not B? At any rate in Exhibit 10D it would have had this result that the onus of proof would have been thrown on the other party, and this might easily have led to a different decision being arrived at.

In this connection I may observe that the Huzur Court in Exhibit 10D reversed the decision of the Court of the Appeal, which after a first or second rehearing on review had eventually held that Muhammadan Law applied. A copy of this decision of the Court of Appeal was unfortunately not produced before me, but it is quite clear from Exhibit 10D that such a decision was given and that it was to the effect I have already mentioned.

This litigation, which culminated in Exhibit 10D, began indeed in 1904 with a suit by a widow named Zulikhabai to establish her alleged rights under her husband's Will (Exhibit 23). On the 3rd of August 1909, the Huzur Court in Civil Appeal No. 8 of 1908-09 held the Will valid by reason of the acquiescence of the heirs and passed a decree in favour of the widow, modifying in that respect the order of the lower Court. That is Exhibit 10A. Subsequently Zulikhabai died and her son by another husband claimed to be entitled to enforce that decree. One

attempt seems to have failed in March 1912. (See Exhibit 10H) On the 3rd of March 1915, the Court of the Nyayadhish dismissed a similar application with costs. That is Exhibit 10B and is in Suit No. 521 of 1912-13. An appeal No. 16 of 1915-16 from that decision was, on the 31st of June 1915, dismissed by the Sar Nyayadhish. (See Exhibit 10C.) Subsequently in Civil Review No. 1 of 1915-16 the Appellate Court reversed its previous decision and held that the applicant was entitled to succeed as heir to the property in question. (See Exhibit A15.) Up to that point it does not appear to have been considered, or at any rate closely considered, whether Hindu Law or Muhammadan Law applied, but the fair inference from Exhibit 10D is, I think, that after Exhibit A15 the Appeal Court must have been directed by the Huzur Court to make a specific finding on that point, for it was that finding, *viz.*, that the governing law was Muhammadan Law, which was eventually reversed in Exhibit 10D.

So much for that complicated litigation. There is this item of interest about it, *viz.*, that the present plaintiff's husband was a party to it and there contended in favour of Hindu Law, and eventually succeedded on that footing in defeating the applicant's claim to the property. I had better, however, deal with this when considering the oral evidence taken in the present suit.

The previous decisions of Porebunder Courts are conflicting just as those in Exhibit 10 (A to H) are. Mr. N. J. Maru's two decisions in 1896 and 1911 (Exhibits 8 and 29) are opposed to that in 1900 of the Sar Nyayadhish in Civil Appeal No. 2 of 1898-99 (Exhibit K), which I have already alluded to. Mr. Setalvad lays great stress upon Exhibit 8, because that decision was based on specific instances and did not rely on any case law. Exhibit K was, however, a decision of a superior Court and in face of that I cannot accept Exhibit 8 as conclusive. I draw particular attention to Exhibit K, for it is a case where I entirely agree with the lines on which the Court approached the case. The learned Sar Nyayadhish first decided on whom the onus of proof lay and then having decided (and in my opinion rightly) that the onus was on those who contended for Hindu Law, he examined the evidence and eventually held that the onus had not been discharged. This decision in Exhibit K was dissented from in Exhibit 10D, where the Huzur Court thought that in view of the decisions in the Privy Council and elsewhere the Sar Nayayadhish had taken an entirely mistaken view of the law. The only decision subsequent to Exhibit 10D is Exhibit 9, which was decided by Mr. Modi in October 1916 in Suit No. 117 of 1915-16, but as it only purported to follow Exhibit 10D, I need not deal with it.

In the result, therefore, I am of opinion that the Porebunder decisions cited to me do not establish that by special custom Hindu Law is the law governing succession amongst Halai Memons, for it has yet to be seen what view the Porebunder Courts will take when it is proved to them that the Bombay Courts have not swept away the distinction between Cutchi Memons and Halai Memons, but on the contrary apply Hindu Law to the one and Muhammadan Law to the other. I may perhaps add that *Trufort, In re, Trafford* v. *Blanc* (11), which dealt with the question as to the binding effect of a foreign judgment notwithstanding an erroneous view as to English Law, does not apply, because in the present case the parties are not the same as in Exhibit 10D. On the other hand, I cannot ignore Exhibit 10D as being a decision after the death of the intestate, as was done in *Lynch* v. *Paraguay Government* (13), where the Court of Probate refused to recognise an act of the Paraguayan Legislature passed after a testator's death, but purporting to confiscate his property. This latter case is of some interest on the question whether a Court administering moveable assets is bound to follow the law of the foreign domicile in all respects. The subject is further dealt with in Mr. Pawley Bate's Treatise on the Doctrine of Renvoi in Private International Law at page 105, but I pass it by as I do not think any difficulty of that sort really arises here.

(13) (1871) 2 P. 268; 40 L. J. P. 81; 25 L. T. 164; 19 W. R. 982.

As I am now dealing with legal decisions, it is perhaps convenient to refer to the other Indian cases outside Porebunder which were cited to me by Mr. Setalvad. A dozen, *viz.*, Exhibits 1—8, 33, 34, 35 and 37, are all decisions in the Court of the Political Agent at Rajkot which are reported in the Kathiawar Law Reports. Many of them relate to Memons of Bantwa and it is not shown whether they were Cutchi Memons or Halai Memons. Exhibit 1, a decision in 1896 of Captain Hyde Cates, the then Acting Judicial Assistant, has been frequently cited and apparently relied on, *e. g.*, in Exhibit 10D. But never was there a more unfortunate leading case. Exhibit A43 shows that the actual decision arrived at in Exhibit 1 was reversed by the Governor of Bombay in Council, and that the parties were Cutchi Memons. Counsel did indeed suggest that this was a mistake by the Governor in Council, and that I ought to look at the earlier proceedings, but this I declined to do as in no event could Exhibit 1 be set up on its legs again. Exhibit 2 is perhaps the best case for the defendant, for there Mr. Jardine in effect gave up his contention that Muhammadan Law applied. This contention was not, however, essential, as his client won on another point and obtained the dismissal of the suit. Consequently the value of the admission is much diminished. In some other cases it appears to have been assumed that Hindu Law applied, or else previous decisions such as Exhibits 1 and 2 were followed without comment. In none of them do I find such evidence as would satisfy the test as to custom laid down by the Privy Council in *Ramalakshmi Ammal* v *Sivanantha Perumal Sethurayar* (4) and which I have already quoted. Further, as I have already pointed out, the Privy Council in *Hemchand Devchand* v. *Azam Sakarlal Chhotamlal* (12) laid stress upon the fact that the jurisdiction exercised in the Court of the Political Agent is political. Its decisions can hardly, therefore, be cited in a Court of Law as judicial decisions.

Under the above circumstances I think that the alleged custom has not been judicially proved to exist in those districts of Kathiawar over which the Political Agent has civil jurisdiction; and that in any event Porebunder State is outside these districts and that its Courts are not bound by the above decisions in the Kathiawar Law Reports: and that it does not necessarily follow that its customs are the same as elsewhere in Kathiawar. In the result, therefore, I think that the above decisions in the Kathiawar Law Reports are of no assistance to me in determining the present case.

Counsel for the defendant also relied on Exhibit 31 (*a*), (*b*) and (*c*), a case in the Courts of the Junagadh State in Kathiawar. It is sufficient, however, to say that there the Appellate Court in Exhibit 31 (*b*) based its judgment on the supposition that in the Bombay Courts Hindu Law applied to all Memons, which as I have already said is not the fact.

The remaining case relied on by the defendant came from Coorg in the Madras Presidency and is Exhibit 11 (*a*) and (*b*). This is, however, open to the same objection as Exhibit 10D, for the Judge of first instance appears to have relied on Exhibit 1 and other cases as establishing Hindu Law, and then to have thrown the onus of proof on the defendant to establish Muhammadan Law. On appeal, the District Judge does not appear to have dissented from this view, and accordingly I need only add that both the learned Judges appeared to have thought the evidence as to custom conflicting.

The conclusion, therefore, which I have arrived at is that the Court decisions, whether inside or outside Porebunder, are not such as I can rely on as showing that the special custom alleged by the defendant has ever been satisfactorily established.

This brings me to a particularly important part of the case, *viz.*, the oral evidence as to custom. It is voluminous and troublesome, for it involves a detailed investigation of the devolution of a large number of estates of deceased Halai Memons. Most of the individuals have long names, but collectively there is little variety. Hence there is a considerable risk of confusion, which is increased by the necessary dullness and monotony of the bare records of their lives, families and properties, for that is all that is material in the present suit. Mr. Setalvad and Mr. Davar have, however, tackled this tedious evidence with exceptional patience and lucidity, and in particular the various summaries that

have been prepared under their advice will be found of great assistance in deciding what the evidence really amounts to. This is very necessary, as a mere reading of the commission and trial evidence straight through from beginning to end is more likely to hypnotize the reader than to assist him in a critical analysis of the evidence.

The evidence in support of the defendant's case was all taken on commission, apart from that of the defendant himself and one formal witness. On this commission the defendant examined some twenty-seven witnesses, who between them depose to the fifty instances of Hindu succession which are set out in the summary called "Table of Instances" and therein numbered consecutively, 1, 2, 3 and so on. Of these fifty instances thirteen are either duplicates or are for some other reason withdrawn by Mr. Setalvad, *viz.*, Nos. 20, 24, 27, 29, 30, 31, 34, 35, 41, 42, 46, 47 and 48. The number of instances eventually relied on by him is thus reduced to thirty-seven. Of these thirty-seven, I reject the evidence in support of twenty-one of them, *viz.*, Nos. 1, 2, 3, 4, 6, 9, 10 12–15 (inclusive), 21, 22, 23, 26, 28, 33, 37, 40, 43 and 49. This leaves sixteen instances, *viz.*, Nos. 5, 7, 8, 11, 16, 17, 18, 19, 25, 32, 36, 37A, 38, 39, 44 and 45, which may be said to be established, leaving for further consideration the question what weight should be given to such sixteen instances.

I have the following general criticisms to pass on the thirty-seven instances relied on by Mr. Setalvad. In the *first* place, they are all recent or comparatively recent. Only four of them, *viz.*, Nos. 25, 26, 36 and 39 are shown to be instances of deaths prior to 1900. Of these, I have rejected No. 26, and consequently the earliest instance established is No. 25 in the year 1884. This alone is, I think, a serious flaw, for the alleged custom must be proved to be ancient and immemorial before I can accept it. The Court will of course on satisfactory evidence make all proper presumptions from matters occurring within living memory, but these recent instances contrast unfavourably in point of age with the Bombay records to the opposite effect, such as the evidence before Sir Erskine Perry in 1847 which I have already alluded to. One must also bear in mind that all the sixteen established instances except No. 25 were from 1896 onwards, and were consequently within the period covered by the above-mentioned decisions in the Porebunder and Kathiawar Courts. If then these decisions were either based on a misunderstanding of Bombay law or were conflicting, the devolution in many of these sixteen instances may be due to legal advice founded on such decisions. In this connection. I think the plaintiff's husband may be substantially accurate when he said: "My Pleader told me there are two laws, Hindu and Muhammadan Law, and that I could act under whichever law I thought fit" (see Questions 55 and 112, pages 155 and 163).

Secondly, only five of the thirty-seven instances, *viz.*, Nos. 1, 4, 5, 6 and 25, are supported by any documentary evidence. Of these I have rejected Nos. 1, 4 and 6, thus leaving only two, *viz.*, 5 and 25. This alone necessitates caution, particularly when I find that the persons alleged to have been excluded from the succession are nearly all females, not one of whom has been called by the defendant. Indeed I had at the trial several reminders of the danger of accepting mere verbal statements on succession. Two of the witnesses, *viz.*, Exhibit Com. 13 and Exhibit Com. 19, were proved by documents to be utterly wrong in their statements about Hindu succession, while one of the plaintiff's witnesses, *viz.*, No. 10 who appeared to be an intelligent and respectable businessman, had either not grasped the distinction between a deed *inter vivos* and a grant of Letters of Administration or else was entirely wrong in his positive recollection of what had taken place with reference to his deceased father.

Thirdly, a good deal of the evidence is of a loose general character. Names and dates and particulars of property, if any, are often not given; or again witnesses say a daughter got no share, when in fact there has hitherto been no division of the property. Much of it too is hearsay and the parties really involved are not called. Again witness after witness says confidently in examination-in-chief that daughters of various deceased persons got no share, and then in cross examination is shown to have no personal knowledge, but to have really

guessed at the truth and to have based that guess on the alleged custom.

Fourthly, I think there is a want of candour in the evidence in chief. For instance, witness after witness deposed in chief to the length of time the intestate was at Porebunder each year, but on cross-examination was shown to have little or no personal knowledge of the matter as he was in Africa at the time. Again 18 of the 27 witnesses deposed to instance No. 1 and stated that the widow and daughter got no share. This was literally true; whether it was substantially true is another matter, for the facts elicited or proved by the plaintiff and not mentioned in examination-in-chief tend to show that before any division was made the estate in question was lost. Alleged family history which is unsupported by any documentary evidence is apt to be difficult to check in cross-examination, at any rate when the instances given are very numerous as here. Want of candour, therefore, in one instance gives rise to the suspicion that other similar instances might have been proved unreliable if better materials for cross-examination had been in Counsel's possession, or if some chance question had brought the true facts to light.

Fifthly, as regards the witnesses themselves. I reject the evidence of Exhibit Com. 1, as, in my opinion, he is a paid witness who has denied the payment. He admits that in other litigation he was paid for his services by other parties, but denies any payment in the present case. He admits moreover borrowing Rs. 300 from the defendant, but says he repaid it before his cross-examination, and in this statement the defendant concurs. But I find that the Rs. 300 was borrowed on the 27th September 1915, just one week after the admission of the plaint, and that although the cross-examination ended about 12th September 1916, the defendant's books up to the close of the year, *viz.*, 26th October 1916 do not show any repayment, and on the contrary show that the amount was carried forward to the then new year. The defendant says this was because he did not return to Bombay and tell his Mehta about the repayment till January 1917, and that in fact he spent the repaid loan in distribution to the poor at Porebunder in Ramzan, *viz.*, July 1916, as was noted by the entries made in January 1917. The defendant, however, admits that no receipt or other writing was given to Exhibit Com. 1 on the alleged repayment, and I cannot accept their story as to this Rs. 300 being a repaid loan. It would also appear that there is enmity between Exhibit Com. 1 and the plaintiff. At any rate the former obtained a decree for Rs. 6,400 against plaintiff's husband: he also took criminal proceedings which were unsuccessful against plaintiff's husband: and he has also been in litigation with the plaintiff's mother-in-law. He is hardly, therefore, an unbiassed witness, nor does he explain why he was excluded from the Porebunder Jamat for some three years. Exhibit Com. 1 is, however, the principal witness for the defendant, and the other witnesses seem to have modelled their evidence very largely on his, which is not altogether satisfactory seeing that Exhibit Com. 1 seems to be a semi-professional witness.

29. Another important witness is Exhibit Com. 2 and he also is I think unreliable. In question 107 he denied positively having distributed Ibrahim Nur Mahomed's estate (instance No. 24) according to Muhammadan Law, whereas in his evidence in the Porebunder litigation, Exhibit 10E, he admitted the fact. So too in question 153 his answer about Hawabai, a daughter of Haji Abu Jiwa, getting some money by way of charity appears to be inadmissible as hearsay, but if admissible is contradicted by the sale-deed, Exhibit A1, according to which she took a share under Muhammadan Law and sold it to her brothers for Rs. 925. Exhibit Com. 21 repeats this false story about charity in question 36, and accordingly I reject his evidence too. I may also remark that Exhibit Com. 2 was the second arbitrator in Bombay Suit No. 22 of 1911 (see Exhibits H and I), by whose award the estate of one Haji Abdul Rehman Khamisa was distributed according to Muhammadan Law. Possibly, Khamisa although originally a Porebunder man may have acquired a Bombay domicile, in which case the award becomes of less importance. It is also noteworthy that in the Porebunder litigation in June 1916, this witness only gave two instances of custom (see Ex-

hibit 10E), while on commission in September 1916 he mentions fourteen instances.

So, too, witnesses Exhibits Com. 7 and 9 give no instances of custom in the Porebunder litigation, but give four or five instances respectively on commission. Further in Exhibit 10G, witness Exhibit Com. 9 says:—

"If any daughter or some such comes to me for a share, I would say" 'Give according to Sareh' (*i. e.*, Muhammadan Law).

Three months later on commission he says (Question 40): 'If a Memon's daughter were to approach the Jamat for a share in her father's property I would drive her out. I don't remember to have deposed in the Sar Nayayadish Court in Abu Haji Suleman's case that I would award to a female her share if she were to approach me."

This change of front seems to me to afford some ground for Mr. Davar's suggestion that it is due to Exhibit Com. 1 that this witness and also some others have added to or varied their evidence in the short interval between the Porebunder litigation and the commission in the present suit. Be that as it may, I cannot accept Exhibit Com. 9 as a reliable witness.

Exhibits Com. 13 and 19 I must reject as being contradicted by written documents. Indeed Exhibit Com. 13 went so far as to deny that his wife got any share in her father's estate which is quite at variance with Exhibit O and Exhibit Q.

If I make no further comment on the other commission witnesses, it must not be assumed that I implicitly accept their evidence so far as it goes. I will only add that as the defendant's evidence is practically all taken on commission, he is endeavouring to establish a custom on the evidence of witnesses not one of whom (except himself and Exhibit Com. 3) will have been subject to personal scrutiny by any Court. It is only fair, however, to say that Exhibit Com. 3 struck me favourably during the short time he was in the witness-box before me. He is not, however, an independent witness, being a brother-in-law of defendant No. 1 and the duly constituted attorney of defendant No. 2 (see his written statement).

As regards the twenty-one instances which I said I had rejected, I should perhaps explain briefly my principal reasons for such rejection. Instance No. 1 is too doubtful, in view of the allegations that the property was not divided and was eventually lost. These allegations seem to me substantially true. In No. 2 the division was after this suit began: it was made in Africa; and really rests on hearsay evidence, the sons and daughters not being called. Instance No. 3 depends on the evidence of witnesses Exhibits Com. 1 and 21, whom as I have already said I consider unreliable. In instance No. 4 the widow claimed a share according to Muhammadan Law and her claim went to arbitration. The award (Exhibit Com. 8 A) appears to have been based on Hindu Law, but in view of the claim being contrary to the alleged custom I can hardly accept the instance as a satisfactory one. Instance No. 6 is too doubtful I think the release (Exhibit 4A) amounted to a distribution according to Hindu Law, and was not a winding up of a partnership as Mr. Davar contends. On the other hand, the release is dated the 11th October 1915 and by that time the present suit had been started. Further it is clear from the sale deed, Exhibit A, and the suit, Exhibit A36, that the estates of the father and a step-brother of instance No. 6 devolved according to Muhammadan Law. The pedigree, which I have marked Exhibit 13F, shows the children the father (Haji Abu Jiwa) had by his two wives, and in this connection Hawabai, the daughter, must not be confused with the daughter-in-law of the same name, nor with another daughter named Hurbai. It was Hawabai, the daughter, whom the defendant himself (see questions 134-135) and his witnesses (Exhibits Com. 2 and 21) stated took a share by way of charity or as a poor sister, a statement which as I have already said I reject, having regard to the sale-deed Exhibit A1. It was then ingeniously argued by Mr. Setalvad that I should regard the case as a striking example of Hindu Law applying to Porebunder residents and Muhammadan Law to Bombay residents, on the ground that instance No.

6 and his brother No. 10 remained in Porebunder while their father went to Bombay, as did their step-brother, the subject of suit Exhibit A36. This contention I do not accept. The release Exhibit 4A is too recent to warrant that conclusion, for amongst other things it may have been prompted by late decisions in the Porebunder Courts. On the other hand it is clear from Exhibit A1 that the father's estate devolved according to Muhammadan Law, as did also that of one of the step-brothers of instance No. 6. Instance No. 10 is a brother of No. 6 and is only deposed to by witness Exhibits Com. 1 and 2, the former of whom falsely denies that Hawabai got a share according to Muhammadan Law

Instance No. 9 is another example of the unreliability or want of candour of witnesses Exhibits Com. 1 and 2. The examination-in chief contains the usual answer that the daughter got no share. It appears, however, from the cross-examination and also from the evidence of the defendant himself (questions 399-408) that instance No. 9 had a vacant piece of land and a house. The vacant land he sold to his sons in his life-time, so the story about the sons' separate houses which they afterwards built on his land may be eliminated The remaining property, *viz.*, the house, has not yet been divided.

Instances Nos. 12 and 13 are only given by witness Com. 1. He has muddled up instance No. 12 with another case: and as regards No. 13 he had not the candour to state in examination-in-chief that No. 13 was the testator in the Porebunder litigation (Exhibit 10A and B) and that No. 13 left a Will (Exhibit 23) by clauses 4, 8, 10, 11 and 12 of which he gave directions for division according to Muhammadan Law.

Instances Nos. 14 and 15 are brothers of No. 13. Both died in Africa and may have been domiciled there. Apart from witnesses Exhibit Com. 1 and 2, instance No. 14 is only deposed to by Exhibit Com. 5 and instance No. 15 by Exhibit Com. 14. Exhibit Com. 5, however, was not present at the alleged division, and his statement that the daughter got no share appears to be based solely on his allegation as to custom, and the daughter is not called. Exhibits Com. 5 and 1 differ by seven years as to the date of the death of instance No. 15. Consequently it becomes doubtful whether any daughter survived No. 15 and so was in a position to take.

Instances Nos. 21, 22 and 23 are only deposed to by Exhibit Com. 1.

In instance No. 26, the sons gave each daughter Rs. 700 or Rs. 800 on returning from Africa. This would roughly correspond with the amount the daughters would have taken under Muhammadan Law, and consequently this instance seems too doubtful.

In instance No. 28 it would seem doubtful whether the property consisted of more than a valueless equity of redemption. Be that as it may, the daughter was required to join in the sale.

Instance No. 33 depends on witness Exhibit Com. 13.

In instance No. 37 there was litigation in the Courts of Pretoria with reference to the minor daughters, and the decree is not produced.

Instance No. 40 is only deposed to by Exhibit Com. 19 and there is no evidence that this instance left any property.

Instance No. 43 is not shown to have left any property. He admittedly left no landed property at Ranavav.

Instance No. 49 is also too doubtful to rely on. He admittedly left no landed property, and I am not satisfied that he left any moveable property, although he may at one time have been "worth about two to three thousands."

As regards the sixteen instances which may be said to be established, I do not think their collective weight is great having regard to the general comments I have made, and in particular those as regards age and the absence of documents. Even as regards instance No. 5 where there is a document, Exhibit Com. 5A, there is a doubt whether the property in question was not partnership property. Mr. Setalvad says, however, that quality as well as quantity is supplied, if I add to these sixteen instances the fifteen instances referred to in the judgment of Mr. Maru, Exhibit 8. This I cannot do. For one thing I have not got the de-

positions or record in that suit. Even if I had, I should have to consider whether they are admissible under section 32 of the Indian Evidence Act and if so, they would have to be weighed against the instances to the opposite effect given in Exhibit K, and also presumably in that judgment in the Porebunder Court of Appeal which was reversed by the Huzur Court in Exhibit 10D and which, I much regret, has not been produced before me despite my enquiries as to why it was not forthcoming.

As regards the evidence of the defendant himself, I think he adds little to what was said on commission, but I should say a word about his general evidence on the five pedigrees Exhibits 13A to E. The case as opened to me was that these five pedigrees all showed Hindu succession. In examination-in-chief the defendant, beyond saying generally that the pedigrees were correct, gave no evidence as to how the various estates devolved. In re-examination I gave leave to adduce this evidence having regard to Counsel's opening, and accordingly the defendant testified generally that in no case did a daughter or widow take a share according to Muhammadan Law. Cross-examination, however, proved that he had little or no personal knowledge on the point and in many instances he did not even know whether the persons in question had left any property. The pedigrees may, therefore, I think, be disregarded, except in so far as they contain persons enumerated in the table of instances which I have already dealt with.

I next turn to the plaintiff's evidence in opposition to the alleged custom. It consists of thirteen trial witnesses and two commission witnesses. Taking the trial witnesses first, witnesses Nos. 2, 3, 5 and 13 are good types of the trading community. They gave their evidence well and I accept it. Witness No. 9 was of a superior position and his evidence also was useful. Witness No. 1 is the Pleader I have already referred to, and witnesses Nos. 7 and 8 were only formal witnesses. Witnesses Nos. 4 and 6 are not as important as others, and No. 10 may, I think, be disregarded. Nos. 11 and 12 are the plaintiff and her husband.

These witnesses depose between them to numerous instances of Muhamamdan succession, but the bulk of them relate to persons domiciled in Bombay. Three instances are, however, proved to my satisfaction as being cases of Muhammadan succession amongst Halai Memons domiciled in Porebunder State, *viz*:—

(*a*) Saleh Mahomed Haji Vali of Ranavav, who died on 2nd November 1910. The distribution of his estate is evidenced by Exhibits O and Q, and by the oral testimony of his brother (witness No. 2). It is clear that he remained a Ranavav man. Even the defendant admits that (see qestions 111-119). This deceased was instance No. 34 in the Table of Instances but was naturally enough abandoned by Mr. Setalvad.

(*b*) Sulleman Hussam Kalli of Ranavav, who died in 1901. I think the release Exhibit A17 bears out the evidence of witness No. 2 (see questions 47-49 and 103-105) and of witness No. 13 (see questions 13-20 and 69-70), to the effect that the widow took a share according to Muhammadan Law. It is clear that this deceased remained a Ranavav man. And

(*c*) Osman Hamid of Porebunder, who died in 1877. This is an important case deposed to by witness No. 3. The release Exhibit U1 shows clearly that the widow and daughter took shares according to Muhammadan Law. The deceased was clearly a Porebunder resident (see Questions 20 and 37). His pedigree is Exhibit U5.

Other instances are given of alleged residents in Porebunder State, *e. g.*, Mahomed Juma Chaya (question 50) and Mahomed Jusub Patel (question 54) by witness No. 2: and Haji Mahomed Juma (question 47) and Jusub Ahmed (question 69) by witness No. 5. The last of these is borne out by the conveyance, Exhibit A16, but it would seem from question 163 of witness No. 5 that he resided mostly in Bombay. The other three cases rest mainly on hearsay and I think it safer to reject them although the dividing line between them and some of the defendant's instances which I have accepted may be a narrow one.

I may add that witness No. 2 gives an excellent example of Muhammadan

succession in the case of his father Haji Ahmed, who was originally a Porebunder man but was probably a resident of Bombay at his death on the 31st July 1885. The plaints Exhibits S1 and S2 in the Administration Suits Nos. 33 and 34 of 1886: the family agreement Exhibit T1 (which states that the shares "are according to the Muhammadan Law and agreeably to the opinions of Kazis (Judges) and Moulvis (lawyers)": the decree Exhibit T2 which approved the agreement on behalf of minors and the release Exhibits T3 by a brother and his sisters, all prove an instance of the custom which exists among Halai Memons in Bombay in a way which is in striking contrast to the type of evidence put forward on behalf of the defendant. Two other similar instances as regards Bhavnagar are given by witness No. 4 with reference to his grandfather and father and are supported by plaints Exhibits V1 and W1, decrees Exhibits V2 and W2 respectively. Further the defendant's witness Haji Ibrahim Geega (the treasurer of the Bhavnagar Jamat in Bombay) admitted this, and indeed claimed that he himself was governed by Muhammadan Law and had never heard of any alleged change of personal law on migration from Kathiawar to Bombay. I attach importance to this latter statement for the deponent is an independent witness: he is in a responsible position as treasurer, and he impressed me very favourably.

The evidence of the plaintiff herself on the question of custom I propose to treat as I do in effect that of the defendant, *viz.*, to disregard it. As regards the plaintiff's husband he claimed in the Porebunder litigation (Exhibits 10A—E) that Hindu Law applied. Consequently in the present suit he was in rather an embarrassing position, which he did not improve by fencing with the questions. He left an unfavourable impression on my mind; and the defendant may legitimately point to question 110 as showing that this witness could not cite any instance in his family of a daughter getting a share. As against this it must be borne in mind that the deponent is only aged 30, so his personal experience is limited.

Nor do the plaintiff's two commission witnesses carry the plaintiff's case any further. Exhibit Com. A, after saying that he had heard Porebunder Memons were governed by Hindu Law, went on to depose to the case of Saly Mahomed Haji Vali where the witness held the widow's power-of-attorney, and where (as I have already said, she took a share according to Muhammadan Law (see Exhibit O. Exhibit Com. B deposes principally to the same instance. He is only 28 and I do not think his evidence on the other cases is of any real assistance. The plaintiff at one time proposed to call other witnesses on commission, but she appears to have had some difficulty in getting them to attend. At any rate two warrants were issued against proposed witnesses (Exhibit N) but without result.

This leads me to a point on which the defendant naturally relies, *viz.*, the comparative weakness of the plaintiff's Porebunder evidence as compared with the defendant's. In considering this point I must also consider whether there is any reasonable explanation of those sixteen recent or comparatively recent instances which the defendant has established, as opposed to the three contrary instances which the plaintiff has established. One possible explanation is that some at any rate of these sixteen instances may be due to legal advice founded on a misapprehension of the Bombay decisions with reference to Cutchi Memons or Khojas. If the Judges themselves in Porebunder and elsewhere were under this misapprehension, it is likely that some Counsel are either of the same opinion or have advised their clients in accordance with that opinion.

Another possible explanation may lie in the legislation which was proposed for Cutchi Memons and which was based on the principle that each Cutchi Memon should have the option either to retain Hindu Law or else to adopt Muhammadan Law as regards inheritance and succession. The original Bill was a private Bill No. 17 of 1885 (see Bombay Government Gazette for 1885, part VI, page 52) and as drafted it applied to Memons generally without distinguishing Cutchies and Halais. This was rectified in the later and official Bill No. 13 of 1896 (see Bombay

Government Gazette for 1896, part VI, page 149) which was confined to Cutchi Memons. Exhibit M shows that the Police notice, Exhibit L, was also advertised in the Porebunder State Gazette. One may assume that the Government of India took this step, because it did not wish legislation in British India to prejudice the community of Halai Memons who are partly within and partly without British India. At any rate it seems probable that the Porebunder Halai Memons were consulted as to their wishes. Witness Exhibit Com. 2 says (question 63):

"In 1897 the leaders of the Memon community were asked by the Administrator to state what law they followed in matters of inheritance and succession. We said that we have adopted Hindu Law. We were told that the Bombay Government wanted to know whether the Porebunder Memons and the other Memons of Kathiawar wanted to follow Muhammadan Law. We replied in the negative."

Witness Exhibit Com. 5 is much to the same effect. He says (question 41):—

"The leaders of Jamat had assembled at my shop. I was present there. They decided to inform the Aministrator that the Jamat has approved of Hindu Law of inheritance by which they were governed."

The phrase "adopted Hindu Law" is a curious one for Exhibit Com. 2 to use, seeing that the defendant's case is that Hindu Law has been retained and not adopted; but in view of what Exhibit Com. 5 says, too much stress must not be laid on that phrase. I think, however, it may well be that although the Jamat was not convened (see Exhibit Com. 5, question 72), the community got an impression that they had a choice as to which law should be adopted and that the leaders having once decided on Hindu Law, it would be improper to act contrary to that decision or to give evidence against it. But how those leaders arrived at that decision is another matter. Exhibit Com. 2, who is now a leader, does not even know the injunctions of the Koran upon which the Muhammadan Law of inheritance is based. He says (questions 134-135):

"We believe that those who do not follow the Sareh (Koran) are Kafars (infidels). The point of inheritance is based on custom and I do not know whether the question of inheritance is treated of in the Sareh. I do not know how many matters the Sareh comprises. I have not learnt it."

I do not say that the above explanations have been legally proved, for, except in so far as they are legitimate inferences from the evidence, they must be considered as hypothetical. It is one of the misfortunes of commission evidence that at the trial Judge and Counsel have to take this evidence as they find it and irrespective of the course the case may take when heard. But disregarding the above explanations, one still has to remember that the onus of proof is on the defendant.

I have now dealt with most of the leading contentions which were urged on me with such force by Mr. Setalvad and Mr. Davar. Mr. Setalvad did indeed urge on me one other, *viz.*, that the *Kojahas and Memons' case* (2) should be adopted as the standard of proof, and that the defendant's evidence in the present case was at least as strong as that which Sir Erskine Perry thought sufficient to establish Hindu succession in 1847. I think, however, that the true test is that laid down by the Privy Council in *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayar* (4) which I have already mentioned, for I have no reason to suppose that there is any difference in Porebunder law as to the requisite proof of a custom. Accordingly I do not propose to discuss the question whether the evidence before Sir Erskine would nowadays satisfy that test. But I may add that the practical result of Sir Erskine's decision is hardly calculated to induce the Court to modify the strict standard of proof required for a custom. Cases such as *Jan Mahomed* v. *Datu Joffar* (14), *Mangaldas* v. *Abdul Razak* (15) and *Advocate-General* v. *Jimbabai* (16) show the difficulty of saying

(14) 22 Ind. Cas. 195; 15 Bom. L. R. 1044; 38 B. 449.

(15) 23 Ind. Cas. 565; 16 Bom. L. R. 224.

(16) 31 Ind. Cas. 106; 17 Bom. L. R. 799; 41 B. 181.

where the law of inheritance and succession begins and where it ends, and there appears to be still much uncertainty as to the precise legal position of Cutchi Memons and Khojas. Unfortunately the efforts of Government to remedy by legislation this uncertainty in the law and consequent hardship came to naught.

I should also mention that my attention was drawn to section 32 of the Indian Evidence Act; and also to the ruling of the Privy Council in *Garuradhwaja Prasad* v. *Superundhwaja Prasad* (17), to the effect that a witness may state his opinion as to the existence of a family custom and give as the grounds thereof information derived from deceased persons: but this must be independent opinion based on hearsay and not mere repetition of hearsay. In considering the evidence I have borne this ruling in mind, though possibly I have been too lenient in its application to some of the defendant's instances which I have held to be established.

There was one extraneous matter which had little or no bearing on the question of custom, but which affected the plaintiff and defendant personally, and which occupied unfortunately a good deal of time. The defendant alleged in effect that this action was brought out of spite because of a quarrel about a house he had bought for the plaintiff, and because of his subsequent refusal to execute certain repairs. The threats alleged by the defendant were after the Municipal notice to repair, which was received by the defendant about the 26th July 1915, (see Exhibit 19). Unfortunately for this contention the evidence of Mr. Daphtary (plaintiff's witness No. 8) shows clearly that this litigation was contemplated months before, *viz.*, in January 1915, shortly after the testator's death. The power of attorney (Exhibit A3) from the plaintiff to her husband, which had been engrossed about the 28th January 1915, was executed on the 16th July 1915, and consequently before the Municipal notice. The documentary evidence, therefore, so far as it goes, is against the defendant. As regards the oral evidence I may disregard the plaintiff's husband, but I think the plaintiff is just as likely to be telling the truth as her brother the defendant, and as she is supported by the documents I decide this point in her favour. But it is quite a bye point, and only material on credibility and costs.

I now turn to my conclusions.

Viewing the case as a whole, does the evidence satisfy the test required to prove a custom in a Court of Law? After weighing all the evidence to the best of my ability, and after giving due consideration to the arguments of Counsel, I am of opinion and so hold that it does not, and that the defendant has not discharged the onus of proof which lies upon him.

The result is that in my judgment the testator was governed by the Muhammadan Law of inheritance and succession at the date of his death, and that accordingly the defendant fails in this suit.

The formal issues are:—

(1). Whether the intestate Haji Abu belonged at all material times to a family of Halai Memons who were settled in Porebunder?

(2). Whether as regards inheritance and succession, Halai Memons so settled in Porebunder as aforesaid (*a*) retained Hindu Law at the time of their conversion to Islam; or (*b*) have by immemorial custom adopted Hindu Law?

(3). Whether Halai Memons so settled as aforesaid are governed by Hindu Law as regards inheritance and succession?

(4). Whether the intestate at the date of his death was governed by (*a*) Muhammadan Law; (*b*) Hindu Law as regards the inheritance and succession to his moveable and immoveable properties (*i*) in Bombay and (*ii*) outside Bombay?

(5). Whether the plaintiff has any and, if so, what interest in the property left by the intestate?

I answer these issues as follows;—

(1). Yes.

(2) and (3) No.

(4). By Muhammadan Law.

(5). Yes. As one of the co-heirs of the intestate she is entitled to a 7/32 share of his estate.

I will hear Counsel on the precise form the decree should take and also on the question of costs.

(17) 27 I. A. 238 at p. 251; 2 Bom. L. R. 831; 23 A. 37; 10 M. L. J. 267; 5 C. W. N. 33; 7 Sar. P. C. J. 724 (P. C.).

My final word at the present stage of the case is to thank Mr Setalvad and Mr. Davar for the great assistance they have been to me in one of the most laborious cases I have ever had to deal with.

[*Note*:—On 18th December 1917 his Lordship delivered a judgment dealing with the question of costs which is not necessary for the purposes of this report.—*Ed.*]

Suit decreed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 634 OF 1916.

October 30, 1917.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

SUBRAMANIA AIYAR—PLAINTIFF—APPELLANT

versus

NARAYANASWAMI VANDYAR *alias* NARAYANASWAMI THEVAR—DEFENDANT—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 83—Tender of mortgage money—Deposit of more than amount due, validity of—Non-acceptance, wrongful, by mortgagee—Redemption, suit for—Cessation of interest—Interest to plaintiff from date of suit—Civil Procedure Code (Act V of 1908), O. XXIV, r. 2—Petition for deposit asking for costs, legality of—Contract Act (IX of 1872), s. 38—Tender, nature of.

The deposit of a larger sum than is due to the mortgagee, from which the latter is asked to take whatever is due to him, is valid under section 83 of the Transfer of Property Act and from the date of such deposit interest on such amount ceases to run. [p. 639, col. 2.]

Where a mortgagee wrongfully refuses to receive the amount deposited and the mortgagor is forced to bring a redemption suit, he is entitled to interest after the date of the service of the plaint and summons on the defendant. [p. 641, col. 1.]

Properties in schedule A were mortgaged to defendant in 1902. A portion of these properties covered by schedule B was subsequently mortgaged to one *R*. *R* sued on his mortgage and brought the schedule B properties to sale, which were purchased by the plaintiff subject to defendant's mortgage. Plaintiff paid the money due on schedule A mortgage into Court and presented a petition, requiring that defendant should accept it and give possession of all the properties or that he should take from the amount deposited whatever was due on the schedule B mortgage and deliver to him the schedule B properties, and that the Court should provide for the costs. Defendant refused to receive an unspecified proportionate amount, but was willing to deliver to plaintiff the title-deeds of the Schedule B lands only on receiving the entire amount due on schedule A properties. Plaintiff in consequence, sued for redemption of schedule B properties, the whole amount deposited remaining in Court:

Held, (1) that as a larger amount was deposited in Court than was due under the schedule B mortgage, the tender was valid and interest ceased to run from its date; [p. 640, col. 2; p. 641, col. 1.]

(2) that under Order XXIV, rule 2, Civil Procedure Code, plaintiff was entitled to interest after the date of the service of the plaint and summons on the defendant. [p. 641, col. 1.]

Per *Seshagiri Aiyar, J*.—The rule as to tender is part of the law as to performance of a contract as laid down in section 38 of the Contract Act. [p. 640, col. 2.]

If parties make a *bona fide* attempt at performing their contracts, the rights of the parties should not be defeated by technicalities. There is no rule that where a person tenders a large amount and asks for a change, he should not have the benefit of the tender. [p. 640, cols. 1 & 2.]

Per *Napier, J*.—Section 83 of the Transfer of Property Act does not contemplate the exercise of any discretion by the Court in the matter of making either party liable for costs or granting any relief. If a tender under the section is accompained by a prayer for costs and the Court refuses to take action thereon, the tender is bad. The tender is equally bad if, in making the deposit, the mortgagor requires the Court to ascertain the amount due on the mortgage. [p. 641, col. 2.]

Second appeal against the decree, dated 19th January 1916, of the Court of the District Judge, Tanjore, in Appeal Suit No. 280 of 1915, preferred against the decree of the Court of the Subordinate Judge, Negapatam, in Original Suit No. 69 of 1913.

Messrs. *T. R. Ramachandra Aiyar* and *S. Rangachariar*, for the Appellant.

Mr. *T. R. Narayanaswami Aiyar*, for the Respondent.

JUDGMENT.

SESHAGIRI AIYAR, J.—**This suit is for redemption. Although the question of the priority of the two mortgages in dispute is not easy to determine, I shall proceed on the same assumption on which the Courts below have acted throughout. The defendant obtained a mortgage of the A schedule properties in 1902. On a portion of these properties which are included in the B schedule, there was a mortgage to one Bava Rowther. This Rowther brought a suit on his mortgage. The properties were put up to sale and the present plaintiff purchased the B schedule properties alone in 1908, subject to the defendant's mortgage. After he became the purchaser, the plaintiff presented an application under section 83 of the Transfer of Property Act, in January 1912, calling upon the defendant to receive the amount due and to deliver up the title deeds. This application is Exhibit Q. In it petitioner states that he**

has paid into Court the whole of the money due on the mortgage of the A schedule properties, and asks the defendant to accept the amount and to give him possession of all the properties. Then he makes an alternative request to the effect that, if the defendant is willing to receive the principal amount due in respect of the B schedule properties alone, he may draw out that sum from Court and give possession of the B schedule properties. The reply of the defendant is Exhibit R. 1 will use his own language in referring to it. In paragraph 2 he says: "As there is only an offer to pay only the proportionate amount, I am unwilling to accept the same. The petition does not state how much is the proportionate amount and I am not willing to accept it." In paragraph 5 he says that he is willing to hand over the B schedule lands alone on receiving the whole of the amount of the mortgage due upon the A schedule properties. As the parties were not able to come to terms, the Subordinate Judge passed this order, upon the plaintiff's petition: "counter-petitioner refuses to receive the money. Petitioner is referred to a regular suit. This petition is dismissed." Thereupon the present suit was brought. It is admitted that ever since the 9th of January 1912 when the money was deposited by the plaintiff, it has remained in Court and has not been drawn out by him. In the present suit the plaintiff asked that he should be allowed to redeem the B schedule properties on payment of Rs. 1,800 and odd out of the sum of Rs. 3,650 deposited by him. The defendant raised various objections. He stated the same grounds which he put forward in the counter-petition. He also raised the plea that the plaintiff was only a *benamidar* and as such was not entitled to redeem the property. The Subordinate Judge found all the issues against the defendant and gave a decree to the plaintiff as prayed for. He found that the sum of Rs. 1,852-3-10 mentioned in the plaint was the correct amount payable in respect of the B schedule properties. In appeal, the District Judge confirmed the findings of the Subordinate Judge upon all the points, except upon the question of interest and mesne profits. He held that the plaintiff was the real owner, and that the defendant is only entitled to the proportionate amount due upon the B schedule properties. But he was of opinion that the tender was not a valid one and that, consequently, interest did not cease to run from the date of its deposit in Court. That is the main point to be decided by us.

I am unable to agree with the District Judge on the question of the validity of the tender. Section 83 of the Transfer of Property Act says: "The mortgagor or any other person entitled to institute such suit may deposit...to the account of the mortgagee the *amount remaining due on the mortgage*." The second paragraph says: "The Court shall call upon the mortgagee by notice to state the amount then due on the mortgage and his willingness to accept the money in full discharge of such amount." The section does not say that nothing more than the amount actually due should be paid. Of course if the money deposited is less than the amount payable to the mortgagee, the section will not be satisfied; but where more than the amount due is paid, I fail to see anything in the section to compel me to hold that the amount remaining due has not been paid. The English authorities to which I shall presently refer support the view I have taken. In the earliest case on the subject, *Wade's case* (1), the resolution, as it is called, is thus stated: Resolution 3: "A tender of more than is due is good:" This decision was followed in *Douglas* v. *Patrick* (2) by a Bench of four Judges including Chief Justice Kenyon. Ashhurst, J., said: "There is no doubt a tender of the greater includes the smaller sum." Buller and Grose, JJ., use almost the same language. These two cases and others were considered in *Dean* v. *James* (3). Four Judges of the King's Bench headed by Denman, C. J., accepted the correctness of the earlier decision. Littledale, J., said: "This case falls within the 3rd Resolution in *Wade's case* (1), that if a man tender more than he ought to pay, it is good, for *omne majus continet in se*

(1) (1572) 5 Co. Rep. 114*a*; 77 E. R. 232.
(2) (1790) 3 T. R. 683; 100 E. R. 802; 1 R. R. 793.
(3) (1833) 4 B. & Ad. 546 at p. 547; 1 N. & M. 303; 2 L. J. K. B. 94; 110 E. R. 501.

minus, and the other ought to accept so much of it as is due to him." In *Bevans* v. *Rees* (4) the Chief Baron and three other Barons affirmed the proposition laid down in the earlier case. The Chief Baron said: "I am prepared to say that, if the creditor knows the amount due to him and is offered a larger sum and without any objection on the ground of want of change makes quite a collateral objection, that would be a good tender." I may mention in this connection that there are some curious decisions in the English Courts to the effect that where a debtor on paying a larger sum asks the creditor to take what is due to him and return the balance with a change, that will not be good tender. I have not examined this matter very carefully to see on what principles this exception as regards a claim for change is based. Probably it is due to the idea that the creditor should not be put to any trouble in accepting a tender. I do not think that, in this country, where we are not obsessed by technicalities of such a narrow description, we shall be justified in accepting a rule that where a person tenders a large amount and asks for a change, he should not have the benefit of the tender. Apart from this rule as to the claim for a change, the decisions I have referred to affirm the principle which has been consistently laid down since *Wade's case* (1). All these decisions were passed before the Transfer of Property Act was enacted. I feel no doubt that the framers of the Act had these decisions in their mind in drafting the rule as to tender and deposit. It is to be remembered that the rule as to tender is a part of the law as to the performance of a contract. Section 38 of the Contract Act, which uses the term 'offer', lays down three conditions. The offer must be unconditional; it must be made at a proper time and place; and the thing offered must be produced for inspection.

So far as I have been able to see, there are no provisions in any English Act relating to tender. The practice is referred to in Bullen and Leake, pages 710 and 711. There is an analogous provision in the rules of the County Court.

(4) (1839) 5 M. & W. 306; 8 L. J. (N. S.) Ex. 263; 7 Dowl. P. C. 510; 52 R. R. 727; 3 Jur. 608; 151 E. R. 130.

Now I shall refer to a few Indian decisions which were quoted on behalf of the respondent. All that was decided in *Venkatrama Aiyangar* v. *Rangasawmi Aiyangar* (5) was that the mortgagee should not be compelled, before accepting the tender, to decide a dispute which has arisen between the parties as to the extent of the subsisting interest of the mortgagor in the equity of redemption. I do not think that this decision is against the view I have enunciated. In *Lal Batcha* v. *Arcot Narainaswami Mudaliyar* (6) Sir Arnold White, C. J., and Ayling, J., held that an offer to pay such amount as may be due on a settlement of account, if the payee would execute an indemnity bond, is not a valid tender. To use the language of the Contract Act, in that case there was no unconditional tender. In *Subbai Goundan* v. *Palani Goundan* (7) where a tender of money which was less by nine pies was made, the learned Judges seem to have held that it was not a valid tender. If I were deciding that case, I would have applied the maxim *de minimus non curat lex*; however, that may be, the principle that where a man tenders less than what is actually due it is not a good tender, is the only proposition that must be taken to have been laid down in that case. In *Avyakutti Mankondan* v. *Periyasami Kavandan* (8) it was held by Coutts Trotter and Kumaraswami Sastriyar, JJ., that, where a bond contains a stipulation by way of penalty and the debtor deposits in Court what he considers to be reasonable compensation for the penal claim, it is a valid tender.

The principle to be borne in mind, especially in this country, is that the parties should be given an opportunity of making a *bona fide* attempt at performing the contract. If that requirement is complied with, the rights of the parties should not be defeated by technicalities. Of course, if the law imposes conditions, we are not at liberty to disregard them on the ground they are against justice. I am of opinion that the

(5) 17 Ind. Cas. 368; 23 M. L. J. 588; (1912) M. W. N. 1175.

(6) 12 Ind. Cas. 502; 34 M. 320.

(7) 34 Ind. Cas. 825; 30 M. L. J. 607.

(8) 30 Ind. Cas. 497; 39 M. 579; 2 L. W. 585; 18 M. L. T. 161.

tender in January 1912 was valid. At any rate so far as the ceasing of interest after the date the defendant was served with the summons in the present case is concerned, I entertain no doubt about it. The defendant was informed by the plaintiff that the money was already in Court; he was told what the exact sum was which was due and payable to him; he was further told that he could draw that amount from Court.

The Courts below have found that the exact amount mentioned in the plaint was the sum which was payable to the defendant and nothing more.

Under these circumstances the principle of Order XXIV, rule 3, of the Civil Procedure Code applies, and the plaintiff is entitled to interest after the date of the service of the plaint and the summons on the defendant. I would modify the decree of the lower Appellate Court by giving interest to the plaintiff from the date of the service of the plaint and summons on the defendant. The parties are entitled to proportionate costs in this Court and in the Court below.

NAPIER, J.—I have found some difficulty in holding that there was a deposit within the meaning of section 83 of the Transfer of Property Act for, in my opinion, the petition which was filed with the deposit was not a petition contemplated by the section. The section requires that the mortgagor should deposit, to the account of the mortgagee, the amount remaining due on the mortgage, and that thereupon the Court should give written notice to the mortgagee, and he, on presenting a petition stating the amount then due on the mortgage and his willingness to accept the money so deposited, is entitled to receive the money. Now the appellant, according to the language of his petition, sought something different. He asked the Court to pass an order "directing the counter-petitioner to hand over all the said *othi* lands with the produce to the petitioner on receiving the *othi* amount of Rs. 3,650 or directing the counter-petitioner to hand over the lands along with the produce brought in auction on receiving the proportionate amount, making the counter-petitioner liable for the costs and granted other reliefs." This petition is clearly not contemplated by the Act. This Court has, under its powers to make rules given by section 104 of the Act, framed Rules for the Original Side which, though not applicable to the present case, indicate the scope of the section. They require that the mortgagor should file an affidavit stating the facts of the case and in addition to depositing the amount due on the mortgage, deposit in Court a sum sufficient to provide for the costs of the mortgage, etc. They do not contemplate the exercise by the Court of any discretion, in the matter of making either party liable for costs or granting any relief. I am clear, therefore, that if the Court had refused to take any action on this petition the proceeding purported to be taken under section 83 would have been bad. However, the Court did give notice to the mortgagee and I must take it that it treated the application as being in proper form. The mortgagee did not take objection that the mortgagor had not deposited the amount remaining due on the mortgage, so as to enable him to decide whether he would accept the money so deposited in full discharge of the amount as calculated by him. Just as it was the duty of the mortgagor to deposit the amount remaining due, so it was the duty of the mortgagee to state the amount then due on the mortgage. It appears to me that, if he had stated the amount as some figure under the whole *othi* amount and had claimed to receive that amount out of the total amount deposited, he would have been entitled to do so. It is on this footing alone that I can find that the proportionate amount on such properties was, in fact, deposited. If the petition was to be read as requiring the Court to ascertain what the proportionate amount was, I should certainly hold that there was no proper deposit, but in the view that the petitioner left it to the mortgagee to take whatever sum under the total amount, which he thought he was entitled to as proportionate, I am not prepared to say that the deposit was not good. I agree with the order of my learned brother.

M.C.P.

Decree modified.

MUHAMMAD ABDUL LATIF *v.* HABIBUR RAHMAM.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 589 OF 1917.

April 11, 1918.

Present:—Mr. Justice Jwala Prasad.

MUHAMMAD ABDUL LATIF—DEFENDANT NO. 1—APPELLANT

versus

Shaikh HABIBUR RAHMAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Denial of landlord's title—Forfeiture of tenancy—Determination of tenancy—Transfer of Property Act (IV of 1882), s. 111 (g).

A denial by a tenant of his landlord's title in a suit for rent causes a forfeiture of the tenancy enabling the landlord to eject the tenant as a trespasser. [p. 642, col. 2.]

In order to determine a tenancy on the ground of denial of title by the tenant, it is not necessary that any notice should be given or a prescribed act should be done by the landlord. It is sufficient if something is done by the lessor to show his intention to determine the lease. [p. 643, col. 2.]

Appeal from a decision of the District Judge, Patna.

Rai Bahadur *Purnendu Narayan Sinha* and Mr. *Panchanan Banerji*, for the Appellant.

Mr. *Mohammad Husan Jan*, for the Respondents.

JUDGMENT.—This second appeal arises out of a suit for ejectment of the defendant No. 1 from two plots of homestead land in Mouza Dariapur Sher, and in the alternative for *mutharja* rent for 1320 to four annas *kisht* of 1323 *Fasli*. The Mouza was partitioned in 1894 and the lands in dispute, bearing Batwara Khasra Nos. 65 and 67, fell in Touzi No. 98. The plaintiffs now hold the entire 16 annas of Touzi No. 98. The defendant No. 1 holds the lands as tenant thereof. He denied the title of the plaintiffs to *khas* possession or to rent and set up the title of one Nur Jahan, wife of defendant No. 2, to the lands in suit. Nur Jahan was impleaded as defendant No. 2 in the suit and after her death her husband was substituted in her place. There was no appearance in the Courts below by Nur Jahan or her husband. The suit was contested by defendant No. 1 only.

The Courts below have concurrently held that the plaintiffs as owners of 16 annas of Touzi No. 98 are proprietors of the disputed lands which have fallen in their Touzi and that Nur Jahan, defendant No. 2, has no concern with the disputed lands. This finding as to the plaintiffs' title to the lands in suit is not pressed before me in this appeal. The plaintiffs are, therefore, owners of the lands in suit and the defendant No. 1 is tenant thereof. The Courts below have decreed the suit for possession in favour of the plaintiffs. The defendant No. 1 has preferred this second appeal.

In 1907 the plaintiffs brought a suit for recovery of rent from the defendant No. 1. In that suit the defendant denied the relationship of landlord and tenant and set up the title of Nur Jahan. The plaintiffs' suit was dismissed on 19th June 1908. The plaintiffs subsequently brought another suit for rent. The defendant No. 1 again denied the title of the plaintiffs and the relationship of landlord and tenant, with the result that the plaintiffs had to withdraw the suit with liberty to bring a fresh suit. The plaintiffs, therefore, in the present suit seek to recover possession of the property in this suit on the ground that the denial of their title by the defendant in the two previous suits for rent constituted a forfeiture of the tenancy. The Courts below have found as a fact that the lands in suit are homestead lands and are not governed by the Bengal Tenancy Act, and that defendant No. 1 clearly and unequivocally denied the title of the plaintiffs in the previous suits referred to above. The attempt of the defendant to challenge these findings of fact is futile. In the first place, the appellant is not entitled to re-open the findings of fact in second appeal. Apart from this a reference to the written statement of the defendant, Exhibits 6 and 6 (1) in the previous suits, and his deposition in the suit of 1907 clearly go to show that the defendant No. 1 openly and clearly repudiated *in toto* the plaintiffs' title to the lands. It is also admitted, as held by the Courts below, that the lands when acquired were homestead lands and hence are not governed by the Bengal Tenancy Act. This finding is not seriously disputed in the second appeal. The defendant not only denied the plaintiffs' title in the previous suits but persists in denying it in the present suit and in setting up the title of a third person. There can, therefore, be no doubt that defendant No. 1 has forfeited his right of tenancy

in the lands in suit and is liable to be ejected therefrom. The learned Vakil on behalf of the appellant, however, contends that the defendant is not liable to be ejected from the lands in suit, inasmuch as there is nothing to show that the plaintiffs did any act prior to the suit for ejectment showing their intention to determine the lease. Reliance is placed upon clause (*g*), section 111 of the Transfer of Property Act, which runs as follows:—

"A lease of immoveable property determines by forfeiture, that is to say, (1) in case the lessee breaks an express condition which provides that on breach thereof the lessor may re-enter or the lease shall become void; or (2) in case the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself; *and in either case the lessor or his transferee does some act showing his intention to determine the lease.*"

This point does not appear to have been taken in the Courts below nor in the written statement. The defendant, to my mind, is not entitled to raise this point in second appeal, particularly when the decision on the point involves determination of facts which should have been raised in and determined by the Courts below. The defendant is a purchaser of the holding of the plots Nos. 65 and 67 from Kanhai Mahto and Gopi Halvai respectively by means of sale-deeds executed some 27 or 28 years ago, *i. e.*, about the year 1888, the exact dates whereof are not disclosed. The origin of the tenancy is not at all known. Kanhai and Gopi must have held the lands for over 12 years prior to 1888, when they transferred the occupancy rights in the lands to defendant No. 1. The tenancy was, therefore, probably created before the Transfer of Property Act. If the tenancy was created prior to the Transfer of Property Act of 1882, clause (*g*) of section 111 will not apply, as clearly held in *Padmanabaya* v. *Ranga* (1), which was followed in *Korapalu* v. *Narayana* (2); *vide* also *Ramnath Sil* v. *Siba Sunduri Debya* (3). It was for the defendant-appellant to show that the tenancy was created after the Transfer of Property Act in order to take advantage of the clause mentioned above. The defendant did not take this plea nor offered any evidence to show when the tenancy was created. He is not entitled in second appeal to raise this question.

Again even if the tenancy was created after the Transfer of Property Act, it appears to me that the clause does not require any notice to be given, nor a prescribed act to be done on the part of the lessor. It is sufficient if something is done by the lessor to show his intention to determine the lease. In the present case the defendant repudiated the plaintiffs' title in 1907 and the plaintiffs' suit for rent was dismissed. Subsequently the plaintiffs had to withdraw their second suit for rent on account of the denial of their title by the defendant. The plaintiffs, therefore, bring the present suit for ejectment treating the defendant as trespasser, as they are entitled to do so: *vide Khater Mistri* v. *Sadruddi Khan* (4), *Nilmadhab Bose* v. *Ananta Ram Bagdi* (5) and *Ramnath Sil* v. *Siba Sundari Debya* (3). The withdrawal of the suit, with liberty to bring another suit, was an act done by the plaintiffs sufficient to indicate the intention of cancelling the lease and ejecting the defendant from the holdings. The plaintiffs have accomplished their intention by bringing the present action for ejectment.

It is thus clear that the plaintiffs are entitled to eject the defendant No. 1, whether the tenancy was created before or after the Transfer of Property Act.

I, therefore, hold that the defendant has forfeited the lease and the plaintiffs are entitled to recover possession in the present suit. The result is that agreeing with the views of the Courts below I dismiss the appeal with costs.

Appeal dismissed.

(1) 6 Ind. Cas. 447; 34 M. 161; 8 M. L. T. 110; (1910) M. W. N. 462; 20 M. L. J. 930.

(2) 20 Ind. Cas. 930; 38 M. 445; (1913) M. W. N. 655; 25 M. L. J. 315.

(3) 40 Ind. Cas. 348; 25 C. L. J. 332.

(4) 34 C. 922.

(5) 2 C. W. N. 755.

MADEPALLI VENKATASWAMI *v.* MADEPALLI SURAMMA.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1461 OF 1916.

November 15, 1917.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

MADEPALLI VENKATASWAMI—DEFENDANT No. 1—APPELLANT

versus

MADEPALLI SURAMMA AND OTHERS—PLAINTIFF AND OTHER DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), Sch. II, para. 14 (c), scope of—Arbitration, reference to—Award, erroneous view of law in—Court, whether can set aside award—Reference as to right to succession of Hindu alleged to be congenitally blind—Award giving life-interest, legality of.

An award cannot be set aside under clause (*c*) of paragraph 14 of Schedule II, Civil Procedure Code, on the ground that the arbitrators have given an erroneous decision on a point of law. [p. 645, col. 2.]

Clause (*c*) of paragraph 14, of Schedule II, Civil Procedure Code, should be confined to cases like those where the arbitrator perversely and manifestly misapplies a rule of succession or applies to the parties a rule by which they are not bound. Where the arbitrator has applied his mind honestly and has arrived at a decision to the best of his ability, the fact that the Judge might take a different view is not a ground for holding that the award is illegal on its face. [p. 645, col. 2.]

Where a reference was made to arbitrators as to the right of inheritance of the plaintiff who was alleged by defendants to be congenitally blind, and the arbitrators awarded to plaintiff a life-interest in a fourth share in the properties subject to its becoming an absolute interest in case the plaintiff married:

Held, that the award was not liable to be set aside under paragraph 14 (*c*) of Schedule II, Civil Procedure Code. [p. 645, col. 2.]

Second appeal against the decree of the Court of the Additional Temporary Subordinate Judge, Rajahmundry, in Appeal Suit No. 4 of 1916, preferred against that of the Court of the Additional District Munsif, Amalapuram, in Original Suit No. 245 of 1912.

Mr. *B. Narasimha Row*, for the Appellant.

Mr. *P. Somasundaram*, for the Respondents.

JUDGMENT.—Plaintiff sues for a share in the family properties. The defence is that he was born blind and that consequently he is not entitled to any share under the Hindu Law. A number of issues were raised, including the one on the question whether the plaintiff was congenitally blind. After the settlement of issues the parties agreed to refer the disputes to certain arbitrators. The agreement to refer is very general in its terms and apparently all questions of fact and law were referred to arbitrators. Upon the reference the arbitrators decided that the plaintiff was entitled to a life-interest in a fourth share in the properties subject to its becoming an absolute interest in case the plaintiff married.

On the submission of this award objections were taken by the plaintiff, on the ground that it was illegal on the face of it and the Court should not accept it. Both the Courts below have upheld this contention and have set aside the award.

In second appeal the learned Vakils have argued the case very elaborately; we have come to the conclusion that the Courts below are wrong.

Section 14 of the Second Schedule to the Civil Procedure Code sets out the grounds on which an award may be set aside; clause (*a*) refers to the arbitrators not deciding what has been referred to them and to deciding matters not within their jurisdiction; clause (*b*) refers to an indefinite award; and clause (*c*) to an award whose illegality is patent upon the face of it.

In the present case the complaint is that the award is illegal as it apparently proceeded on the ground that the plaintiff, though not born blind, is not entitled to his full rights in the family. It may be observed in passing that the rights of the plaintiff were not beyond question until the recent decision of the Judicial Committee in *Musammat Gunjeshwar Kunwar* v. *Durga Prashad Singh* (1). The arbitrators were of opinion, whether rightly or wrongly, that the plaintiff should not have anything more than a life-interest in the properties. Now the point is whether this conclusion is so patently illegal as to come within the mischief of clause (*c*) of section 14.

A large number of English decisions were quoted by Mr. Somasundaram for the respondents. They all assume that where an error of law appears on the face of the award the error can be remedied by Courts. The various *dicta* to be found on the subject all refer to the decision in

(1) 42 Ind. Cas. 849; 22 M. L. T. 403; 22 C. W. N. 74; 26 C. L. J. 557; 16 A. L. J. 1; 34 M. L. J. 1; 20 Bom. L. R. 38; (1918) M. W. N. 16; 7 L. W. 94; 4 P. L. W. 1; 45 C. 17 (P. C.).

Hodgkinson v. *Fernie* (2) as first enunciating this proposition. On examining that case we find this statement of the law in the judgment of Wallis, J., one of the ablest Common Law Judges of his time. If we may say so with respect, we share the doubt expressed by the learned Judge regarding the practicability and the soundness of enforcing the ancient principle referred to by him. Moreover the later decisions to which we shall presently refer and the Civil Procedure Code do not appear to have accepted the proposition that an erroneous view of law appearing on the face of the award vitiates it.

In *King and Duveen, In re* (3) Channel, J, said that if, on a question of law referred to the decision of an arbitrator he has given an erroneous decision, it should not be questioned by the Court. In *Muhammad Newaz Khan* v. *Alam Khan* (4) the Judicial Committee have laid down the same principle. In *Ghulam Khan* v. *Muhammad Hassan* (5) they say expressly that an arbitrator has jurisdiction to decide both on facts and on law and that the Courts have no right to sit in judgment over his views. In *Adams* v. *Great North of Scotland Railway Co.* (6) the same view was held, see also *Dinabandhu Jana* v. *Chintamoni Jana* (7). As regards the decision in *British Westinghouse Electric and Manufacturing Co.* v. *Underground Electric Railways Co.* (8) what was said by Lord Haldane in the House of Lords was that, if the result of an arbitration was induced by a wrong direction as to law given by a Court, the Appellate Court is not powerless and the Court below is not entitled to shelter itself under the award. It is true that the decision of a Division Bench in *Landauer* v. *Asser* (9) supports the contention of the learned Vakil for the respondents. But that case stands by itself and, although there are *dicta* of a very general character in the English reports, in no case except in the case in *Landauer* v. *Asser* (9) was an award set aside on the ground that the arbitrator had given an erroneous decision on law.

Coming to the Civil Procedure Code we think that clause (c) of section 14 should be confined to cases like those where the arbitrator perversely and manifestly misapplies a rule of succession or applies to the parties a rule by which they are not bound ; we are not to be supposed to have exhausted the category of the cases which may come under the clause, but we do think that where the arbitrator has applied his mind honestly and has arrived at a decision to the best of his abilitly, the fact that a Judge might take a different view is not a ground for holding that the award is illegal on its face. We must reverse the decrees of the Courts below and remand the suit to the Court of first instance for its being heard on the other objections taken to the award.

Costs will abide the result.

Appeal allowed;
Case remanded.

M.C.P.

(9) (1905) 2 K. B. 184; 74 L. J. K. B. 659; 93 L. T. 20; 53 W. R. 534; 10 Com. Cas. 265; 21 T. L. R. 429.

(2) (1857) 3 C. B. (N. S.) 189; 27 L. J. C. P. 66; 6 W. R. 181; 140 E. R. 712; 3 Jur. (N. S.) 818; 111 R. R. 614.

(3) (1913) 2 K. B. 32; 82 L. J. K. B. 733; 108 L. T. 844.

(4) 18 C. 414; 18 I. A. 73; 15 Ind. Jur. 284; 6 Sar. P. C. J. 26; 70 P. R. 1891; 9 Ind. Dec. (N. S.) 276 (P. C.).

(5) 29 C. 167; 6 C. W. N. 226; 29 I. A. 51; 12 M. L. J. 77; 4 Bom. L. R. 161; 8 Sar. P. C. J. 154; 25 P. R. 1902 (P. C.).

(6) (1891) A. C. 31.

(7) 26 Ind. Cas. 697; 19 C. W. N. 476.

(8) (1912) A. C. 673; 81 L. J. K. B. 1132; 107 L. T. 25; 56 S. J. 734.

CALCUTTA HIGH COURT.

RULE *Nisi* No. 732 OF 1917.

February 11, 1918.

Present:—Mr. Justice Teunon and Mr. Justice Newbould.

Rani ANHAYESWARI DEBI—PLAINTIFF —PETITIONER

versus

HATU SHIEKH AND ANOTHER—DEFENDANTS —OPPOSITE PARTIES.

Provincial Small Causes Courts Act (IX of 1887), s. 23—Transfer of suit of Small Cause Court nature to ordinary jurisdiction of Munsif—Appeal—Remand, order of, for taking evidence for elucidation of obsolete or provincial expression, validity of,

ANHAYESWARI DEBI v. HATU SHIEKH.

A suit for the recovery of damages for the appropriation of a jack tree was instituted by a landlord against his tenant on the Small Cause Court side of a Munsif's Court invested with Small Cause Court jurisdiction. The Munsif transferred the suit to his ordinary jurisdiction, on the ground that it involved questions of custom and title to immoveable property, and after taking evidence under the ordinary procedure made a decree in favour of the plaintiff. On appeal an objection was taken that as the suit was triable by a Court of Small Causes the appeal was incompetent. This objection was overruled:

Held, that though the procedure which the Munsif followed in transferring the suit to his ordinary jurisdiction was not strictly in conformity with the language of section 23 of the Provincial Small Causes Courts Act, yet his order of transfer might be regarded as an order made under section 23 of the Act, so that his decision was a decision by a Court having jurisdiction to determine questions of title and was, therefore, open to appeal. [p. 646, col. 2; p. 646, col. 1.]

A suit can be remanded by an Appellate Court for the purpose of taking evidence in order to elucidate the meaning of an obsolete or provincial expression. [p. 647, col. 2.]

Rule against the order of the Special Subordinate Judge, Assam Valley Districts.

Babus *Dwarka Nath Chakrabarti* and *Purna Chandra Roy*, for the Petitioner.

Babus *Sarat Chandra Ray Chowdhury* and *Satya Charan Sinha*, for the Opposite Party.

JUDGMENT.—This Rule is directed against an order by which the Subordinate Judge of the Assam Valley Districts in an appeal to his Court has directed the taking by the Court of first instance an additional evidence.

It appears that the suit in question, which was one for the recovery of damages for the appropriation of a jack tree, was originally instituted in the Court of the Munsif at Goalpara, the said Munsif being invested under section 25 of the Bengal, Agra and Assam Civil Courts Act, 1887, with the jurisdiction of a Judge of a Court of Small Causes for the trial of suits cognizable by such Courts up to the value not exceeding Rs. 100. The suit was instituted on what is spoken of as the Small Cause Court side of his Court on the 1st August. When the written statement of the defendants-tenants was filed, it appeared to the learned Munsif that the case was one which involved the question of custom and title to immoveable property. He thereupon on the 14th September 1914 made the following orders:—"This case should be heard under the regular procedure and transferred to the Munsif," and his next following order is, "the case transferred to the Munsif." He then proceeded to take evidence under the ordinary procedure and finally made a decree in favour of the plaintiff for a sum of Rs. 10. Against that decision the tenants-defendants preferred an appeal to the Judge of the Assam Valley Districts, and that appeal finally came on for hearing before the Subordinate Judge to whom we have already referred. In his Court a preliminary objection was taken that the suit being one of a Small Cause Court nature no appeal lay to his Court. By his order dated the 7th December 1916 that objection was overruled by the learned Subordinate Judge, who eventually on the 7th July 1917 made the order of remand or rather the direction for the taking of further evidence of which we have already made mention. The present application of the plaintiff, who is the petitioner before us, is really directed against both those orders.

The contention before us is that the learned Subordinate Judge should have held that inasmuch as the suit was one of Small Cause Court nature, he should have on that ground dismissed the appeal which had been preferred to his Court. This is the question which in this Rule we have to decide, and inasmuch as it is not and cannot be disputed that the case as instituted was one of Small Cause Court nature, the question before us really is whether the Munsif's orders of the 14th September 1914 are to be regarded as an order made under section 23 of the Provincial Small Causes Courts Act, and is the acceptance of a plaint presented under that section to him in his character as Munsif and, therefore, as a Court having jurisdiction to determine questions of title. Obviously the procedure which he followed was not strictly in conformity with the language of section 23. But from the judgment of the learned Munsif we find that his order was made in the presence and at the instance of both parties. That being so, when after that order made at the instance of both parties the plaint was transferred to and accepted by the Munsif and the trial proceeded in his Court, we are of

opinion that we should agree with the Subordinate Judge in holding that the order was one in effect made under the provisions of section 23 of the Small Causes Courts Act, and that the order was followed by the presentation of the plaint to and its acceptance by a Court having jurisdiction to determine title.

It is, however, contended further that after the close of the hearing and before the delivery of judgment the tenants-defendants themselves presented a petition to the Munsif to the effect that the suit was one triable by the Court of Small Causes, that the plaint had not been returned to the plaintiff in the manner provided by section 23 of the Small Causes Courts Act and praying that that course should then be followed and the suit practically re-heard *de novo*. The Munsif did not accede to that prayer, but at the same time in his judgment gave expression to the opinion that the jurisdiction of the Court had not been affected and that leaving out of consideration the order in question, it might be held that the suit was still triable as a Small Cause Court suit, with only this exception that the evidence had been recorded at length and not in the summary way. But we are not able to agree with the Munsif in that view. The plaint having been accepted as a plaint properly presented to the Munsif and having been tried out as a title suit, he could not at the close of the hearing turn round and say that he was in effect exercising the jurisdiction of a Small Cause Court Judge. But it is argued that this petition should be treated as creating an estoppel in favour of the plaintiff and should have been treated by the Subordinate Judge and should be treated by us as creating a bar to the presentation and the hearing of the appeal in the Court of the Subordinate Judge. To that view also we are unable to accede. The Munsif in effect did not grant the prayer of the tenants-defendants and hence the doctrine of estoppel can have no application.

With regard to the merits of the order of remand the appeal being competent, only one question has been raised before us. The evidence now to be adduced is to be taken in order to elucidate the meaning of an obsolete or provincial expression. To the taking of such evidence, having regard to the provisions of section 98 of the Evidence Act, there can of course be no objection. But it is said that while in the first Court the tenants-defendants relied upon evidence of custom, they now seek to shift their ground to base their defence upon grant. It is not, however, necessary for us to decide that point at this stage. In so far as we understand the judgment of the Subordinate Judge leading up to his order of remand, he treats the document as one which, if the meaning of the expression in question can be elucidated, may be used as evidence corroborating the other evidence of custom adduced in the first Court by the tenants-defendants. This is, however, as we have already said a question which we really need not decide at this stage. It may be more appropriately considered and decided after the final decision of the appeal by the learned Subordinate Judge.

For the reasons we have given we discharge this Rule. The opposite party is entitled to his costs, which we assess at three gold *mohurs*.

Rule discharged.

PUNJAB CHIEF COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 2281 OF 1917.

March 5, 1918.

Present:—Mr. Justice Scott-Smith.

ALLAH DIN—PLAINTIFF—APPELLANT

versus

Musammat BADSHAH BEGAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), Sch. II, paras. 17, 20, 21, scope and applicability of—Application to file award made before delivery of award—Order, whether appealable—Material irregularity in proceedings of arbitrators—Revision.

Paragraph 20 of Schedule II of the Civil Procedure Code prescribes the procedure to be followed in respect of an application for filing an award which has already been made without the intervention of the Court, and does not apply to a case where up to the date of filing of the application the arbitrators have not made their award. [p. 648, col. 2.]

ALLAH DIN v. BADSHAH BEGAM.

Where, therefore, the parties to a dispute entered into an agreement to refer it to arbitration and after the commencement of proceedings by the arbitrators but before the delivery of any award, the plaintiff made an application under paragraphs 17, 20 and 21 of the Second Schedule to the Civil Procedure Code, whereupon the Court made an order directing the award to be filed in Court:

Held, that the order was not one under paragraphs 20 and 21 and was not, therefore, appealable.

A revision lies against a decree based upon an arbitration award on the ground of material irregularity, but that material irregularity must have reference to the proceedings of the lower Court and not to those of the arbitrators.

Sita Ram v. *Dhani Ram*, 92 P. R. 1903; 35 P. L. R. 1904, followed.

Miscellaneous first appeal from the order of the Senior Subordinate Judge, Lahore, dated the 27th June 1917, directing the award of the arbitrators to be filed in Court under paragraphs 20 and 21 of the Second Schedule, Civil Procedure Code.

Mr. *Abdul Rashid*, for the Hon'ble Mr. *Muhammad Shafi*, for the Appellant.

Bakhshi *Tek Chand*, for the Respondents.

JUDGMENT.—This appeal was filed as one from an order directing an award to be filed in Court under paragraphs 20 and 21 of the Second Schedule, Civil Procedure Code. Bakhshi Tek Chand on behalf of the respondents raises a preliminary objection that no appeal lies as the order appealed from is not one under the aforesaid paragraphs of the Second Schedule. On the 1st of June 1915 the parties entered into an agreement to refer the matters in dispute between them to arbitration. The arbitrators are said to have begun their proceedings, but admittedly when the present application was made on the 21st March 1917 no award had yet been made. The plaintiff then applied that under paragraphs 17, 20 and 21 of the Second Schedule to the Civil Procedure Code the arbitrators and the umpire should be required to file the agreement in Court and then to file their award in Court and that a decree be passed in accordance with the said award. On the 24th April 1917 the Court ordered the agreement to be filed and referred the matters in dispute to the arbitrators, who were required to file their award on the 2nd May 1917. The award was filed on the 2nd May and thereafter the Court, after disposing of the objections filed by the plaintiff-appellant, passed a decree in accordance with the award. In Civil Appeal No. 2036 of 1917 decided by Shadi Lal, J., on the 26th February 1918 it was held in a similar case to the present that no appeal lay. In that case also it was common ground that up to the date of filing of the application the arbitrators had not made their award and the Judge held that, that being the case, paragraph 20 of the Second Schedule was wholly inapplicable as it prescribed the procedure to be followed in respect of an application for filing an award which had already been made without the intervention of the Court. In the present case also no award had been made at the time when the application of the 24th March 1917 was made to the Court, and, therefore, that application cannot be considered as one under paragraph 20 of the Second Schedule but must be considered as one under paragraph 17 thereof. I, therefore, hold that no appeal lies in the present case.

Mr. Abdul Rashid asks that the appeal may be treated as an application for revision. He admits, however, that he cannot point to any error in the procedure of the Court but merely to errors in the procedure of the arbitrators. In *Sita Ram* v. *Dhani Ram* (1) it was held that although a revision lies against a decree based upon an arbitration award on the ground of material irregularity, yet that material irregularity must have reference to the proceedings of the lower Court and not to those of the arbitrators. Now it is admitted that in the present case the lower Court has followed the correct procedure. It follows, therefore, that there is no ground for revision.

The appeal is accordingly dismissed with costs.

Appeal dismissed.

(1) 92 P. R. 1903; 35 P. L. R. 1904.

RAMASWAMI REDDI *v.* GENGA REDDI.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1531 OF 1916.

November 28, 1917.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

RAMASWAMI REDDI—PLAINTIFF—APPELLANT

versus

GENGA REDDI AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. VI, r. 17—Amendment of pleadings—Discretion of Court, principles governing.

Amendments of pleadings should be allowed when asked for by a party, provided the opposite party is not taken by surprise or precluded from adducing evidence or raising the necessary issues. Where, however, a party is agitating only a technical claim or the character of the suit is likely to be altered or where there is inordinate delay in asking for amendment, the Court would be justified in refusing to grant an amendment. The main considerations to be borne in mind are that multiplicity of suits should be avoided and the interests of substantial justice should be advanced. [p. 649, col 2; p. 650, col. 1.]

Weldon v. *Neal*, (1887) 19 Q. B. D. 394; 56 L. J. Q. B. 621; 35 W. R. 820, *Kumara Venkata Perumal Raja Bahadur Varu* v. *Velayuda Reddi*, 24 Ind. Cas. 195; 27 M. L. J. 25, distinguished.

Plaintiff sued for recovery of 2 out of 5 shares in one plot or in the alternative 2 out of 12 shares in that and another plot. Mesne profits were reserved for a separate action. The trial Court decreed only the first prayer, but on appeal the District Judge granted the second prayer. Before the appeal was heard, plaintiff had filed a suit to recover mesne profits in respect of the property decreed to him. After the disposal of the appeal, he applied for amendment of the plaint by substituting a claim for mesne profits of 2 out of 12 shares in both plots:

Held, that the amendment should be allowed. [p. 649, col. 2.]

Second appeal against the decree of the Court of the District Court, Chingleput, in Appeal Suit No. 214 of 1915, preferred against the decree of the Court of the Principal District Munsif, Chingleput, in Original Suit No. 791 of 1913.

Mr. *C. Narasimhachariar*, for the Appellant.

Mr. *T. M. Krishnasuami Aiyar*, for the Respondents.

JUDGMENT.—The present plaintiff first brought a suit against the defendants to recover 2 out of 5 shares in one plot of property. He also asked in the alternative that he should be given 2 out of 12 shares in that and another plot of property. The District Munsif gave him a decree for 2 out of 5 shares in the first plot. Thereupon the defendant preferred an appeal to the District Court. Before the appeal was heard, the plaintiff sued to recover mesne profits in respect of the property decreed to him by the District Munsif, as he had reserved his right to sue for such mesne profits. In appeal, the District Judge modified the decree of the Munsif and gave the plaintiff 2 out of 12 shares in both the plots. Thereupon the plaintiff presented a petition to the District Munsif to allow him to amend the plaint by inserting a claim for mesne profits on 2 out of 12 shares in both the plots. This amendment was disallowed by the District Munsif, as he held that the nature of the amendment was such as to change the character of the suit. His view was upheld in appeal; and this second appeal has been preferred against that judgment. We are unable to agree with the Courts below.

We agree with the statement of law contained in the judgment of Oldfield and Krishnan, JJ., reported as *Gatiganti Subbarayudu* v. *Arumilli Surayya* (1), where they point out that, on a question of the propriety of allowing amendments, each case will have to be decided on the facts presented to the Court. In the present case, the amendment prayed for will not alter the nature of the suit, nor will there be an addition of a new cause of action. The principle to be borne in mind by Courts below is, that, provided the opposite party is not taken by surprise, nor precluded from adducing evidence nor from raising the necessary issues, the amendment should ordinarily be allowed. In the present case, on the date of the application for amendment, the suit was at the very initial stage of the proceedings. No issue had been raised and no evidence had been let in, and, therefore, the District Munsif ought, in the circumstances, to have allowed the amendment. At the same time, we wish to point out that where the plaintiff is agitating only a technical claim or where the character of the suit is likely to be altered, or where there has been an inordinate delay in asking for amendment, the Court will be justified in refusing to grant an amendment. The main considerations to be borne in mind are that multiplicity of suits should be avoided and the

(1) 37 Ind. Cas. 914.

interests of substantial justice should be advanced.

As regards the cases quoted at the Bar, Mr. Krishnaswami Aiyar strongly relied upon the observation of Lord Esher in *Weldon* v. *Neal* (2). In that case, the amendment necessitated the adding of a new cause of action, as was pointed out by the learned Master of the Rolls. Moreover, it has to be borne in mind that in England pleadings are drafted with greater care than in this country. In an early case before the Judicial Committee of the Privy Council reported as *Mohummud Zahoor Ali Khan* v. *Musammat Thakooranee Rutta Koer* (3), it was pointed out that Courts should have regard to the loose way in which pleadings are prepared in India, and should, as far as possible, allow amendment of the pleadings, in order to avoid a claim being barred by the Statute of Limitation. This is quite consistent with the view taken in *Weldon* v. *Neal* (2), and we are certainly bound to follow this dictum of the Judicial Committee in preference to the decision of the Master of the Rolls in *Weldon* v. *Neal* (2).

Mr. Krishnaswami Aiyar also relied upon certain observations of the present learned Chief Justice in *Kumara Venkata Perumal Raja Bahadur Varu* v. *Velayuda Reddi* (4). If we may say so with respect, upon the facts presented to the Court in that case, we would not have been prepared to allow the amendment. In that case an attempt was made to get property not included in the application to be sold after 12 years from the date of the presentation of the first application. That was a case of gross carelessness and of great delay. Therefore the observations in *Kumara Venkata Perumal Raja Bahadur Varu* v. *Velayuda Reddi* (4) do not conclude this case. On the other hand, in that same case, Mr. Justice Sadasiva Aiyar took a different view of rule 17 of Order VI, Civil Procedure Code. In *Varadiah* v. *Raja Kumara Venkata Perumal* (5) the same learned Judge was a party to allowing amendment under similar circumstances. A case almost on all fours with the present case is *Sevugan Chetty* v. *Krishna Aiyangar* (6), where Benson and Spencer, JJ., allowed an amendment on grounds similar to the present case. This case was commented on by Oldfield and Krishnan, JJ., in *Gatiganti Subbarayudu* v. *Arumilli Surayya* (1), but they did not disapprove of the decision, although they pointed out that it was a case which had reached the high water mark in respect of allowing amendments. In the case before them, the learned Judges pointed out that the amendment sought for would not only change the nature of the suit, but would be diametrically opposed to it as originally presented, and that there was great delay in the presentation of the application for amendment. We think, in the circumstances of this case and having regard to the facts that the case of the defendants would not be changed and that there has been no delay in the presentation of the application for amendment, the Courts below should have allowed the amendment of the plaint.

We, therefore, reverse the decrees of the Courts below, and grant the plaintiff liberty to amend the plaint. It was due to the precipitate action of the plaintiff that there was necessity for this amendment, and in the circumstances, we think he should be directed to pay the costs of the respondents hitherto incurred in all the Courts. Further costs will be provided for in the revised decree.

M. C. P.

Appeal allowed.

(2) (1887) 19 Q. B. D. 394; 56 L. J. Q. B. 621; 35 W. R. 820.

(3) 11 M. I A. 468; 9 W. R. P. C. 9; 2 Suth. P. C. J. 107; 2 Sar. P. C. J. 320; 20 E. R. 177.

(4) 24 Ind. Cas. 195; 27 M. L. J. 25.

(5) 21 Ind. Cas. 782; 26 M. L. J. 83; 14 M. L. T. 530; (1914) M. W. N. 157.

(6) 13 Ind. 268; 36 M. 378; 10 M. L. T. 557; 22 M. L. J. 139.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 735 OF 1917.

April 17, 1918.

Present:—Justice Sir Ali Imam, KT.

DHURI PATAK—PLAINTIFF—APPELLANT

versus

TIMAL SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIV,

1—*Redemption suit—Suit withdrawn as against one of several mortgagees—Maintainability of suit.*

Where in a redemption suit the plaintiff withdraws his claim as against one of the mortgagees, the suit should be dismissed for non-joinder of necessary parties.

Appeal from a decision of the Subordinate Judge, Chapra, dated the 29th March 1917.

Mr. *Parmeshwar Dayal*, for the Appellant.

Mr. *B. N. Mitter*, for the Respondents.

JUDGMENT.—The plaintiff instituted this suit for the redemption of a holding measuring 1 *bigha* 2 *cottas* 17 *dhurs* of land that was originally the holding of one Bhikari Kuarmi, who had admittedly mortgaged it to defendants Nos. 1 and 2 and also to one Jagdish Singh, who was a defendant in the suit but against whom the plaintiff did not proceed having withdrawn his suit against him. The Munsif decreed the suit but the Subordinate Judge reversed the decision of the Munsif and has dismissed the suit. This appeal is from the decision of the learned Subordinate Judge.

It appears that there had been a previous suit for declaration of title and recovery of possession between the plaintiff and the defendants Nos. 1 and 2 and also Jagdish in respect of the land in suit. The Munsif relied on the decision given in that case and held that the title of the plaintiff to the holding in question was declared in the previous suit and that the decision of that case operated as *res judicata* in the present one on the question of the plaintiff's title. The learned Subordinate Judge on the other hand in his judgment has made no reference to the decision in the previous case, nor has he dealt with the question of *res judicata* taken up in the judgment of the Munsif. He has rested his decision on the question of title on the point that the plaintiff had not acquired the equity of redemption in respect of this holding, because there was no such transfer to him by a registered instrument. The appeal, however, is concluded on the question of the defect of parties. Under Order XXXIV, rule 1, it was incumbent on the plaintiff to implead Jagdish in this case, but it appears that he withdrew his suit against agdish. This is not permissible to him and the lower Appellate Court was right in holding that the Munsif was wrong in passing a decree for redemption in the absence of defendant No. 3. This aspect of the case should have been sufficient for the lower Appellate Court to have given his decision in reversing the judgment and decree of the Munsif. I agree with the lower Appellate Court in the view that the absence of Jagdish from the present case is a sufficient defect to set aside the judgment and the decree given by the Munsif. The point is concluded by a decision of this Court reported as *Girwar Narain Mahton* v. *Musammat Makbulunnissa* (1). The appeal is, therefore, dismissed with costs.

Appeal dismissed.

(1) 36 Ind. Cas. 542; 1 P. L. J. 468.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2834 OF 1915.

March 20, 1918.

Present:—Mr. Justice Fletcher and Justice Sir Shamsul Huda, Kt.

MOHIM CHANDRA PAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

Maharaja SIR PRADYAT KUMAR TAGORE AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Dowl kabuliyat, *construction of*—*Permanent interest, acquisition of*—*Landlord entitled to re-enter upon parties failing to settle rate of rent on expiration of temporary term, effect of.*

Where a Dowl Kabuliyat provided *inter alia* that in the event of the landlord and the tenant not being able to arrive at a new rate of rent after the expiration of the temporary term covered by the Dowl Kabuliyat, the landlord would be entitled to take possession of the land leased:

Held, that the provision was absolutely inconsistent with the fact that the tenant had a permanent interest in the land leased. [p. 652, col. 2.]

Appeal against the decree of the Special Judge, Mymensingh, dated the 22nd May 1915, reversing that of the Assistant Settlement Officer of that district, dated the 21st September 1914.

FACTS appear from the judgment.

Babu *Heramla Chandra Guha*, for the Appellants.—The question for your Lordships' consideration is whether the Dowl Kabuliyat is any evidence as to the nature of the tenancy. The Record of Rights is in my favour. I have been recorded as having a permanent interest in the land held by me. The entry in the Record of Rights must be taken to be correct, unless it is proved to be incorrect. The entry has not been proved to be incorrect by any evidence except the Dowl Kabuliyat. The word "Sarasari" does not mean "temporary" but means "roughly." The term 'Dowl' itself means 'rent roll' and nothing else. 'Dowl Bandobasto' means 'settlement of rent.'

[FLETCHER, J.—'Sarasari Dowl Kabuliyat' means temporary settlement of land. So your interest cannot be permanent.]

'Sarasari' means temporary when it refers to settlement of rent. It does not mean temporary interest in land. It also means 'roughly.' See Wilson's Glossary, page 169.

[SHAMSUL HUDA, J.—If your tenure was permanent, you could have given other evidence to show that the tenancy was heritable. We cannot hold the tenancy to be permanent simply on the construction of the 'Dowl Kabuliyat', the terms of which are not entirely free from ambiguity.]

[FLETCHER, J.—Except the Record of Rights there is nothing in your favour to show that the tenancy is permanent.]

A tenancy will be presumed to be permanent from the circumstances that it descended from the father to son and was in the uninterrupted possession of the tenant for a long time.

Dr. *Rash Behari Ghose* (with him Babus *Ram Churn Mitter*, *Mukundanath Roy* and *Permanand Laniri*), for the Respondents.—The question whether the tenancy in this suit is permanent is concluded by the decision of this Court reported as *Prodyot Coomar Tagore* v. *Krishnamoni Dasya* (1), where the suit was between the same landlord and some other tenants in which 'Dowl Kabuliyat' in the same terms as here was construed.

JUDGMENT.

FLETCHER, J.—This is an appeal by the defendants against the decision of the learned Special Judge of Mymensingh, dated the 22nd May 1915, reversing the decision of the Assistant Settlement Officer of the same place. The proceedings out of which this appeal arises were instituted under the provisions of section 106 of the Bengal Tenancy Act. In the Record of Rights finally published under section 103B of the same Act, there was an entry that the defendants held a permanent tenure subject only to the liability to have the rent enhanced. Therefore, the plaintiffs instituted the present suit under the provisions of section 106. The first Court dismissed the suit, holding that the tenure was permanent, not subject to enhancement of rent. On appeal, the learned Special Judge has reversed that finding. The way that the learned Judge bases his judgment is this. *First* of all, the learned Judge holds that, apart from certain Dowl Kabuliyats, the evidence does not establish that the defendants have a permanent interest. If that is the correct view, of course, there is nothing to say. *Secondly*, the learned Judge holds that, if the Dowl is to be the document for consideration apart from the other evidence, then the Dowl itself shows quite clearly that the tenure is not a permanent one. I think that the learned Judge is right on the terms of the Dowl. The last clause in the document, entitling the landlord to take possession in the event of the parties not being able to arrive at a new rate of rent after the expiration of the temporary term covered by the Dowl Kabuliyat, is absolutely inconsistent with the fact that the tenant has a permanent interest. No person having a permanent interest would contract that, if he and his landlord cannot agree as to what is to be the rate of the rent after the term for which the rent is settled with the landlord, he would forfeit his permanent interest in the land. Further, the Dowl Kabuliyat in the present case is substantially in the same terms as the Dowl Kabuliyat in the case that was heard by another Division Bench of this Court between the same landlord and another tenant, namely, the case of *Prodyot Coomar Tagore* v. *Krishnamoni Dasya* (1), where it was held that the Dowl Kabuliyat did not confer a permanent and heritable interest on the tenant. I think the conclusion arrived at by the learned Special Judge in the present

(1) 40 Ind. Cas. 513; 21 C. W. N. 809.

case is correct. The present appeal, therefore, fails and must be dismissed with costs.

SHAMSUL HUDA, J.—I agree.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1226 OF 1916.

November 21, 1917.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

VADLUR CHINNA NAGI REDDY—PLAINTIFF—APPELLANT

versus

DEVINENI VENKATRAMANIAH AND ANOTHER—DEFENDANTS NOS. 1 AND 3—RESPONDENTS.

Madras Revenue Recovery Act (II Mad. of 1864), s. 59—Sale for dues to Government—Notice, absence of, to defaulter, effect of—Irregularity—Civil Procedure Code (Act V of 1908), s. 115—Suit to set aside sale beyond limitation—Proceedings after sale, knowledge of, effect of—Estoppel—Evidence Act (I of 1872), s. 114.

Failure to serve notice of sale on a defaulter under Madras Act II of 1864 does not affect the jurisdiction of the Collector to sell the property for arrears due to Government. [p. 653, col. 2.]

Venkata v. *Chengadu*, 12 M. 168; 4 Ind. Dec. (N. S.) 467 (F. B.), followed.

An omission to serve notice will amount to an illegality or irregularity in the exercise of jurisdiction by the Collector within the meaning of section 115, Civil Procedure Code, and would vitiate his proceedings; but that is not enough to enable the party aggrieved to obtain a declaration that the sale is not binding on him, if he does not sue within the period specified in section 59 of the Act. [p. 654, col. 1.]

Secretary of State v. *Radha Kishore Manikya*, 38 Ind. Cas. 379; 44 C. 328; 14 A. L. J. 1205; 18 Bom. L. R. 1027; (1917) M. W. N. 25; 21 C. W. N. 291; 5 L. W. 570; 25 C. L. J. 425 (P. C.), *Mysore Balakrishna Rao* v. *Secretary of State*, 30 Ind. Cas. 355; 39 M. 494; 2 L. W. 695; 29 M. L. J. 276; 18 M. L. T. 151, *Dorasamy Pillai* v. *Muthusamy Mooppan*, 27 M. 94; 13 M. L. J. 479 and *Zamindar of Ettayapuram* v. *Sankarappa Reddiar*, 27 M. 483 (F. B.), distinguished.

The fact that the sale was without notice will not enable the defaulter whose property was sold to ignore subsequent proceedings taken to his knowledge as having been taken without jurisdiction. [p. 654, col. 2.]

Purna Chandra Chatterjee v. *Dinabandhu Mukerjee*, 34 C. 811; 5 C. L. J. 696; 2 M. L. T. 371; 11 C. W. N. 756 (F. B.) and *Rameswar Singh* v. *Secretary of State*, 34 C. 470; 11 C. W. N. 356; 5 C. L. J. 669, distinguished.

Second appeal against the decree of the Court of the Temporary Subordinatse Judge, Bellary, in Appeal Suit No. 87 of 1916, preferred against the decree of the Court of the District Munsif, Bellary, in Original Suit No. 224 of 1913.

Messrs. *A. Krishnaswamy Iyer* and *K. G. Babu Row*, for the Appellant.

Messrs. *T. Prakasam*, *P. Narayan Murthi* and *C. Rama Row*, for the Respondent.

JUDGMENT.—The property in suit belonged to the 2nd defendant. He obtained a loan under the Agricultural Improvements Act from Government in 1897. That loan was payable by instalments; while some of the instalments still remained unpaid, he sold the land to the plaintiff in 1902; owing to the default in the payment of one of the instalments, the land was put up to sale by the Government and was purchased by the 1st defendant. Plaintiff sues for a declaration that the revenue sale is not binding on him. It is found that no notice of the sale which was held in 1910 was served on the 2nd defendant or the plaintiff; but that, when the 1st defendant took proceedings under Act II of 1864 to obtain possession, plaintiff who had notice of the application objected to the delivery on the ground that the sale was not binding on him; this was in November 1912. The suit was instituted on the 9th June 1913, more than six months after the order for possession.

The Subordinate Judge held that the sale was invalid, as there was no demand on the 2nd defendant to pay the instalment and also because no notice of the sale was served on him. He, however, held that as the proceedings to obtain possession were taken to the knowledge of the plaintiff more than 6 months before the suit, the suit was barred by limitation under section 59 of Act II of 1864.

We think he has come to the right conclusion. The learned Vakil for the appellant contended that the sale was without jurisdiction, inasmuch as no notice of it was given to the plaintiff. In a very similar case it was held by a Full Bench of this Court in *Venkata* v. *Chngadu* (1) that failure to serve notice did not affect the jurisdiction of the Collector to sell the property. Under the Revenue Recovery Act there are some requisites which go to the root of the jurisdiction. As pointed out by Muthuswami Aiyar, J., in *Venkata* v. *Chengadu* (1), if there are no arrears, or if

(1) 12 M. 168; 4 Ind. Dec. (N. S.) 467 (F. B.).

the land on which the arrear is due is not included in the holding of the alleged defaulter, any proceeding taken against such a person would be *ultra vires*. These are the essential conditions, compliance with which alone can invest the Collector with jurisdiction to take proceedings under the Act. If they are not complied with, the sale would be without jurisdiction. There are other conditions which the Act enjoins upon the Collector which are not conditions precedent. In conducting the sale certain formalities have to be observed. If they are not conformed to, the Collector, to borrow the language of section 115 of the Code of Civil Procedure, will be acting illegally or irregularly in the exercise of his jurisdiction. No doubt such an illegal exercise of jurisdiction would vitiate the proceedings. But that is not enough to enable the plaintiff to obtain a declaration that the sale is not binding on him, if he does not sue within the period fixed by the Act. The proceedings taken being *intra vires* unless the suit is brought within 6 months to set the sale aside on the ground of irregularity or illegality, the plaintiff's suit will be barred.

We are unable to agree with Mr. Babu Rao that the sale was without jurisdiction, because of want of notice. The view taken by the Full Bench of this Court in *Venkata* v. *Chengadu* (1) is against such contention and we are not prepared to hold that that case is opposed to any subsequent decision of this Court and of the Judicial Committee.

The case of *Secretary of State* v. *Radha Kishore Manikya* (2), which was strongly relied on, related to the sale of waste lands; instead of proclaiming that the waste lands were situated in the District A, it was proclaimed that they were in District B; and when subsequently lands in District A were sold under such a proclamation, it was held that the sale was without jurisdiction. That was a case where the Revenue Officer had no jurisdiction to act in respect of the lands in District A. He violated the observance of a condition precedent.

In *Mysore Balakrishna Rao* v. *Secretary of State* (3) properties belonging to an individual were declared to be included in a reserved forest without any notice to him. Before taking action under the Act, the Government was bound to inform the person in possession that the property was going to be reserved. As regards the cases under the Rent Recovery Act in *Dorasamy Pillai* v. *Muthusamy Mooppan* (4) and *Zamindar of Ettayapuram* v. *Sankarappa Reddiar* (5), it is enough to say that in none of these was it held that the proceedings were without jurisdiction.

There is another point on which this appeal can be disposed of. Granting that the sale was invalid, the plaintiff was aware of the proceedings taken under the Act 6 months before the suit. It cannot be argued that the plaintiff was not aggrieved by the step taken to obtain possession. It was a step taken under colour of the Act and was calculated to injuriously affect the plaintiff's rights. The fact that the sale was without notice will not enable the plaintiff to ignore subseqnent proceedings taken to his knowledge as having been taken without jurisdiction. In this view the decisions in *Purna Chandra Chatterjee* v. *Dinabandhu Mukerjee* (6) and in *Rameswar Singh* v. *Secretary of State* (7) are distinguishable from the present case. We think the decision of the Subordinate Judge is right and dismiss the second appeal with costs.

M. C. P. *Appeal dismissed.*

(4) 27 M. 94; 13 M. L. J. 479.
(5) 27 M. 483 (F. B).
(6) 34 C. 811; 5 C. L. J. 696; 2 M. L. T. 371; 11 C. W. N. 756 (F. B.)
(7) 34 C. 470; 11 C. W. N. 356; 5 C. L. J. 669.

(2) 38 Ind. Cas. 379; 44 C. 328; 14 A. L. J. 1205; 18 Bom. L. R 1027; (1917) M. W. N. 25; 21 C. W. N. 291; 5 L. W. 570; 25 C. L. J. 425 (P. C.).
(3) 30 Ind. Cas. 355; 39 M. 494; 2 L. W. 695; 29 M. L. J. 276; 18 M. L. T. 151.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 833 OF 1914.
November 29, 1915.
Present:—Sir Henry Drake Brockman, KT., J. C.

Musammat KAMA AND ANOTHER—DEFENDANTS—APPELLANTS
versus
BHAJANLAL CHANTANLAL MINORS, THROUGH NEXT FRIEND DAULAT—PLAINTIFF—RESPONDENT.

C. P. Tenancy Act (XI of 1898), s. 97—

KAMA *v.* BHAJANLAL CHANTANLAL.

Jurisdiction of Civil Courts—Suit between landlord and tenant—Person other than landlord joined as co-defendant—Venue of case, how to be determined—Interpretation of Statutes—Act taking away jurisdiction of ordinary Courts.

An act by which the jurisdiction of the ordinary Courts of Judicature is taken away must be construed strictly.

Prosunno Coomar Paul Chowdhry v. *Koylash Chunder Paul Chowdhry*, 8 W. R. 428 at p. 436; B. L. R. Sup. Vol. 759, 2 Ind. Jur. (N. S.) 327, followed.

The policy of the C. P. Tenancy Act, as declared by section 97 of the Act is that all questions concerning the right of a tenant as such of an agricultural holding which arise out of the relationship of tenant and landlord should, except so far as appeals are concerned, be tried by a Judge who is also a Revenue Officer.

The mere fact that some one who is not a landlord is joined as a co-defendant in a suit between a landlord and tenant does not take away the operation of section 97 of the C. P. Tenancy Act and such a suit is triable only by a Judge who is also a Revenue Officer.

Tarapat Ojha v. *Ram Ratan Kuar*, 15 A. 387; A. W. N. (1893) 164; 7 Ind. Dec. (N. S.) 967, followed.

The venue of a case must be determined by the nature of the claim as laid, and not by the nature of the defence set up.

Appeal from a decree of the Court of the District Judge, Bhandara, dated the 11th September 1914.

Mr. *S. K. Barlinge*, for the Appellants.

Mr. *S. Y. Deshmukh*, for the Respondents.

JUDGMENT.—I am clearly of opinion that this second appeal must succeed on the short point that the suit is one between landlord and tenant as such and, therefore, should not have been tried by an ordinary Civil Court.

The plaint alleges that the plaintiffs have been the ordinary tenants of the land in dispute since 1906-07, their landlord being *Musammat* Kama (defendant No. 1); that in 1910 Sonba (defendant No. 2) sued *Musammat* Kama for possession and obtained a decree as the outcome of a compromise; that the plaintiffs objected to being dispossessed in favour of Sonba, but their objection was dismissed on the ground that they had not in fact been ousted; and that subsequently both the defendants ejected them from the land. Sonba's defence was that he is occupancy tenant of the land which is in the *patti* of *Musammat* Kama's co-widow *Musammat* Rakhu and that he let it to Rakhu in 1906 on condition that she would vacate on demand. He was supported by the other defendant: in fact they filed a joint written statement at a late stage of the case. It is, however, unnecessary to consider the nature of the defence set up. The venue in a case is determined by the nature of the claim as laid: see *Ganpat* v. *Trimbak* (1) and compare *Bhanya* v. *Nana* (2) and *Musammat Durbasa* v. *Khulak Singh* (3).

It is urged for the plaintiffs, who are the respondents in this Court, that the principal defendant is Sonba, *Musammat* Kama being added *pro forma*. This contention, however, is not borne out by the plaint, in which possession and damages alike are claimed from both defendants. The policy of the Tenancy Act as declared in section 97 is that all questions concerning the right of a tenant, as such, of an agricultural holding which arise out of the relationship of tenant and landlord should, except so far as appeals are concerned, be tried by a Judge who is also a Revenue Officer. To hold that the section is inoperative where some one other than the landlord is joined as a co-defendant, would make evasion of the law a simple matter. An act by which the jurisdiction of the ordinary Courts of Judicature is taken away must be construed strictly, as laid down in *Prosunno Coomar Paul Chowdhry* v. *Koylash Chunder Paul Chowdhry* (4), but the view I have expressed is in no way incompatible with the grammatical interpretation of section 97, and a similar one was taken by the Full Bench in *Tarapat Ojha* v. *Ram Ratan Kuar* (5) of the analogous provisions of the N.-W. P. Revenue Act, 1881.

The decrees of the lower Court are set aside and the plaint will now be returned to the plaintiffs for presentation to a Judge, who is also a Revenue Officer and has jurisdiction to hear a suit to recover possession of land from which a tenant has illegally been ejected by the landlord. The point on which the plaintiffs succeed in this Court having been taken here for the first time, I direct that all costs hitherto incurred except the Court-fee on the plaint be borne by the parties respectively incurring them.

Decrees set aside.

(1) 19 Ind. Cas. 759; 9 N. L. R. 54 at p. 61.
(2) 31 Ind. Cas. 5; 11 N. L. R. 160.
(3) 4 N. L. R. 63.
(4) 8 W. R. 428 at p. 436; B. L. R. Sup. Vol. 759; 2 Ind. Jur. (N. S.) 327.
(5) 15 A. 387; A. W. N. (1893) 164; 7 Ind. Dec (N. S.) 967.

ELEDATH THAVAZHI *v.* ELIANGATTIL SANKARA VALIA.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1748 OF 1916.

November 29, 1917.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

ELEDATH THAVAZHI, KARNAVAN AND MANAGER KUNHUNNI MENON—DEFENDANT No. 2—APPELLANT

versus

ELIANGATTIL SANKARA VALIA RAJAH AVARGAL, STYLED VANNILASSERI UTAYA KANDAN THEVA AND ANOTHER—PLAINTIFF AND DEFENDANT No. 1—RESPONDENTS.

Evidence Act (I of 1872), s. 116—Estoppel—Landlord and tenant—Grant of patta to tenant by Government, effect of—Adverse possession, claim of—Limitation Act (IX of 1908), Sch. I, Art. 144.

Where the relationship of landlord and tenant has once been created, it cannot be terminated by any adverse action taken against the landlord by a third party, whether that party be the Government or some other rival claimant, and the tenant will still be estopped from denying the landlord's title. [p. 657, col. 1.]

Amma Ammal v. *Puthiaparambath Moidin*, 43 Ind. Cas. 677; (1918) M. W. N. 38, followed.

Hattikudur Narain Rao v. *Andar Sayad Abbas Sahib*, 27 Ind. Cas. 785; 28 M. L. J. 44 and *Amma* v. *Ramakrishna Sastri*, 2 M. 226 at pp. 229, 230; 1 Ind. Dec. (N. S.) 429, dissented from.

Subbaraya v. *Krishnappa*, 12 M. 422; 4 Ind. Dec. (N. S.) 643, distinguished.

The grant of a *patta* by Government to the tenant of a third person or a declaration of its ownership of the property will not dissolve the relationship of landlord and tenant already existing or start adverse possession in favour of the tenant against the landlord. [p. 657, col. 1.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Palghat at Calicut, in Appeal Suit No. 1000 of 1916, preferred against the decree of the Court of the District Munsif, Ponnani, in Original Suit No. 30 of 1914.

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

Mr. *C. Madhavan Nair*, for Respondent No. 2.

Mr. *C. V. Ananthakrishna Aiyar*, for the Respondents.

JUDGMENT.—The 2nd defendant obtained a *kanom* from the plaintiff's Tarwad in 1860. There was a decree for redemption against him; after decree and before restoring possession, he assigned his rights to the grandmother of the 1st defendant by Exhibit VIII. Subsequently, the 1st defendant's grandmother obtained a *kanom* in 1888 from the plaintiff's Tarwad which was renewed in 1899. The 2nd defendant took on lease the properties included in these demises from the 1st defendant, Exhibit XXX. Plaintiff sues to redeem the *kanom*. The 2nd defendant contended that the lands in suit were not included in the demise sued on. The Subordinate Judge has found after full discussion that they were included, and we see no reason to differ from him.

The learned Vakil for the appellant next contended that the lease under which he was holding was determined by the Government granting him a *patta* for the lands in 1893 and as he has been holding the lands under the Government, since then without paying any rent to the 1st defendant or the plaintiff's Tarwad, he had acquired a title to them by adverse possession.

The case strongly relied on by him for this proposition is *Subbaraya* v. *Krishnappa* (1). But an examination of the facts of the case shows that that decision lends no support to the appellant. In that case, the 1st plaintiff and the 1st defendant were adjoining landowners, the former being an old *wargdar* and the latter a person to whom a *warg patta* was newly granted. The land in question was Government waste land situated near the two *wargs*. The plaintiff, under the impression that the waste land would be granted to him by the Government, allowed the 2nd plaintiff to take them on lease from him. The 2nd plaintiff assigned that lease to the 2nd defendant. The Government, however, did not grant a *patta* to the 1st plaintiff, but gave the lands to the 1st defendant. The 2nd defendant contended that this action of the Government put an end to his tenancy from the 1st plaintiff; and the Court upheld that contention. It was apparently conceded by the contending parties that the lessor and the lessee did not deal with the property in the belief that the lessor had a right to grant a lease. The lease was accepted on the footing that the right to the land would be granted subsequently by the Government. When that understanding between the parties was not realised, the 2nd defendant

(1) 12 M. 422; 4 Ind. Dec. (N. S.) 643.

was held entitled to repudiate the relationship of landlord and tenant. We are, therefore, of opinion that that decision is no authority for the broad proposition that an interference by a third party, whether that party be the Government or some other rival claimant, can have the effect of determining the relationship originally created between the landlord and the tenant. The next case relied on was *Hattikudur Narain Rao* v. *Andar Sayad Abbas Sahib* (2). Mr. Justice Hannay seems to have held that *Subbaraya* v. *Krishnappa* (1) was authority for the theory that a declaration by the Government can sever the relationship of a tenant to the landlord under whom he held properties. In our opinion, the learned Judge has stated the inference from the earlier case too broadly. As regards *Ammu* v. *Ramakrishna Sastri* (3), we are clear that the statement 'the tenancy under which the appellant held the plot of which she is now in possession was determined when the Deputy Collector declared the land to be the property of Government and granted it to the appellant as a *ryot* of the Government, and thereafter the appellant was not estopped from contending that the interest of the former landlord had expired' [see *Ammu* v. *Ramakrishna Sastri* (3)] does not enunciate the law correctly.

In more recent cases, this Court has recognised the principle that any adverse action taken by a third party cannot have the effect of terminating the relationship of landlord and tenant and that the tenant will be estopped by the provisions of section 116 of the Evidence Act from denying the landlord's title. See *Ammu Ammal* v. *Puthiaparambath Moidin* (4) and Second Appeal No. 320 of 1915. We think these decisions lay down the law correctly. In both the second appeals the action of the Government was relied on as starting adverse possession against the landlord.

As regards improvements the 2nd defendant has been awarded compensation after the date of Exhibit VII, under which he sold his right to the then existing improvements to the 1st defendant.

(2) 27 Ind. Cas. 785; 28 M. L. J. 44.
(3) 2 M. 226 at pp. 229, 230; 1 Ind. Dec. (N. S.) 429.
(4) 43 Ind. Cas. 677; (1918) M. W. N. 38.

The Subordinate Judge is right and we dismiss the second appeal with costs.

Appeal dismissed.

M. C. P.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 23 OF 1917.

January 25, 1918.

Present :—Mr. Justice Teunon and Mr. Justice Newbould.

MAKUNDA LAL KUNDU AND OTHERS—DECREE-HOLDERS NOS. 1 TO 10—APPELLANTS

versus

PRIYA NATH MOITRA—JUDGMENT-DEBTOR—RESPONDENT.

Res judicata *in execution proceedings—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 5, sub-r. 2—Application for final decree, whether can be considered as in continuation of previous application.*

On the death of one of several decree-holders after the preliminary decree in a mortgage suit, the surviving decree-holders were, at the instance of the judgment-debtor, treated as the legal representatives of the deceased decree-holder. They then applied on their own behalf as well as the legal representatives of the deceased decree-holder for a final decree for sale of the mortgaged properties, and after issue of notice upon the judgment-debtor a final decree was made. Afterwards on the judgment-debtor's objection to execution on the ground that the widow and not the surviving decree-holders was the legal representative of the deceased decree-holder, the widow made an application to be made a party as the legal representative of her deceased husband, which was granted and was treated as an application for a final decree. The judgment-debtor then raised objections to execution on the ground that the widow's application not having been made within six months from the date of her husband's death, the suit had abated and also that the application was barred by the three years' rule of limitation contained in Article 181 of Schedule I of the Limitation Act:

Held, (1) that unless and until the judgment-debtor succeeded in having the final decree made on the application of the surviving decree-holders set aside, he could not be permitted to advance the objections, as the final decree, having been made after notice to the judgment-debtor, could not be attacked at a subsequent stage of the execution proceedings; [p. 658, col. 2.]

(2) that even if the widow's application was regarded as one for a final decree, it should be referred back to the judgment-debtor's original application for substitution of the surviving decree-holders as

the legal representatives of the deceased decree-holder, or be dealt with under Order XXII, rule 9, and should next be considered as in continuation of the application of the surviving decree-holders for a final decree [p. 658, col. 2.]

Appeal against the order of the District Judge, Nadia, dated the 25th September 1916, reversing that of the Subordinate Judge of that district, dated the 19th February 1916.

Babus *Haro Kumar Mitter* and *Rupendra Kumar Mitter*, for the Appellants.

Babu *Jatindra Nath Lahiri*, for the Respondent.

JUDGMENT.—In this appeal it appears that in a suit for sale of certain mortgaged properties a preliminary decree was made on the 31st August 1911. The date for payment was the 12th February 1912.

On the 31st September 1911 the judgment-debtor applied for permission to appeal as a pauper and this application was finally dismissed on the 6th of June 1913.

Meanwhile one of the decree-holders, Gopi Nath Kundu, had died on the 10th April 1913, and at the instance of the judgment-debtor, then appellant, the surviving decree-holders, who are the six brothers of Gopi Nath, were placed on the record as his legal representatives and the proceedings continued against them.

The judgment-debtor's appeal having been dismissed, the surviving decree holders, on their own behalf and as representatives of the deceased Gopi Nath, applied on the 30th June 1914 for a final decree for sale in terms of Order XXXIV, rule 5, sub-rule (2). After issue of notice upon the judgment-debtor a final decree was made on the 19th August 1914.

Next followed the present application for execution on the 8th January 1915, and on the 5th of April an objection by the judgment-debtor to the effect that the widow and not the surviving decree-holders was the legal representatives of the deceased Gopi and that in her absence the proceedings could not continue. That objection was decided in favour of the judgment debtor on the 4th December 1915.

On the 7th December 1915 the widow Sarat Kumari applied to be made a party as the legal representative of her deceased husband and on the same day her application was granted.

For some reason not made apparent to us, possibly as the result of some faulty arrangement of the record, notwithstanding the final decree of 19th August 1914 which has never been vacated, the widow's application was treated as an application for a final decree.

The judgment-debtor thereupon objected that the widow's application not having been made within six months from the date of her husband's death the suit had abated and also that her application was barred by the 3 years' rule of limitation contained in Article 181 of the 1st Schedule to the Limitation Act.

The District Judge by his order of the 25th September 1916 gave effect to both these contentions and it is against that order that the present second appeal is preferred.

On the facts which we have set out above, it appears to us that unless and until he could succeed in having the final decree of 19th August 1914 set aside, the judgment-debtor should not have been permitted to advance these objections. That final decree was made on the application of the surviving decree-holders for themselves and as the persons who at the judgment-debtor's own instance had been accepted by the Court as the legal representatives of the deceased decree holder. It was further made after notice to the judgment-debtor and cannot be attacked in execution proceedings. Even, however, if the widow's application were properly regarded as one for a final decree, it should, in our opinion, have been referred back to the judgment-debtor's original application for substitution or dealt with under Order XXII, rule 9, and should next have been considered as in continuation of the application of the 30th June 1914 and therefore as within time.

We, therefore, decree this appeal with costs, set aside the order of the District Judge and direct that the appellants be at liberty to proceed with the execution of the final decree in their favour. We assess the hearing fee at 5 gold *mohurs*.

The appeal having been decreed, the connected application is rejected.

Appeal allowed;
Order set aside.

VYTHINATHIEN v. PADMANABHA PATTAR.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS Nos. 290 AND 292 OF 1916.

February 1, 1918.

Present:—Mr. Justice Oldfield and Mr. Justice Sadasiva Aiyar.

VYTHINATHIEN — PLAINTIFF—APPELLANT

versus

PADMANABHA PATTAR AND OTHERS — DEFENDANTS—RESPONDENTS.

Malabar Law—Melcharth, *execution of, by* devaswom *agent—Consideration, application of, for purposes of* devaswom Melkanomdar, *duty of, to enquire as to application of funds—Recital in deed as to nature of executant's control over* devaswom, *whether renders* melcharth *unenforceable.*

A Melcharth executed by the agent of a Devaswom is not unenforceable merely because the executant describes the nature of his control over the Devaswom

The grant of a Melcharth by the trustee of a Devaswom is an ordinary incident of its management, the propriety of which the Melkanomdar is under no obligation to scrutinise and the latter is not bound to enquire into the existence of any particular necessity for funds by the Devaswom or into the application of such funds by the trustee.

Second appeals against the decrees of the Court of the Subordinate Judge, South Malabar, at Palghat, in Appeal Suits Nos. 1011 and 1012 of 1914, preferred against those of the Court of the District Munsif, Alatoor, in Original Suits Nos. 426 and 427 of 1912.

Mr. *T. R. Ramachandra Aiyar*, for the Appellant.

Mr. *K. P. M. Menon*, for the Respondents.

JUDGMENT.—In these cases the question is of the validity of the two Melcharths in plaintiff's favour, executed by some of defendants on behalf of the Devaswom, of which they had control.

The lower Appellate Court's main ground of decision against plaintiff is that the Melcharths are unenforceable, because their execution with recitals in them regarding the nature of the executant's control over the Devaswom was a step towards carrying out a scheme for their aggrandisement by setting up the private nature of their trust and was, therefore, a breach of that trust. We have not been shown authority, which would justify such a decision; and we cannot accept it especially as, in our opinion, defendants' further case also, that plaintiff acted in bad faith, is not supported by evidence.

As regards the last mentioned point, the lower Appellate Court found that consideration passed for the Melcharths. But it held that such consideration "was not utilised for the benefit of the Devaswom and that plaintiff, therefore, was not shown to have taken the document *bona fide*," because the debt alleged as having been discharged with the money was not shown to have been binding on the Devaswom. The lower Appellate Court overlooked the facts that the terms of the *kanoms*, with which the Melcharths were connected, had elapsed, and that, therefore, the grant of the latter was an ordinary incident of the management, the propriety of which the plaintiff was under no obligation to scrutinise further; and, as was observed in the judgment in Second Appeal No. 965 of 1903, 'persons dealing with the agent of a Devaswom in such matters of every-day management are not bound to enquire into the existence of any particular necessity for funds by the Devaswom or into the application of such funds by the agent.' We, therefore, dissent from the lower Court's conclusion on this point also.

The lower Court's decrees must be set aside. Plaintiff is entitled to preliminary decrees for redemption with reference to the lower Appellate Court's other findings, which have not been disputed, and to the amount which may be ascertained by the lower Appellate Court for future *purapad*. The appeals are remanded to the lower Appellate Court, in order that it may pass preliminary redemption decrees in the light of the foregoing. Each party will pay his own costs in the lower Courts, except that plaintiff and defendants will respectively pay half the Commissioner's fee in the District Munsif's Court. First to 3rd defendants will pay plaintiff's costs in this Court. The Receiver will have his costs from the estate.

M. C. P.

Appeal allowed; *Suits remanded.*

DHRUPAD CHANDRA KOLEY v. HARINATH SINGHA ROY.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 466, 467, 468, 469, 470 AND 471 OF 1916.

March 23, 1918.

Present:—Mr. Justice Richardson and Mr. Justice Walmsley.

IN No. 466 OF 1916.

DHRUPAD CHANDRA KOLEY AND OTHERS—DEFENDANTS—APPELLANTS

versus

HARINATH SINGHA ROY—PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII B. C. of 1885), s. 52—Additional rent for excess land, suit for—Burden of proof—Appeal, second—Finding of fact based on conjecture, whether binding—Suits, several, tried together—Conduct of one defendant, whether affects others.

In a suit under section 52 of the Bengal Tenancy Act for additional rent, the burden of proving an increase in "area for which rent has been previously paid" is on the landlord. Speaking generally, he may discharge the burden in two ways:—

(1) By proving that the tenant is in possession of excess land outside the boundaries of land originally settled with him, for instance, land obtained by encroachment or alluvial increment.

(2) By proving that at the original settlement of the land rent was fixed at a rate per *bigha* or other unit of measurement or at differential rates according to the quality of the land and so forth and that in fact and substance the agreement was that the tenant should pay at that rate or at those rates for all the land of which he was put in possession according to its true area, and by further proving that the existing rent is less than the rent payable under such agreement. [p. 662, col. 1.]

The rent might be a consolidated rent, even if it was calculated at so much per measured or estimated *bigha*. The question would depend on the true intention of the parties, to be gathered in the absence of a written instrument from all the circumstances. Where, however, it is proved that the tenant is holding land outside and beyond the original boundaries, the question as to the rent being a consolidated rent cannot well arise except possibly in connection with land gained by alluvion. [p. 662, col. 1.]

Where several suits instituted by the landlord for additional rent under section 52 of the Bengal Tenancy Act against several tenants were tried together without objection by the tenants-defendants, and one of the latter did not produce the *chitta* which was in his possession:

Held, that as the evidence given, so far as it was general in its character, applied to all the suits and all the defendants or sets of defendants were sailing in the same boat, and none of them dissociated himself from the defendant who did not produce the *chitta* or at any rate displayed any anxiety to forego any advantage that might accrue from his conduct, they were all alike affected by his conduct in the suit. [p. 662, col. 2; p. 663, col. 1.]

A finding of fact based not on the evidence but on surmise and conjecture is open to question in second appeal. [p. 663, col. 1.]

In a suit under section 52 of the Bengal Tenancy Act for additional rent for excess area when the landlord proves the existence of an excess area, a case is made out for the increase of rent which must be met by the tenants. [p. 664, col. 1.]

Appeal against the decree of the Subordinate Judge, Hooghly, dated the 9th September 1915, reversing the decree of the Munsif at Serampur, dated the 29th August 1914.

FACTS of the case appear from the judgment.

Babu *Bepin Behary Ghosh* (with him Babu *Narendra Nath Chowdhury*), for the Appellants.—This second appeal arises out of a suit under section 52 of the Bengal Tenancy Act for additional rent, on the ground that the tenants are in possession of the land "proved by measurement to be in excess of the area for which rent has been previously paid." The suit has been decreed by the lower Appellate Court and the tenants-defendants have preferred this second appeal. Several suits against several tenants were tried together in the lower Court. One of the defendants in one of the suits did not produce the *chitta* of the year 1227, which is said to have been in his possession. The Subordinate Judge in the lower Appellate Court draws an unfavourable inference against all the tenants-defendants in all the suits from the fact of non-production of that *chitta*. This *chitta* was in the possession of only one of the defendants in one of the suits. The other defendants in the other suits were not in a position to produce that *chitta*. Why should they be affected by the non-production of the *chitta*? The decision of the Subordinate Judge rests not on the evidence adduced in the case but on surmises and conjectures. He speculated as to the effect which the production of the *chitta* would have had and decided the case according to his speculation. I submit his findings, in so far as they are based not on evidence but on surmises and conjectures, are not binding even in second appeal. The burden of proof has been wrongly placed upon the tenants. The tenancies in suit are very old and the tenants have been holding the land at the same rent for over 100 years. The learned Subordinate Judge did not take into consideration the age of the

tenancies and thus failed to carry out the direction laid down in clause 2 (*c*) of section 52 of the Bengal Tenancy Act. The landlord must show that the land was let out by actual measurement and the rent was fixed on the basis of that measurement, but the tenants have been found by a subsequent measurement to be in possession of more land than was let out to them. There is no finding to this effect in the judgment of the lower Appellate Court.

Referred to *Rajkumar Pratap Sahay* v. *Ram Lal Singh* (1), *Uma Singh* v. *Rai Tarini Prosad Bahadur* (2).

Babu *Surendra Chandra Sen* (with him Babu *Kaisari Singh Roy*), for the Respondent.—In a suit for additional rent for excess land the landlord is entitled to a decree when he proves that land which is found in the possession of the tenants is in excess of the land for which they were paying rent before. The principal point to be considered in such a case is whether the area was taken as the basis for the purpose of fixing the rent. The exact area, as found in the landlord's *chitta*, was the area upon which rent was settled. Now it is found that the tenants are in possession of more lands. Therefore, they are bound to pay additional rent. The lower Appellate Court has found that the Mahal was actually measured and that the tenants were in possession of more lands either by encroachment on contiguous lands or otherwise. The decision of the Subordinate Judge as to the area originally let out and the area which is now in the possession of the tenants cannot be questioned in second appeal. The decision is based on evidence and not on surmises and conjectures. It cannot be said that the learned Subordinate Judge erred in law, when he drew an unfavourable inference against the defendants' cases in several suits from the fact that one of the defendants in one of the suits did not produce his *chitta* which was in his possession. That particular *chitta* the other defendants in other suits might not have been able to produce. Bnt the conclusion of the learned Subordinate Judge was that the other defendants in the other suits had also *chittas* which they did not produce in the Court in support of their cases. This was a perfectly reasonable conclusion, which cannot be questioned in second appeal.

Babu *Bepin Behary Ghose* gave reply.

JUDGMENT.

RICHARDSON, J.—This second appeal arises out of a suit brought under section 52 of the Bengal Tenancy Act for enhancement of rent, on the ground that the tenants are in possession of land "proved by measurement to be in excess of the area for which rent has been previously paid".

Gouri Pattra's case (*Gouri Pattra* v. *H. R. Reily*) (3) is the ruling authority upon the main principles governing such a claim. It is true that clauses (5) and (6) have since been added to the section, clause (5) by the Amending Act, 1898, and clause (6) by the Amending Act of 1907. But clause (5) merely corrects a misapprehension which had arisen in regard to a particular passage in the judgment in *Gouri Pattra's case* (3) [*Rajkumar* v. *Ram Lal* (1)], and clause (6) only applies when such a practice has been proved by the landlord or tenant as is mentioned in the clause.

If regard be had to the terms of the section itself the question in every case, the landlord being the claimant, is whether the tenant is in possession of land "in excess of the area for which rent has been previously paid by him" [section 52 (1) (*a*)]. Light is thrown on the meaning of the words by clause (2). That clause lays down that "in determining the area for which rent has been previously paid, the Court shall, if so required by any party to the suit, have regard to" four matters, of which I need only mention three:

"(*a*) The origin and conditions of the tenancy, for instance whether the rent was a consolidated rent for the entire tenure or holding."

* * * * * * * * * * * *

"(*c*) the length of time during which the tenancy lasted without dispute as to rent or area", and

"(*d*) the length of the measure used or in local use at the time or the origin of the tenancy as compared with that used or in local use at the time of the institution of the suit."

The burden of proving an increase in "the area, for which rent has been previously

(1) 5 C. L. J. 538 at p. 540.

(2) 25 Ind. Cas. 532; 19 C. L. J. 451 at p. 452.

(3) 20 C. 579; 10 Ind. Dec. (N. S.) 392.

paid" is on the landlord. Speaking generally, he may discharge the burden in two ways:—

(1) By proving that the tenant is in possession of excess land outside the boundaries of the land originally settled with him, for instance land obtained by encroachment or alluvial increment.

(2) By proving that at the original settlement of the land the rent was fixed at a rate per *bigha* or other unit of measurement or at differential rates according to the quality of the land and so forth, and that in fact and substance the agreement was that the tenant should pay at that rate or at those rates for all the land of which he was put in possession according to its true area, and by further proving that the existing rent is less than the rent payable under such agreement.

It is in connection with this second method of proving a right to increase of rent that questions may arise under clause (2) (a) as to the conditions of the tenancy and whether the rent originally fixed was or was not a consolidated rent for the whole area. The rent might be a consolidated rent, even if it was calculated at so much per measured or estimated *bigha*. The question would depend on the true intention of the parties to be gathered, in the absence of a written instrument, from all the circumstances. When, however, it is proved that the tenant is holding land outside and beyond the original boundaries, the question as to the rent being a consolidated rent cannot well arise, except possibly in connection with land gained by alluvion.

This second method is that to which the learned Judges in *Gouri Pattra's case* (3) refer, when they speak of the landlord showing "that the previous settlement was made on the basis of a measurement and the rates of rent as applied to the area then determined, while on a fresh measurement made by the same length of measure it has been found that he is entitled to receive additional rent which by carelessness or neglect or some other reason he had hitherto lost."

In *Rajendra Lal Goswami* v. *Chunder Bhusan Goswami* (4) Banerjee, J., said that the words "the area for which rent has been previously paid" mean the area with reference to which the rent previously paid had been assessed or adjusted. That was a case where enhancement was claimed by the first method but the language is applicable also to the second method. The cases as I understand are brought together in this sense in the judgment of Coxe, J., in *Akbar Ali Mian* v. *Hira Bibi* (5), in which N. Chatterjea, J., concurred.

The case of *Lakhi Narain Saronyi* v. *Sri Ram Chandra Bhunya* (6) is probably to be regarded as an example of the first method available to the landlord, but if it be assumed that the tenant then had been holding the same land throughout and that the area of the land was in the first instance wrongly or inaccurately measured or calculated, then the case would be an example of the second method.

As to the effect of clause (6) with which we are not immediately concerned, reference may be made to *Um Singh* v. *Rai Tarini Prosad Bahadur* (2), where *Lakhi Narain's case* (6) is cited.

I have said so much because it seemed necessary, for the purposes of the case before us, to endeavour to obtain a clear understanding of what the law is. I come now to the present case. In the lower appellate Court the plaintiff has secured an enhancement of rent and before us the tenants, the defendants, are the appellants.

The first objection taken on their behalf to the judgment of the learned Subordinate Judge in the lower Appellate Court is this. There were several suits tried together. The Subordinate Judge says that a defendant in one of the suits, Nirod Koley, had in his possession a *chitta* of the year 1227, which he failed to produce when called upon to do so. The Subordinate Judge refers to this document as the suppressed *chitta*, and the complaint made is that he has fastened upon the tenant defendants in all the suits a responsibility for the non-production of the *chitta* which ought to belong to Nirod Koley alone. It remains, however, that the suits were tried together without objection by the defendants. The evidence given, so far as it was general in its

(4) 6 C. W. N. 318.

(5) 15 Ind. Cas 332; 16 C. L J 182

(6) 11 Ind. Cas. 212; 15 C. W. N. 921; 14 C. L J. 146.

character, applied to all the suits. The several defendants or sets of defendants were all sailing in the same boat. No defendant dissociated himself from Nirod Koley. In the circumstances it would be difficult to say that the defendants were not all alike affected by his conduct, at any rate, none of them displayed any anxiety to forego any advantage that might accrue therefrom.

Then it is objected that the Subordinate Judge has decided the case not on the evidence but on surmise and conjecture, and that no doubt raises a question which is open in second appeal.

It is said for instance that the *chitta* of 1227 is a myth and there is no evidence to establish the existence of such a document. But the Subordinate Judge says that Nirod Koley and his father and uncle were *gomastas* under previous *patnidars*, and he refers to evidence that "this *chitta*, be it the original or the copy, was invariably consulted by the tenants of the Mahal whenever the transfer of a holding took place and the Koley charged a fee for this reference." It is clear that the document so consulted should have been produced.

Then again it is said the Subordinate Judge has speculated as to the effect of the *chitta* and his conclusions must be rejected. The case stands thus:—

In the year 1305, the Mahal of which the plaintiff is now *patnidar* came directly under the Burdwan Raj and a *hastabud* or rent roll was prepared by the officer of the Raj. As to this the Subordinate Judge says:—

"The area and annual rent of such each holding are given in this *hastabud* and the tenants not only testified to the accuracy of the entries by their respective signatures but by accepting rent receipts for a considerable number of years without any protest."

The Subordinate Judge has, no doubt, used the suppression of the *chitta* as a ground for inferring that the areas mentioned in the *hastabud* and the *dakhilas* were taken from the *chitta*. He refers to the evidence of Adhar Koley, one of the tenants, who, speaking apparently for all the tenants, said that the quantity of land stated in the *dakhilas* was correct and that he could not say how the quantity of land was incorporated in the *dakhilas*. The Subordinate Judge goes on:—

"His statements strike at the root of the defendants' *dabsurat* theory"—that is, that the areas were entered according to common repute—"and show that these minute specifications of areas and the annual rents in the rent receipts were taken from the *chitta* of 1227, which the defendants have intentionally suppressed, and were the result of a measurement to which the present defendants or their predecessors-in-interest were parties. If the areas had been put down by report as is urged by the defendants, one would have expected to find them in round numbers and not in scrupulously accurate and exact quantities running to *koras* and *krantis*."

In that way he arrives at the conclusion that the rent had originally been assessed on a basis of measurement and finds in effect that, whichever of the above two methods be adopted, the present area of the holdings is in excess of the area for which rent had been previously paid. His own words are:—

"There is no dispute as to the standard of measurement, and the increase in the areas [as ascertained by a Commissioner who made a local enquiry] must be due to the gradual encroachment on the jungle and waste lands of the Mahal *or to erroneous or fraudulent measurement on the previous occasion*." [The italics are mine.]

There is no doubt a distinction, however difficult it may be to define, between inference and speculation, but I cannot see that the Subordinate Judge in coming to that finding exceeded the boundaries of legitimate inference from the facts and circumstances disclosed on the record. If I am correct in that view, the finding is conclusive in second appeal.

Objection is next taken to a subsequent passage in the judgment, which shows, it is argued, that the Subordinate Judge erroneously placed the burden of proof on the tenants. The passage runs:—

"The existence of the excess area is a proved fact and it is not for the landlord to explain how it came about, and this increase may be due to many events such as encroachment on the adjoining waste or *khas* land, etc. Unless it is established by very satisfactory and reliable evidence that

the rent was a consolidated one for an area within specified boundaries irrespective of its precise quantity, the landlord is entitled to claim additional rent for the excess lands"

What the learned Subordinate Judge means is that the proof by the landlord of the existence of excess area shifted the burden and raised a case which the tenants had to meet. He was merely following the decision of this Court in the case, already cited, of *Lakhi Narain Sarongi* v. *Sri Ram Chandra Bhunya* (6). Though he does not expressly refer to the case, his language clearly shows that he had it before him. If therefore, the finding as to excess area be accepted, there is no substance in the objection that the Subordinate Judge misplaced the burden of proof.

Then remains only one point. It is said that these are old tenancies and that the tenants represented that they had been holding the same land at the same rent for about one hundred years. It is suggested that the Subordinate Judge took no account of the age of the tenancies and thereby failed to carry out the direction given to him by clause 2 (*c*) But the mere fact that he does not refer to the point in his judgment does not show that he did not consider it. He traced the tenancies to the *chitta* of 1227 and other parts of his judgment show that the provisions of section 52 as a whole were present to his mind.

On the whole I am of opinion that though the case may be near the border line, no sufficient ground is shown for our interference in second appeal and that this and the analogous appeals should be dismissed. As to costs, in the circumstances we propose to make no order as to the costs of this appeal.

WALMSLEY, J.—I agree that these appeals must be dismissed, but I do so with considerable reluctance. The reasons given by the lower Appellate Court for believing that the holdings were measured in 1227 B. S. are not at all convincing and there are other difficulties which he has dealt with very lightly. We cannot, however, go behind his findings in this case, because it is impossible to say that there is no evidence to warrant them.

Appeals dismissed.

MADRAS HIGH COURT.

CIVIL APPEAL No. 43 OF 1917.

November 23, 1917.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Oldfield.

GOUWRI—PLAINTIFF—APPELLANT

versus

NARAINA MUCHINTHAYA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Will—Legatee of specific property—Mesne profits, date of accrual of—Interest, award of, on mesne profits, legality of—Probate and Administration Act (V of 1881), s. 120.

A legatee under a Will to whom specific property has been devised, is entitled to mesne profits thereon from the date of the testator's death. [p. 665, col. 1.]

The Court will, however, not charge an executor, who has been guilty of delay in accounting, with interest on arrears of income not paid by him. [p. 665, col. 1.]

Blogg v. *Johnson*, (1867) 2 Ch. 525; 36 L. J. Ch. 859; 16 L. T. 306; 15 W. R. 626, followed.

Appeal against the decree of the Court of the District Judge, South Kanara, in Original Suit No. 5 of 1916.

Messrs. *H. Balakrishna Rau* and *Ramanath Sujir*, for the Appellant.

Mr. *B. Sitaram Rau*, for the Respondents.

JUDGMENT—The first question that we have to decide in this appeal is whether the plaintiff is entitled to mesne profits from the date of the death of the testator, under whose Will she is entitled to the property in question. The Will, Exhibit A, bequeaths the item of the property with which we are concerned in the case to the plaintiff, his daughter, who, at the time of the Will, was only two years old. The testator bequeathed the other properties, moveable and immoveable, to the defendants, who were distant cousins of his. The bequest to the plaintiff is absolute and the Will provides that the defendants are to bring about the marriage of the plaintiff with a boy named in the Will and that they are to deliver possession of the property given to her on such marriage. The property became the plaintiff's on the death of the testator; *prima facie* she is entitled to all the income from that date. There is nothing in the terms of the Will by which her right to the income of the property bequeathed to her is limited as accruing from any other date.

The District Judge was, however, of opinion that she was not entitled to mesne

profits. He seemed to think that the defendants were not to render an account of the proceeds because the Will does not specifically provide for it. On the other hand, what he ought to have held, in the absence of any specific provision in the Will showing that the legatee is not entitled to the income from the date from which the bequest came into operation, was that she would be entitled to the income from that date. Section 128 of the Probate and Administration Act is clear on the point. It lays down: 'The legatee of a specific legacy is entitled to the clear produce thereof, if any, from the testator's death.' Evidently this provision of the law was not brought to the notice of the District Judge. We must reverse his finding on issue No. 1.

Then the defendants claimed that the expenses of the plaintiff's marriage incurred by them must be allowed. We think this is a valid contention. In the Will the defendants are asked to marry the plaintiff to a boy named Subroya Kanuraya, but it does not say that they are to find the expenses of that marriage from their own pockets. If that was the intention of the testator he would have said so in so many words, as we find that he charges the defendants with the expenses necessary for certain ceremonies specified in the Will, among which the marriage of the plaintiff is not included. The learned Vakils for the appellant and respondents have agreed to Rs. 200 being fixed for expenses on account of plaintiff's marriage.

There is a finding of the District Judge that the plaintiff is entitled to interest on the arrears of mesne profits from the date of her marriage. But the law on that point seems to be what is laid down in *Blogg* v. *Johnson* (1) in these terms: "The Court will not charge an executor, who has been guilty of delay in accounting, with interest on arrears of income unpaid by him." There the cases are discussed and this rule of law is so stated. The same statement of the law is to be found in Simpson on 'The Law of Infants' at page 261. There is no authority that has been referred to which goes the other way. There are no Indian cases on the point. But the rule laid down in *Blogg* v. *Johnson* (1) seems to be reasonable and we do not find any grounds for not adopting it. The decree of the District Judge will be modified and mesne profits will be embodied in it from the date of the testator's death on 6th February 1899 and interest on the mesne profits will be allowed from December 1907. From this amount a sum of Rs. 200 will be deducted on account of the marriage expenses incurred by the defendants.

The decree will provide for proportionate costs.

M. C. P.

Appeal allowed;
Decree varied.

(1) (1867) 2 Ch. 225: 36 L. J. Ch. 859; 16 L. T. 306; 15 W. R. 626.

PATNA HIGH COURT.

FIRST CIVIL APPEAL No. 181 OF 1916.

April 11, 1918.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Jwala Prasad.

ASHARFI SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MADHABESHWAR INDRA NARAIN SAHI—DEFENDANT—RESPONDENT.

Specific Relief Act (I of 1877), s. 42—Declaration, introductory to relief for possession, nature of—Parties—Defendant not interested in property in dispute, declaration against, whether can be granted.

A. instituted a suit for declaration of title to and recovery of possession of the estate of one *K.* as his next reversionary heir after the death of *K.*'s grandmother, who had succeeded to his estate. *M.*, a cognatic relation of *K.*, was made a defendant to the suit, because in a probate proceeding relating to the Will of another separated member of the family, *M.* had claimed to be the nearest cognatic relation and had not admitted *A.*'s claim as an agnatic relation of the family. *M.* claimed no interest in the property in suit but it was alleged that he was interested in denying *A.*'s title to the estate of *B.*, another member of the family, succession to which had not yet opened:

Held, (1) that the declaration claimed, being merely introductory to a claim for possession, was not one for which legislative sanction was required and that the suit was not one under section 42 of the Specific Relief Act. [p. 667, col. 1.]

(2) that *M.* not having claimed any interest in the properties in suit, it would be an abuse of the

process of the Court to allow him to be harassed by being made a party to litigation, the only relief claimed in which was one in which he had no interest and in which he was not directly concerned, to enable the plaintiff to support a possible claim in a future litigation which might arise. [p. 667, col. 1.]

Appeal from a decision of the Subordinate Judge, 1st Court, Muzafferpore, dated the 7th August 1916.

Mr. Sharoshi Charan Mitra, for the Appellant.

Messrs. *Hasan Imam* and *Rajendra Prasad*, for the Respondents.

JUDGMENT.

MILLER, C. J.—This is an appeal from a decision of the Subordinate Judge of the first Court, Muzafferpore, dated the 7th August 1916. One of the issues framed was whether the plaintiffs had any cause of action against the defendant No. 7. With the consent of all parties this issue was tried separately, and it was argued and decided upon the assumption that the issue was whether the plaint disclosed any cause of action against defendant No. 7 and no evidence was called.

The object of the plaintiffs in bringing the suit is undoubtedly to obtain possession of certain properties the succession to which reopened on the death of *Musammat* Malikrani Koer in 1908. She succeeded her grandson Babu Krishna Pertap Indra Narain Singh, who was the last male owner. The defendants Nos. 2 to 6 are either descendants or collateral relations of Malikrani's husband but trace their descent through females and are, therefore, not agnates of the last male owner. Defendant No. 7 is also a Bandhu of the last male owner, but belongs to a more remote class than the defendants Nos. 2 to 6 and lays no claim whatever to the property in question. Defendant No. 1 claims to be the adopted son of Babu Kishen Kishore Narain Singh, a descendant in the male line from Bhagirath Jha, the common ancestor of himself and the other defendants, and if he can prove the validity of his adoption, will take in priority both to the plaintiffs and to the defendants Nos. 2 to 6 who lay claim to the property in question. The plaintiffs claim to be the direct descendants in the male line from a brother of Bhagirath Jha, one Bunwari. The relationship between Bunwari and Bhagirath Jha is disputed by the defendants Nos. 1 to 6. Before the plaintiffs can succeed against the defendants Nos. 2 to 6 they must prove that Bunwari and Bhagirath Jha were sons of the same father, and before they can succeed against defendant No. 1 it must further be found that the defendnat No. 1 was not the adopted son of Krishna Kishore Narain Singh. The relationship between the parties is made clear by reference to the genealogical trees attached to the pleadings. I have stated the above facts to shew what is the nature of the questions in dispute between the parties in the suit who lay claim to the property in question. So far as these issues are concerned, the defendant No. 7 is not a necessary party as he has at no time claimed and does not now claim any right, title or interest in the disputed property, nor could he in the circumstances by any possibility make out a title. He only asks to be dismissed from the suit and left alone.

But the plaintiffs contend that as in their plaint they ask not only for possession of the property but also for a declaration that they are the nearest *gotias* to the last male owner of the property, the suit ought to be treated as a declaratory suit under section 42 of the Specific Relief Act and they claim that they are entitled to such a declaration against defendant No. 7, because in the year 1916 defendant No. 7, in the course of probate proceedings concerning a Will propounded by the widow of Kisheu Kishore Narain Singh (defendant No. 1's adoptive father), claimed amongst others to be the nearest heir to Kishen Kishore and did not admit the plaintiffs' claim to be the nearest *gotias* related to Kishen Kishore. It should be noted that defendant No 7 is not interested to deny that the plaintiffs are not heirs to Krishna Pertap Indra Narain Singh and it does not appear that he had in terms done so The cause of action in the present suit is alleged in paragraph 12 of the plaint to have arisen in 1908, when certain events arose relating to the property now claimed and as the suit is one claiming possession of that property alone with a declaration that the plaintiffs were the nearest *gotias* of the last male owner, it is clear that the declaration is merely claimed as an adjunct to a title suit relating to that property and is not an essential part of the claim

Moreover, no claim is made for a declaration that the plaintiffs are the nearest *gotias* related to Kishen Kishore.

The object of the plaintiffs in seeking to join the defendant No. 7 as a party in these proceedings is admittedly to assist a possible claim by them in any future litigation which may arise on the death of Rani Rajbansi Koer, defendant No. 7's grandmother, when the succession to the estate of her late husband will re-open. This is a matter entirely unconnected with the claim in the present suit. This is not a suit for a declaration such as is contemplated and sanctioned by section 42 of the Specific Relief Act. The declaration claimed is merely introductory to a claim for possession and is not one for which legislative sanction is required. Moreover, it is not a claim for a declaration as to the plaintiffs' relationship to Krishna Kishore, and in my opinion it would be an abuse of the process of the Courts to allow parties to be harassed in this way by being made parties to litigation in which the only relief claimed is that in which they have no interest and are not directly concerned. I agree with the conclusion arrived at in the Court below and I would, therefore, dismiss the appeal with costs and order that the plaint be rejected as against the defendant No. 7.

JWALA PRASAD, J.—I concur.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 3157 OF 1915.

May 28, 1917.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Smither.

KHETRA MOHAN PODDAR AND OTHERS —PLAINTIFFS—APPELLANTS

versus

ASWINI KUMAR SAHA AND OTHERS— DEFENDANTS—RESPONDENTS.

Minor, liability of, for debt incurred in carrying on ancestral trade—Minor, liability of, for partnership debt—Interest whether can be allowed as damages for detention of money—Contract Act (IX of 1872), s. 247—Interest Act XXXII of 1839.

The liability of a minor in respect of a debt incurred in carrying on an ancestral family trade, in which he is a sharer, is not greater than that of a minor admitted to a partnership, as laid down by section 247 of the Contract Act. Therefore, a minor, on whose behalf an ancestral trade is carried on, is not personally liable for the debts incurred in such trade. His liability is limited to his share in the trade. [p. 668, col. 1.]

It is open to a Court to award damages for wrongful detention of money after adjustment of accounts even though interest is not recoverable either under a contract or under the provisions of the Interest Act. [p. 668, col. 2.]

Appeal against the decree of the Subordinate Judge, Noakhali, dated the 30th August 1915, reversing that of the Munsif, 2nd Court, at Sudharam, dated the 30th May 1914.

Babu *Gobinda Chandra De Roy*, for the Appellants.

Babu *Bhagirath Chandra Dass*, for the Respondents.

JUDGMENT.—The main question involved in this appeal is whether a minor, on whose behalf an ancestral trade is carried on, is personally liable for debts incurred in such business.

It appears that one Bhaja Krishna, the father of the defendants Nos. 1 and 2 who had a Karbar in cloth, used to purchase cloth from the plaintiff's firm. On his death the defendant No. 1, his elder son, for himself and his younger brother, the defendant No. 2, who was and is still a minor, carried on the business and took cloth on credit from the plaintiff's firm. The plaintiff brought the suit out of which this appeal arises for recovery of Rs. 460-10-6, which was found due from the defendants on adjustment of accounts, and also for Rs. 82-5-6 as interest on the said sum.

The Court of first instance allowed the principal claimed together with damages at 1 per cent. in lieu of interest against both the defendants. On appeal, the learned Subordinate Judge held that the defendant No. 2 was not personally liable, and gave a decree against the defendant No. 1 and the assets of the shop. He disallowed interest as no written notice was served upon the defendants that interest would be charged. The plaintiffs have appealed to this Court.

We are of opinion that the Court below is right in holding that the minor is not

personally liable. Section 247 of the Contract Act lays down that "a person who is under the age of majority, according to the law to which he is subject, may be admitted to the benefits of partnership, but cannot be made personally liable for any obligation of the firm, but the share of such minor in the property of the firm is liable for the obligations of the firm." That section refers to a case where a minor is admitted by contract into a partnership business. But as pointed out in the case of *Joykisto Cowar* v. *Nittyanund Nundy* (1), "on principle there ought not to be any difference between the nature of the liability of an infant admitted by contract into a partnership business and that of one on whose behalf an ancestral trade is carried on by a manager", and that the "limit of the infant's liability which has been adopted by the Legislature in the case of a minor being admitted by contract into a partnership business ought to be adopted in such a case as the present." It was accordingly held in that case that a minor Hindu, on whose behalf a trade is carried on, is not personally liable for the debts incurred in such trade, but his share therein is alone liable. See also *Ram Partab Samrathrai* v. *Foolibai* (2).

These cases were decided before it was settled by the Judicial Committee in the case of *Mohori Bibee* v. *Dharmodas Ghose* (3) that a minor cannot make any contract at all. In view of that decision a minor cannot really be a partner. It is unnecessary, however, to consider in this case whether the provisions of section 247 of the Contract Act have in any way been affected by the above decision. We think that the liability of the minor in the case of an ancestral family trade is not greater than that of a minor admitted to a partnership as laid down by section 247 of the Contract Act.

We are accordingly of opinion that although his share in the assets of the shop is liable, the defendant No. 2 is not personally liable for the debt.

The next question is whether the plaintiff is entitled to interest. There was no time fixed for payment, nor was any notice given that interest would be claimed. The plaintiff, therefore, is not entitled to the benefit of the Interest Act (XXXII of 1839).

It is open, however, to the Court to award damages for wrongful detention of money, even though the claim of the plaintiff is limited to interest which is not recoverable either under a contract or under the provisions of the Interest Act. See *Mohamay Prosad* v. *Ram Khelawan Singh* (4) and the cases cited therein. The opposite view taken in *Kamalammal* v. *Peeru Meera Levvai Routhen* (5) has been dissented from in this Court. See the observations of Banerji, J., in *Surjo Narain Mukhopadhya* v. *Partap Narain Mukhopadhya* (6). See also *Saunnadanappa* v. *Shivbasawa* (7).

In the present case so long as the accounts were not adjusted, the defendant did not know what amount was to be paid. But after the adjustment of accounts had been made, and the defendant signed the *moblog-bandi*, the defendant knew the exact amount to be paid, and he did not pay it. Under the circumstances and having regard to the long time during which the plaintiff has been kept out of the money, we think some damages should be awarded for the detention of the money. In the absence of any evidence, we assess the damages at 6 per cent. per annum. The decree of the lower Appellate Court will accordingly be varied and the plaintiff will get damages at 6 per cent. on the principal sum claimed from the date of the last *moblog-bandi*. In other respects that decree will be affirmed.

Decree affirmed.

(1) 3 C. 738; 2 C. L. R. 440; 3 Ind. Jur. 117; 1 Ind. Dec. (N. S.) 1053 (F. B.)

(2) 20 B. 767 at pp. 777, 778; 10 Ind. Dec. (N. S.) 1082.

(3) 30 C. 539; 30 I. A. 114; 7 C. W. N. 441; 5 Bom. L. R. 421; 8 Sar. P. C. J. 374 (P. C.).

(4) 15 Ind. Cas. 911; 15 C. L. J. 184 at p. 687.

(5) 20 M. 481; 7 M. L. J. 263; 7 Ind. Dec. (N. S.) 341.

(6) 26 C. 955; 13 Ind. Dec. (N. S.) 1211.

(7) 31 B. 354 at p. 359; 9 Bom. L. R. 439.

SHALIGRAM SADASHEO PANDE *v.* NARAIN.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 639 OF 1916.

June 19, 1917.

Present:—Mr. Mittra, A. J. C.

SHALIGRAM SADASHEO PANDE—DEFENDANT—APPELLANT

versus

NARAIN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Contract Act (IX of 1872), s. 23, applicability of, to voidable contract—C. P. Tenancy Act (XI of 1898), s. 70—Tenancy land sold as khudkasht—*Registration contrary to law—Dispossession of vendee by landlord—Misrepresentation, damages for, suit for, maintainability of—Transfer of Property Act (IV of 1882), s. 53 (2), presumption under—Specific Relief Act (I of 1877), s. 15.*

Plaintiffs purchased under a registered sale-deed from the defendant 4-pies share in a village and 34·66 acres of land, which was described as his *khudkasht*. The land being the tenancy land of the defendant's predecessor-in-interest could not be transferred without the consent of the landlord, who dispossessed the plaintiff by an order of the Revenue Officer under section 71 of the Central Provinces Tenancy Act. The plaintiffs filed the present suit for compensation for breach of the covenant in the sale-deed which described the land as *khudkasht*. It was contended on behalf of the defendant that, the registration of the sale-deed being contrary to the provisions of section 70 of the Central Provinces Tenancy Act, the agreement was unlawful under section 23 of the Contract Act, as it had the effect of defeating the provisions of the law, and no damages could be claimed in respect of such an agreement:

Held, (1) that a transfer of occupancy and ordinary tenant rights being voidable and not absolutely void, it could not be held to be unlawful within the meaning of section 23 of the Contract Act; [p. 670, col. 2.]

(2) that even if the registration of the instrument was contrary to law, this did not affect the question of damages to which the plaintiffs were entitled for breach of the covenant in the sale-deed. [p. 670, col. 2.]

Under the provisions of section 53 (2) of the Transfer of Property Act, the vendor is deemed to contract with the buyer that the interest, which he professes to transfer, subsists and that he has power to transfer the same. [p. 671, col. 1.]

Where a vendor sells land as belonging to him and it turns out that his title was defective, he is liable to damages for breach of agreement, whether the vendee knows of the defect in the title or not. The vendee is entitled to rely upon the covenant contained in the deed and is not bound to exercise due diligence in discovering the facts. Mere knowledge or suspicion regarding the defect in title does not prevent an express or implied covenant from operating. It is only when there is a contract to the contrary that the implied covenant does not apply. [p. 671, col. 1.]

Adikesavan Naidu v. *Gurunatha Chetti*, 39 Ind. Cas. 358; 40 M. 338; 32 M. L. J. 180; (1917) M. W. N. 171; 5 L. W. 425, followed.

A right to specific performance is in the discretion of the Court and can only be claimed subject to the condition laid down in section 15 of the Specific Relief Act. But after the parties have performed the contract by executing a sale-deed and delivering possession, the rights of the parties are no longer governed by the Specific Relief Act but by the Transfer of Property Act. [p. 671, col. 1.]

Appeal against the decree passed in Civil Appeal No. 52 of 1916, decided on the 13th September 1916 by the Divisional Judge, Nerbudda Division, Hoshangabad.

Messrs. *M. B. Kinkhede* and *W. R. Furanik*, for the Appellant.

Messrs. *D. T. Mangalmoorty* and *V. R. Dhoke*, for the Respondents.

JUDGMENT.—One Tima was the recorded proprietor of eight-pies share in Mouza Dhodki. His brothers Govinda and Sadu were shown in the village papers as ordinary tenants of fields Nos. 98/1, 120/3, 121/3 and 122, area 16·13 acres. It would appear that the brothers formed a joint Hindu family. On the 6th April 1909 they mortgaged with the defendant Shaligram their eight-pies share in the village together with 34·63 acres of land described as Khudkasht, including the area just mentioned. On the 9th June 1911 they sold to the defendant Shaligram four-pies share including 34·66 acres of land described as Khudkasht for Rs. 5,400, and on the same day they sold the remaining four-pies share without any Khudkasht for Rs. 1,000 to one Chindhia. Shaligram sold to the plaintiffs on the 12th June 1912 all his interest in the village, describing the whole of the 34·66 acres of land as Khudkasht. Partition proceedings in the village were started on the 4th October 1900 and were confirmed by the Deputy Commissioner on the 10th of July 1911, and the partition came into force on the 1st June 1912. At this partition 16·13 acres of land, originally shown as the tenancy land of Govinda and Sadu, were allotted to Sheolal and Lakhmichand in proprietary right, the land being still shown as held in tenant right by Govinda and Sadu. An application was made on the 20th March 1913 to the Deputy Commissioner, under section 71 of the Central Provinces Tenancy Act, by Sheolal and Lakhmichand on the allegation that their tenants, Govinda and Sadu, had transferred their holding to the defendant Shaligram, who in his turn sold it to the

SHALIGRAM SADASHEO PANDE v. NARAIN.

plaintiffs. Shaligram was a party to these proceedings. Eventually an order was passed by the Deputy Commissioner putting the landlord in possession. The plaintiffs had actually been put in possession upon the completion of the sale and remained in possession till the 25th October 1913. The plaintiffs admit having received two crops. The present suit has been filed for compensation for breach of the covenant in the sale-deed which described the land as Khudkasht. The plaintiffs have been awarded damages, and this second appeal has been filed by the defendant.

It may be conceded, as urged before me, that the brothers Tima, Sadu and Govinda being joint, the land was their Khudkasht land and there was no question of tenancy in favour of any of them. The land upon the sale to the defendant became his Khudkasht, but unfortunately the land was allotted to the *patti* of Sheolal and Lakhmichand. It continued to remain in possession of the defendant, though Govinda and Sadu were shown as the ordinary tenants thereof. The partition came into effect on the 1st of June 1912, and on the 12th June when the defendant sold the village share to the plaintiffs, the defendant could not claim the land as his Khudkasht. Even conceding that it was the defendant's tenancy land, which seem doubtful though the defendant was actually in possession of it, he had no transferable interest in the land. The utmost the defendant could have claimed is that he was the ordinary tenant thereof. This was undoubtedly a misrepresentation, for which the plaintiffs are entitled to damages.

It is urged that the registration of the sale-deed was contrary to the provisions of section 70 of the Tenancy Act, that the agreement had the effect of defeating the provisions of the law, and that, therefore, under section 23 of the Contract Act the agreement was unlawful and no damages can be claimed in respect of such an agreement. Now section 70 of the Tenancy Act prohibits the registration of an instrument which purports to transfer the rights of an ordinary tenant. This document purported to convey Khudkasht rights, and not the rights of an ordinary tenant. It was never alleged that the parties had fraudulently described the land as Khudkasht for the purpose of evading the rule prohibiting the registration of documents relating to tenancy land: in fact it would seem that even the defendant was ignorant of the legal effect of the partition proceedings. Even if the registration of the instrument is contrary to law, this does not affect the question whether the plaintiffs are entitled to damages in respect of a contract, for in this case we are not concerned with the validity of the transfer in favour of the plaintiffs.

The view which has been taken in this Court regarding the prohibition of transfers of occupancy and ordinary tenant rights is that such transfers are voidable in the manner and to the extent provided for by the Act. It has never been held that such transfers are unlawful within the meaning of section 23 of the Contract Act. The transfers are not absolutely void. The argument based on section 23 of the Indian Contract has no force. The case relied upon [*Ismailji Yusufali* v. *Raghunath Lachiram Marwadi* (1)] has, therefore, no application, as it dealt with a contract of sub-lease without the written permission of the Collector, in contravention of the terms of the license for the manufacture of salt, which was made punishable under the Bombay Salt Act. This was clearly a case of an unlawful contract.

It is contended that the misrepresentation in this case was upon a question of law and not on a question of fact. In *Seth Gokul Dass Gopal Dass* v. *Murli* (2) cited for the appellants, their Lordships of the Privy Council held, in view of the conflicting rulings in the Indian High Courts, that there was a mistake of law in supposing that interest could be claimed after a decree, where the decree is silent on the point. Here the defendant, who was a party to the partition proceedings, knew that the land had been allotted to the *patti* of another co-sharer, that he was not even shown as his tenant and that he was merely in possession of the land. If the document had stated that the land had fallen to the *patti* of another co-sharer and the defendant had made a mistake as regards his tenancy rights over the land, the case might have been

(1) 3 Ind. Cas. 779; 33 B. 636; 11 Bom. L. R. 748.

(2) 3 C. 602; 5 I. A. 78; 2 C. L. R. 156; 3 Suth. P. C. J. 514; 3 Sar. P. C. J. 822; 2 Ind. Jur. 329; 1 Ind. Dec. (N. S.) 967 (P. C.).

different. This is a concealment of a fact. Jessel, M. R., in *Eglestfield* v. *Marquis of Londonderry* (3) say :—"A misrepresentation of law is this: when you state the facts, and state a conclusion of law, so as to distinguish between facts and law. The man who knows the facts is taken to know the law; but when you state that as a fact which no doubt involves, as most facts do, a conclusion of law, that is still a statement of fact and not a statement of law."

The plaintiffs rest their case on the provisions of section 53 (2) of the Transfer of Property Act. Under this section, the vendor is deemed to contract with the buyer that the interest, which he professes to transfer, subsists and that he has power to transfer the same. The vendor in this case had no transferable rights, even if he were the ordinary tenant of the land, his title as co-owner having ceased to exist from the 1st June 1912. *Sada Kavaur* v. *Tadepally Basaviahn* (4) was a case where there was a contract to the contrary within the meaning of section 55 of the Transfer of Property Act. There is no such contract to the contrary in the sale-deed.

It is contended that there should have been an issue as to whether the plaintiffs were aware of the defects in the title. I agree with the learned District Judge that this could have been proved under the issue regarding misrepresentation, and no evidence on the point has been given. Moreover, where the vendor sells land as belonging to him, he is liable to damages for breach of agreement, whether the vendee knows of the defect in the title or not. In other words, the vendee is entitled to rely upon the covenant contained in the deed, and is not bound to exercise due diligence in discovering the facts. Mere knowledge or suspicion regarding the defect in title does not prevent an express or implied covenant from operating. It is only when there is a contract to the contrary that the implied covenant does not apply. *Adikesavan Naidu* v. *Gurunatha Chetti* (5) supports this view.

(3) (1877) 4 Ch. D. 633 at p. 702; 35 L. T. 822; 25 W. R. 690.

(4) 30 M. 284; 1 M. L. T. 416; 17 M. L. J. 167.

(5) 39 Ind Cas. 358; 40 M. 338; 32 M. L. J. 180; (1917) M. W. N. 171; 5 L. W. 425.

Lastly it is argued that if the parties had not completed the contract of sale, and a suit had been brought for specific performance, as the plaintiffs would have had to relinquish all right to compensation for the defect, so having accepted performance of so much as could be performed under the sale-deed, the plaintiffs are not entitled to sue for compensation. Section 55 of the Specific Relief Act has no application to the question before me. A right to specific performance is in the discretion of the Court, and can only be claimed subject to the condition laid down in section 15. But after the parties perform the contract by executing a sale-deed and delivering possession, the rights of the parties are no longer governed by the Specific Relief Act but by the Transfer of Property Act, which clearly entitles the plaintiffs to damages.

The amount decreed as damages has not been questioned before me in argument. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 858 OF 1916.

August 8, 1917.

Present:—Mr. Justice Sadasiva Aiyar and Mr. Justice Phillips.

MEDISETTI VENKATASAMI—PLAINTIFF — APPELLANT

v. rsus

KUNCHALLA CHIDAMBARAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47—Defendant exonerated wrongly described as party in decree, whether party to suit Separate suit, right of.

A defendant, whose name appears in the decree without having been struck off previously from the record, is a party with respect to whom the prohibition of a separate suit enacted in section 47 of the Civil Procedure Code applies, notwithstanding that he has been exonerated by the decree passed in the suit without an adjudication on the controversial questions between him and the plaintiff. [p. 672, col. 1.]

Krishnappa Mudaly v *Periaswamy Mudaly*, 38 Ind. Cas. 287; 21 M. L. T. 121; 5 L. W. 369; 32 M. L. J. 534; 20 M. 161, not followed.

Ramaswami Sastulu v. *Kameswaramma*, 23 M. 361; 10 M. L. J. 126; 8 Ind. Dec. (N. S.) 653 (F. B.), followed.

Second appeal against the decree of the Court of the Additional Temporary Subordinate Judge, Guntur, in Appeal Suit No. 163

of 1915 (Appeal Suit No. 270 of 1915 on the file of the District Court, Guntur), preferred against the decree of the Court of the District Munsif, Ongole, in Original Suit No. 163 of 1914.

Mr. *P. Somasundram* for Mr. *V. Subramaniam Pantulu*, for the Appellant.

Mr. *P. Venkataramana Rao*, for the Respondents.

JUDGMENT.—An important question of law as to interpretation of section 47 of the Code of Civil Procedure (with the new explanation added by the Code of 1908) is involved in this appeal. The contention of Mr. Venkataramana Rao for the respondents is that the case, *Krishanappa Mudaly* v. *Periaswamy Mudali* (1), relied on by the appellant is opposed to the Full Bench decision in *Ramaswami Sastrulu* v. *Kameswaramma* (2) and to the plain language of the explanation to section 47 of the Code of Civil Procedure and ought not to be followed. We agree with Mr. Venkataramana Rao's contention, and we do not think that the anomaly pointed out at page 123(1st column) of the 21 Madras Law Times Report is a sufficient reason for overriding the plain legislative provision, which was apparently introduced in the new Code for the express purpose of enacting as law the views expressed in the decisions of the Bombay and Madras High Courts on the old section 244 (corresponding to the present section 47) and embodied in the Full Bench decision in *Ramasaswami Sastrulu* v. *Kameswaramma* (2), and of overruling by statutory enactment the decisions *contra* of the other High Courts on the question, whether a defendant whose name appears in the decree without having been struck off previously from the record is a party with respect to whom the prohibition of a separate suit enacted in section 47 (old section 244) applies, notwithstanding that he had been exonerated by the decree passed in the suit without an adjudication on the controversial questions between him and the plaintiff.

The second appeal is, therefore, dismissed with costs.

M. C. P.

Appeal dismissed.

(1) 38 Ind. Cas. 297; 21 M. L. T. 121; 5 L. W. 369; 32 M. L. J. 532; 40 M. 964.

(2) 23 M. 361; 10 M. L. J. 126; 8 Ind. Dec. (N. S.) 653 (F. B.).

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1757 OF 1916.

January 21, 1918.

Present:—Mr. Justice Bakewell and Mr. Justice Phillips.

NAGALINGAM PILLAI—PLAINTIFF—APPELLANT

versus

VADUGANATHA ASARI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Hindu Law—Succession—Dancing girl, succession to property of—Sons versus *daughters—Daughter's daughter, whether to be preferred to son.*

The property of a dancing girl will pass to her female issue first and then to her male issue.

Its devolution is by custom similar to the devolution of Stridhanam.

Consequently, a daughter's daughter succeeds to such property in preference to the son.

Kamakshi v. *Nagarathnam*, 5 M. H. C. R. 161, followed.

Second appeal against the decree of the Court of the District Judge, Madura, in Appeal Suit No. 325 of 1915, preferred against the decree of the Court of the Additional District Munsif, Madura, in Original Suit No. 242 of 1913.

Mr. *A. Krishnaswami Aiyar*, for the Appellant.

Mr. *C. V. Ananthakrishna Aiyar*, for the Respondents.

JUDGMENT.—It has been held in *Kamakshi* v. *Nagarathnam* (1) that in the dancing girl caste daughters succeed in preference to sons, and Strange in his Manual of Hindu Law says that the property of a dancing girl will pass to her female issue first and then to her male issue as in the case of other females. Although the property is not Stridhanam, its devolution is by custom similar to the devolution of Stridhanam. Consequently a daughter's daughter must be preferred to a son, just as in ordinary Hindu Law a son's son is preferred to a daughter, as in the latter sons have the preference over daughters. The District Judge is, therefore, right and this second appeal is dismissed with costs.

M. C. P.

Appeal dismissed.

(1) 5 M. H.C. R. 161.

AMBICA SINGH *v.* EMPEROR.

PATNA HIGH COURT.

CRIMINAL REVISION NO. 111 OF 1918.

April 17, 1918.

Present:—Justice Sir Ali Imam, KT.

AMBICA SINGH AND OTHERS—APPELLANTS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1908), ss. 346, 350, 537—Transfer of case from file of Magistrate not competent to try it—Trial, de novo—Accused, whether can waive right—Evidence recorded by Magistrate not competent to try case, whether can be considered—Procedure—Illegality.

Where a case is transferred from the file of a Magistrate who is not competent to try it under section 346 of the Criminal Procedure Code, there must be a trial *de novo* of the whole case, and the whole of the prosecution evidence must be recorded afresh. In such a case the accused have no power to waive their right to a trial *de novo*. The evidence recorded by the Magistrate from whose file a case is transferred under this section, having been recorded by a Magistrate who was not qualified to record it, cannot be taken into consideration by the Magistrate who actually tries the case. [p. 674, col. 1; p. 675, col. 1.]

The failure to hold the trial *de novo* in such a case is an illegality which vitiates the trial and not merely an irregularity covered by section 537, Criminal Procedure Code. [p. 675, col. 1.]

Appeal from an order of the District Judge, Saran.

Messrs. *S. Sinha* and *Parmeshwar Dayal*, for the Appellants.

The Government Advocate, for the Crown.

JUDGMENT.—The facts and circumstances out of which the present revision arises are as follows :—

One Bishun Rai lodged an information before the Police to the effect that the petitioner Ambica and his party came to oust him from a *bathan* and that in the attempt they inflicted injuries on various people and amongst them on Bishun Rai with a deadly weapon, a spear, committing thereby an offence under section 326 of the Indian Penal Code. The petitioners Ambica Singh and Bikan Singh have been convicted under section 323 of the Indian Penal Code and the third petitioner has been convicted under section 326 of the Indian Penal Code and sentenced to three months' rigorous imprisonment. Their convictions have been upheld by the Sessions Judge of Chapra.

Mr. Sinha appearing on behalf of the petitioners assails the conviction and sentence passed on these persons principally upon two grounds.

Mr. Sinha's contention is that on the finding of the learned Sessions Judge I should hold that there was a right of private defence in the accused and that, therefore, the conviction should fail. He has drawn my attention to certain portions of the judgment of the lower Appellate Court, and it appears that on the findings there can be little doubt that the case for the prosecution was materially false. The learned Judge has held that the story that the accused persons proceeded to the *bathan* of Bishun Rai to oust him is totally false. He holds that the interference was on the part of Bishun Rai's men with the accused Ambica and his party, who were peacefully engaged in ploughing or some other agricultural operation on their own land. There is, however, a further finding which very largely affects the contention raised by the learned Counsel. The finding is that when Bishun Rai came and interfered with Ambica and his party, the right of private defence was exceeded by Ambica and his men. The finding on this question is:—"In fact I find the prosecution story of the actual assault to be true and I am unable to hold that Bishun Rai gave any such provocation or made any such resistance as would justify the use of the force actually employed."

In this connection Mr. Sinha has drawn my attention to the fact that one of the prosecution witnesses had admitted that the spear wound attributed to Ramdewan had in fact been caused by another man called Kari Singh. This the learned Judge refused to accept and has held that the wound in question was inflicted by Ramdewan himself. On the findings of the learned Judge, therefore, it is quite evident that although Ambica and his party had the right of private defence as against interference on the part of Bishun Rai, yet that right was exceeded. It is impossible for me, therefore, in the face of this finding to accept the contention of Mr. Sinha that the conviction of these men, because of the original right of private defence having been exercised, is unsustainable.

The second branch of the argument of Mr. Sinha, however, stands on a very different footing. Mr. Sinha raises the question of the illegality of the trial before the Magistrate who tried this case and

convicted the accused. In order to explain the position taken by Mr. Sinha it will be necessary to refer to one or two incidents that took place before the trial concluded.

It appears that the Sub-Divisional Magistrate of Chapra who took cognisance of this case made it over for disposal to Mr. A. Amir. This officer proceeded with the recording of the evidence on behalf of the prosecution, and thereafter felt that possibly the medical evidence that was to be produced before him might show that it was a case that would fall under sections 148 and 326 of the Indian Penal Code. He, therefore, drew the attention of the Sub-Divisional Officer to what he expected. Thereupon the Sub-Divisional Officer desired him to take the medical evidence. The officer in question, however, proceeded to take the evidence of a large number of prosecution witnesses and ultimately that of the medical witness. The medical evidence revealed the fact that there was an offence committed under section 326 of the Indian Penal Code. The case was then again referred to the Sub-Divisional Officer, who transferred it to his own file and then made it over to Mr. J. C. Bose for trial. This is the officer who tried the case.

Before, however, sending the case to Mr. J. C. Bose for trial, the Sub-Divisional Officer appears to have satisfied himself as regards the disposition of the accused with reference to a *de novo* trial. I find in his order sheet of the 25th January the following words:—"The accused will not apply for a *de novo* trial." On the same day from an order passed by Mr. J. C. Bose it appears that he received the seizin of the case from the Sub-Divisional Officer. In this order sheet also it is recorded that the accused did not desire to have a *de novo* trial. The trial before Mr. J. C. Bose proceeded from the stage at which it had been stopped by Mr. Amir. Mr. Sinha's contention is that the accused are not permitted to waive any right which under the law is given to them. Reliance is placed by Mr. Sinha on *Deputy Legal Remembrancer* v. *Upendra Kumar Ghose* (1), *Upendra Nath Mandal* v. *Rampal* (2), *Muhammad* v. *Emperor* (3), *King-Emperor* v. *Sakharam Pandurang* (4). Mr. Sinha contends that the case is not covered by section 350 of the Criminal Procedure Code and that the removal of the case from the file of Mr. Amir to that of Mr. Bose was made under section 346 of that Code. The learned Government Advocate, who appears in support of the conviction, concedes the proposition that section 350 of the Code is inapplicable to the present case. It is pointed out by Mr. Sinha that section 346 contemplates a case where a Magistrate proceeding with an enquiry or trial before him finds on the evidence that the case is one as to warrant a presumption that it should be tried by some other Magistrate in the district. He contends, therefore, that the language of section 346 clearly establishes the proposition that the Magistrate who originally proceeded with the trial was one that was not qualified to go on with it. With reference to section 350 on the other hand Mr. Sinha points out that the Magistrate who ceased to have jurisdiction was qualified to try the case and was succeeded by another Magistrate who could exercise the same powers as his predecessor. On a careful examination of the language of these two sections I am of opinion that there is considerable force in the contention raised by Mr. Sinha. It is quite evident that in this case Mr. Amir, when he had the medical evidence placed before him, found that he being a Second Class Magistrate was not qualified to proceed with the trial. Therefore, the position occupied by Mr. Amir in this case would be a position distinct from the position of a Magistrate who ceased to have jurisdiction under section 350 and was succeeded by another Magistrate of equal qualification. Keeping this distinction in view Mr. Sinha contends that in a case falling under section 350 of the Code the law provides that the accused should have the option of demanding a *de novo* trial or of proceeding with it from the stage at which it was left by the Magistrate who

(1) 12 C. W. N. 140; 6 Cr. L. J. 434.

(2) 4 Ind. Cas. 436; 10 C. L. J. 482; 11 Cr. L. J. 1.

(3) 2 Cr. L. J. 369; 25 P. R. 1905 Cr.; 91 P. L. R. 1905.

(4) 26 B. 50; 3 Bom. L. R. 558.

ceased to exercise jurisdiction. In this connection it is urged that the facility that has been afforded to the accused in such cases to choose a *de novo* trial or not is based upon the consideration that the Magistrate who ceased to have jurisdiction was competent equally with the succeeding Magistrate to try them. Section 346 of the Code, according to Mr. Sinha, stands altogether on a different plane. He urges that the Magistrate who was succeeded by a competent Magistrate was one who had not the qualification and, therefore, was not competent to proceed with the case. In this connection Mr. Sinha has also drawn my attention to the section of the Code which provides for the recording of evidence. The section says that the evidence of each witness shall be taken down in writing in the language of the Court by the Magistrate or in his presence and hearing and under his personal direction and superintendence and shall be signed by the Magistrate. The learned Government Advocate contends that even if the view taken by Mr. Sinha be correct, the defect pointed out by him is only an irregularity and not an illegality. He, therefore, suggests that the irregularity is one that is covered by section 537 of the Code. He also points out that the evidence recorded by Mr. Amir and used by the Magistrate who tried the case would at the very worst mean an irregularity covered by clause *(a)* of section 537 and is curable by that section. I am unable to accept the contention of the learned Government Advocate and I do not regard the defect under consideration as a mere irregularity. I look upon it as an illegality. It is the very mode of trial that in this case has been affected. The evidence recorded by Mr. Amir in the case was not evidence recorded by a Magistrate who was qualified to try it. On the authority of *Subrahmania Ayyar* v. *King-Emperor* (5), it is an illegality that cannot be cured by section 537. My attention has been drawn to the case reported as *Ram Subhag Singh* v. *Emperor* (6). I have carefully gone through the judgments delivered in that case. They do not seem to affect the point raised by Mr. Sinha.

In the circumstances I hold that the trial of the petitioners was not in accordance with law. I, therefore, set aside the conviction and sentences passed on Ambica, Bikan and Ramdewan and send back the case to the District Magistrate of Chapra with the direction that the accused should be re-tried in accordance with law.

Retrial ordered.

(5) 25 M. 61; 11 M. L. J. 233; 3 Bom. L. R. 540; 28 I. A. 257; 5 C. W. N. 866; 2 Weir 271; 8 Sar. P. C. J. 160 (P. C.).

(6) 30 Ind. Cas. 465; 19 C. W. N. 972; 16 Cr. L. J. 641.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 68 OF 1918.

March 25, 1918.

Present:—Mr. Findlay, Offg. A. J. C.

GANPATY—APPLICANT

versus

CHIMNAJI—NON-APPLICANT.

Provincial Insolvency Act (III of 1907), s. 43 (2) (b) —Fraudulent concealment of property—Proceedings under s. 43, nature of—Charge, framing of, whether necessary.

In a proceeding under section 43 (2) of the Provincial Insolvency Act it is not essential that there should be a definite charge, finding and a conviction as a foundation for a sentence under the said provisions. All that the law requires is that the principles underlying a criminal trial should be observed in essentials. [p. 676, col. 1.]

Harihar Singh v. *Maheswar Proshad*, 27 Ind. Cas. 199; 18 C. W. N. 692; 16 Cr. L. J. 135, disapproved.

Where an insolvent who was being proceeded against under section 43 (2) (b) of the Provincial Insolvency Act was informed of the nature of the proceedings, the offence with which he was charged and of its consequences:

Held, that the essentials of a criminal trial were complied with. [p. 676, col. 2.]

Application for revision of the order of the Divisional Judge, Nagpur, dated the 20th February 1918, in Miscellaneous Civil Appeal No. 5 of 1918, in Insolvency Proceedings.

Mr. *Gangadhar Sitaram*, for the Applicant.

ORDER.—The present applicant for revision Ganpaty was sentenced to three months' simple imprisonment by the Subordinate

Judge, Nagpur, under section 43 (2) (*b*) of the Provincial Insolvency Act in respect of his having concealed in the insolvency proceedings certain property alleged to be his. His appeal to the Divisional Judge was dismissed on the 20th February 1918. On revision to this Court the main position taken ups has been that the proceedings, as held by the Subordinate Judge, were not carried on the analogy of proceedings under the Criminal Procedure Code, that the burden of proof was wrongly placed on the applicant and that the applicant was prejudiced by the evidence on behalf of the opposing creditors having been recorded after the applicant's evidence had been taken. I am not, however, with all deference prepared to accept the proposition, laid down by Jenkins, C. J., in *Harihar Singh* v. *Moheswar Proshad* (1), to the effect that in a proceeding under section 43 (2) of the Provincial Insolvency Act there must be a definite charge, finding and a conviction as a foundation for a sentence under the said provisions. It seems to me that so long as the principles underlying a criminal trial are observed in essentials, this is all that the law requires.

In the present case the applicant was adjudicated an insolvent on the 20th April 1917. The learned District Judge, who was then dealing with the case, thereupon framed what was termed "issue and charge". This fell into two parts and the following was the text of the second part:—

"If the insolvent has property as alleged which is not entered in his petition, what punishment should be awarded to him under section 43 (2) (*b*) of the Act?"

A note follows to the effect that these issues are read and explained to the insolvent and "it is made clear to him that they will be treated as charges. He pleads not guilty." It is thus clear that to all intents and purposes a formal charge like that for a criminal offence was made against applicant, and further this charge and its possible consequences were explained to him.

The Subordinate Judge, however, who subsequently dealt with the case in August 1917, made the mistake of recording the evidence for the present applicant before he recorded the evidence for the creditors. Were there any reasons to suppose that the applicant had been prejudiced by this procedure, I should undoubtedly have felt compelled to remand the case for a fresh enquiry on the charge against the applicant, but after carefully examining the evidence on the record I agree with the learned Divisional Judge in thinking that even if the oral evidence produced by the creditors be entirely disregarded, there has been ample proof that the applicant has fraudulently concealed the property. Any evidence the applicant desired to offer was duly taken and so far as the findings of facts go, there is not the slightest ground for disturbing the decision come to by the two lower Courts. A further point has, however, been raised, *viz.*, that the circumstances of this case did not bring it within the purview of section 43 (2) of the Provincial Insolvency Act at all, and in this connection I have been referred to the decision of their Lordships of the Privy Council in *Chhatrapat Singh* v. *Kharag Singh* (2) as well as to the judgment of Mookerjee, J., in *Udai Chand* v. *Ram Kumar Khara* (3). As pointed out, however, by the learned Divisional Judge the Privy Council case just cited has obviously no application in the present instance. That case had no reference to proceedings under section 43 of the Act and as regards the Calcutta Weekly Notes case just quoted it does not favour the applicant as order of adjudication had already been made. What that case laid down was that the conduct of the petitioner in relation to his creditor can be taken into account only at a later stage of the proceedings, when the question of his discharge arises for consideration. What we are dealing with under section 43 is an offence which is committed against the Court, inasmuch as the petitioner has fraudulently concealed property which was in his possession or power and which it

(1) 27 Ind. Cas. 199; 18 C. W. N. 692; 16 Cr. L. J. 135.

(2) 39 Ind. Cas. 788; 15 A. L. J. 87; 21 M. L. T. 36; (1917) M. W. N. 100; 32 M. L. J. 1; 19 Bom. L. R. 174; 25 C. L. J. 215; 21 C. W. N. 497; 10 Bur. L. T. 25; 44 C. 535 (P. C.).

(3) 7 Ind. Cas. 394; 15 C. W. N. 213; 12 C. L. J. 400.

was his duty to bring to the notice of the Court.

In these circumstances I see no cause to interfere and the application for revision is dismissed.

The applicant must surrender to his bail and will be sent to the Court of the District Judge, which will have the necessary orders for his serving the remainder of the period of the sentence passed on him.

Application for revision dismissed.

PATNA HIGH COURT.
CRIMINAL REVISION No. 93 OF 1918.
April 11, 1918.
Present:—Justice Sir Ali Imam, KT.
JAGAN DUBEY AND OTHERS—CONVICTS—PETITIONERS
versus
EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 447—Trespass—Possession necessary to be determined.

For a conviction under section 447 of the Penal Code the finding on the point as to who was in possession of the land in dispute is necessary. [p. 678 col. 1.]

Where a person enters upon land, not with the object of intimidating, annoying or insulting the complainant, but in the *bona fide* assertion of his own right to remain on the land till he is ejected therefrom in accordance with law, he is not guilty of an offence under section 447 of the Penal Code. [p. 678, col. 1.]

Appeal from a decision of the Sessions Judge, Shahabad.

Mr. *M. Yunus*, for the Petitioners.
The Government Pleader, for the Crown.

JUDGMENT.—The three petitioners Jagan Dubey, Damri Dubey and Bigan Kahar were convicted under section 447 of the Indian Penal Code by the Sub-Divisional Officer of Sassaram. On appeal their conviction was upheld by the learned Sessions Judge of Shahabad. The present petition is on behalf of the three men. Mr. Yunus appearing on their behalf contends that the conviction under section 447 of the Indian Penal Code cannot be sustained on the findings of the learned Judge.

It appears that some canal side cutting lands kept by Government are from year to year settled with people and that amongst them the land with which this case is concerned was one. This land has been, it is admitted, settled with the father of the principal accused Jagan Dubey from year to year. The circumstances of the annual settlement leave little doubt that the accused believed that the renewal after the expiration of every annual lease would be a matter of course. What happened last year was that the lease expired on the 31st of March 1917. On the 5th May an application was put in by the private prosecutor Bidyapat before the Settlement Officer for the lease of the land in question. On the 7th May the settlement was made with this man and he was duly given the lease. On the 7th August 1917 Bidyapat entered upon this land. Nothing happened on that day, but on the day following the accused Jagan and the other two petitioners came to the land and ordered Bidyapat to leave the field. He refused and thereupon Jagan called upon his men to beat him. The latter ran away, on which the land was ploughed up by the accused and his party. Mr. Yunus contends that before a conviction under section 447 of the Indian Penal Code can stand, the finding on the point as to who was in possession of the land in dispute was necessary. He contends that although the last lease expired on the 31st March 1917, yet his client continued to remain in possession of this land and that he was in possession of this land when on the 8th August he came and ordered Bidyapat to leave the place. Mr. Yunus relies for this contention on a finding of fact in the judgment of the lower Appellate Court. That finding runs as follows: -

" Indeed there is little doubt that he had actually sown 'Rohini Bawag' earlier in the year between the expiry of his lease on 31st March and the first entrance of Bidyapat on the land. It would seem that at that time he was unaware that his lease would not be renewed."

On this finding he invites me to hold that the land continued to be in possession of his client.

The learned Government Pleader appearing in support of the conviction on the

other hand contends that even if the land continued to be in possession of the petitioner Jagan, in any event on the 7th August 1917, the day previous to the occurrence, Bidyapat had entered upon this land and that, therefore, on the 8th of August, when Jagan came to interfere, the land was in possession of Bidyapat and, therefore, Jagan came and entered upon land in possession of the complainant Bidyapat. I am, therefore, asked to hold that on the 8th August, when the petitioner came to this land, he came as a trespasser. I find from the judgment of the lower Appellate Court that on the 7th August when Bidyapat entered upon this land there was no obstruction, but there is evidence to show that before that threats had been used by Jagan against Bidyapat.

In answer to this Mr. Yunus contends that the fact that after the expiration of the lease the land had been actually cultivated by his client and further the fact that his client had threatened Bidyapat against entering upon this land, show clearly that his client was not only in possession of the land but was also asserting it against Bidyapat and anybody else who might obtain or try to obtain a lease of it from the canal authorities. He also contends that if nothing happened on the 7th August, that might be due to the fact that the complainant came to the land without the knowledge of the accused. On the finding of the lower Appellate Court I cannot but come to the conclusion that the petitioner Jagan continued to be in possession of this land after the expiry of his lease. In the circumstances I am coerced to hold that on the 8th August, when he came and drove Bidyapat out of the land, he did so in the *bona fide* belief that he being in possession of the land was entitled to remain on it till duly ejected. On the facts of this case, therefore, there is substance in the contention that the entry of Jagan on the land in question was not with the object of intimidating, annoying or insulting Bidyapat, but was in the *bona fide* assertion of his own right to remain on the land till he was ejected therefrom in accordance with law.

For these reasons I hold that the conviction under section 447 of the Indian Penal Code of the petitioners is unsustainable. The conviction and sentences as against these petitioners are set aside.

Conviction set aside.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 2 OF 1918.

March 14, 1918.

Present:—Mr. Lindsay, J. C.

GUR BAKHSH TEWARI—ACCUSED—APPLICANT

versus

EMPEROR—COMPLAINANT.

Criminal Procedure Code (Act V of 1898), ss. 537, 540—Prosecution evidence recorded after defence evidence closed—Procedure, legality of Revision—High Court, interference by

In a criminal trial after the evidence for the defence had closed, the Magistrate examined certain witnesses for the prosecution giving at the same time full liberty to the accused to cross-examine them:

Held, that in revision it was not proper for the High Court, having regard to sections 537 and 540 of the Code of Criminal Procedure, to interfere with the Magistrate's order on this ground [p 679, col. 1.]

Appeal against the order of the District Magistrate, Gonda, dated the 18th October 1917, upholding the order of the Deputy Magistrate of 1st Class, Gonda, dated the 28th August 1917.

Mr. *S. P. Kain*, for the Applicant.

The Government Pleader, for the Crown.

JUDGMENT.—This application has already been before me, and on the last occasion on which the learned Counsel was heard on behalf of the applicant, I adjourned the case for the purpose of inquiring into certain circumstances which were brought to my notice in the course of argument. It was complained on behalf of the applicant that witnesses for the prosecution were allowed to be called after the defence evidence had closed. The fact is apparent from the order of the Magistrate who tried the case. I thought it desirable, however, to instruct the Government Pleader to ascertain, if he could, the reasons which led to this somewhat unusual procedure on the part of the Magistrate. The Magistrate

has sent up an explanation disclosing the circumstances in which he thought it necessary to allow this further evidence to be called, and he points out that the accused had been given a full opportunity of cross-examining the witnesses who were produced at this late stage. He refers in his explanation to a ruling of the Calcutta High Court which is reported as *Queen* v. *Belilios* (1). I have also been referred to a somewhat similar case which is referred to as *Ananda Chunder Singh* v. *Basu Mudh* (2). There it was held that a Magistrate was strictly within his right under section 540 of the Code of Criminal Procedure in receiving fresh evidence, after evidence on both sides had been taken and the case had been adjourned for judgment. As their Lordships pointed out in that case, section 540 of the Code of Criminal Procedure gives very wide powers. In any case it seems to me that under the provisions of section 537 it is not proper for me to interfere with the order on this ground, as I am unable to hold that the accused was in any way prejudiced.

As regards the rest of the case, there appears to be plenty of evidence upon the record upon which it was open to the Courts below to find that the applicant was liable to be bound over to give security. The application is dismissed.

Application dismissed.

(1) 20 W. R. Cr. 6'; 12 B. L. R. 249.
(2) 24 C. 167; 12 Ind. Dec. (N. S.) 777.

PATNA HIGH COURT.

CIVIL REVISION CASE No. 6 OF 1918.

April 8, 1918.

Present:—Justice Sir Ali Imam, KT.

BHAIRO PRASAD—PETITIONER

versus

HARIHAR PRASAD—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 195 (7)—Sanction to prosecute granted by Subordinate Judge—Appeal, forum of—District Judge or High Court—Jurisdiction.

Where a sanction to prosecute is granted or refused by a Subordinate Judge, an appeal against the order lies to the District Judge, and not to the High Court, even where the value of the suit out of which the proceeding for sanction has arisen is beyond the appellate jurisdiction of the District Judge. [p. 680, col. 1.]

Civil revision from an order of the District Judge, Saran.

Mr. *Ram Prasad*, for the Appellant.

Messrs. *P. K. Sen* and *Sivanandan Rai*, for the Opposite Party.

JUDGMENT.—The facts of this case are shortly these. The petitioner was defendant in an account suit before the Subordinate Judge of Saran and the opposite party was the plaintiff. The suit was valued at Rs. 19,000. It appears that there was a compromise recorded and the defendant was under the compromise to pay Rs. 4,000 to the plaintiff. Some payments were made, and it appears that at one stage of the case an application was made by the plaintiff to execute the compromise decree to the extent of about Rs. 3,000. A question was raised before the Subordinate Judge as to whether or not by the various payments made by the defendant the decree obtained had been satisfied. This question culminated in an application by the defendant to the Subordinate Judge, praying for sanction to prosecute the plaintiff under various sections of the Indian Penal Code, and amongst them section 210 of that Code. The learned Subordinate Judge duly granted the sanction under the latter section.

There was an appeal preferred by the plaintiff to the learned District Judge praying for revocation of that sanction. The learned District Judge entertained the application and revoked the sanction granted by the learned Subordinate Judge. The petitioner, being dissatisfied with the order of revocation passed by the learned District Judge, has approached this Court and prays for the setting aside of that order. His application was admitted on the ground that the learned Judge had no jurisdiction to entertain an application with reference to a decree made in a suit valued at above Rs. 5,000.

The contention of the petitioner is that the District Judge had no jurisdiction to revoke the sanction. Babu Ram Prasad, who appears on behlf of the petitioner, contends that on a proper interpretation of section 21 of Act XII of 1887 it would be clear that the District Judge is not the authority to whom appeal from the Sub-

ordinate Judge ordinarily lies, and he contends that if that proposition be sound, under sub-clause (*a*) of sub-section 7 of section 195 of the Code the District Judge would have no jurisdiction. I have carefully examined the language of section 21 of that Act. It is evident that the Legislature intended to classify the cases under which appeals would lie to the District Judge and to the High Court respectively. The Legislature also makes it quite clear that the position of any proceeding arising out of an original suit should be on the same plane with the suit itself in matters of appeals therefrom. A reading of section 21 of that Act, therefore, gives the result that all original suits not exceeding in value Rs. 5,000 or any procedure arising out of such suit would be subject to the appellate jurisdiction of the District Judge and that any other case, whether an original suit or any proceeding arising therefrom, would be subject to the appellate jurisdiction of the Hight Court. Reading, as I do, this section, I feel no hesitation in holding that the learned Subordinate Judge's Court is one from which some appeals lie to the High Court and some to the District Judge. In view of the provision contained in section 195, clause (*a*), sub-clause (*a*), it is evident that the Court of inferior appellate jurisdiction would be the Court to which application for revocation of sanction must be made. I, therefore, hold that the District Judge had jurisdiction to entertain the application on which he passed his order revoking the sanction granted by the Subordinate Judge.

Babu Ram Prasad contends that inasmuch as the proceeding, in the course of which the alleged offence was committed and with reference to which sanction was given, was one in execution of a decree in an original suit of the value of more than Rs. 19,000, the jurisdiction of the District Judge was barred. This is a contention with which I am unable to be in sympathy. The point is concluded by the decision given in *Maduray Pillay* v. *Elderton* (1) and *Ganga Dei* v. *Sher Singh* (2). These authorities have laid down that the valuation of the original suit, or for the matter of that of the proceeding arising therefrom, is immaterial to the question as to the Court to which an application under section 195 of the Code of Criminal Procedure for revocation or for order granting sanction should be made. As I have held before, the question of valuation of the suit is of no importance for the disposal of the present application. The point is concluded by the language of sub-clause (*a*), sub-section (7) of section 195 of the Code.

In the circumstances the application is rejected.

Application rejected.

(1) 22 C. 487; 11 Ind. Dec. (N. S.) 325.

(2) 17 A. 51; A. W. N. (1894) 201; 8 Ind. Dec. (N.S.) 357.

CALCUTTA HIGH COURT.

CRIMINAL MISCELLANEOUS CASE No. 27 OF 1918.

March 8, 1918.

Present:—Justice Sir Charles Chitty, KT., and Mr. Justice Smither.

SRILAL CHAMARIA AND ANOTHER—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 526—Transfer of case—Magistrate, necessary witness for defence, effect of.

In applying for the transfer of a case on the ground that the Magistrate before whom it is pending is a witness for the defence, the accused must satisfy the High Court that the Magistrate will be a necessary and essential witness for the defence. [p. 683, col. 1.]

Application for transfer of the case from the Court of the Third Presidency Magistrate, Calcutta, to some other Magistrate.

FACTS appear from the judgment.

Mr. *Camell*, for the Crown.—Mr. K. B. Das Gupta, the Third Presidency Magistrate of Calcutta, the trying Magistrate in this case from whose Court the case is sought to be transferred on the ground that it is necessary for the accused to cite him as a witness in this case, has got nothing to do with the enquiry into the case. The case relied on in support of the petitioners' case, *viz.*, the case of *Emperor* v. *Abdul Latif* (1), is distinguishable from the facts and circumstances of this case. The present Rule was obtained by the petitioner on certain

(1) 26 A. 536; A. W. N. (1904) 94; 1 Cr. L. J. 338.

misstatement of facts. Karuna, as appears from the explanation given by the Magistrate, never worked under Mr. Das Gupta, and Mr. Das Gupta had never any opportunity or chance of knowing the conduct and character of Karuna. The case can, on no account, be transferred unless the petitioner can satisfy the Court that the trying Magistrate, whom he desires to call as a witness, will be a necessary and essential witness for the defence—that but for his evidence the accused will be seriously prejudiced. In this case nothing has been established from which it can be said that the Magistrate, in whose Court the case against the accused is pending, is or will be competent to give any evidence on any matter relevant to the facts of this case. As Karuna never came into direct contact with Mr. Das Gupta, so Mr. Das Gupta would not be in a position to express any opinion as to Karuna's credibility as a witness, so that there is no ground or reason for the transfer of the case from the file of Mr. Das Gupta, who has frankly admitted in his explanation that he has no desire to try the case but that on the contrary it would be a great relief to him if it were transferred from his file. There are authorities to show that when an accused person wants to get a case transferred from the Court of a particular Magistrate on the ground that he wants to cite the Magistrate as a witness for the defence, the ground of application for the transfer and the necessity for transfer should be scrutinized carefully and cautiously, otherwise it would be very easy for every accused person to get transfers on frivolous grounds. There is nothing on the record to justify the transfer of the case. The sole question is whether the Magistrate can give material evidence in this case, and it has been found, after due consideration of all the facts on the record, that he is not in a position to give any such evidence. The Magistrate has exercised his judicial discretion in the case, and nothing has been shown which can justify your Lordships' interference.

Sir *B. C. Mitter* (with him Babus *Monmotha Nath Mukherjee* and *Bhibhuti Bhusan Saha*), for the Petitioners.—It appears from the record that the Magistrate in whose Court the case is pending is competent to give his opinion about the credibility and conduct of Karuna and Girija, the witnesses for the prosecution. The Magistrate is, therefore, a person who can be cited as a witness for the defence to give his evidence upon a relevant fact of the case. How can the petitioners' application under section 257 of the Criminal Procedure Code be rejected, when it appears from the evidence of one of the witnesses for the prosecution that Mr. Das Gupta, the Magistrate, is capable of giving evidence on a relevant fact, *viz.*, as regards the conduct and credibility of Karuna? This case is stronger than the case of *Emperor* v. *Abdul Latif* (1). In that case the Magistrate swore an affidavit that he was not competent to give any evidence on any relevant or material fact, yet the application for transfer was allowed. Here it has been elicited from the witness for the prosecution that the Magistrate can say which of the officers, including Karuna, is worthy of credit. The evidence on the record entitles the petitioner to call the Magistrate as a witness. The application for the transfer cannot be rejected merely on the basis of an extra-judicial explanation of the Magistrate that he is not in a position to say anything about any relevant fact in the case. The application under section 257, Criminal Procedure Code, cannot be rejected unless it is shown to be vexatious or for the purpose of causing delay or for defeating the ends of justice. There is no doubt that this particular Magistrate Mr. Das Gupta is capable of testifying to the general character, conduct and reputation of Karuna, and under section 257, Criminal Procedure Code, the accused person can enforce the appearance of the Magistrate as a witness, and, therefore, the case should be transferred from the Court of the trying Magistrate to the Court of some other Magistrate. The accused, whose position is always one of delicacy and suspense, should not be deprived of his right to call a witness for the defence who is competent to depose on a relevant fact.

[SMITHER, J.—You cannot claim transfer as a matter of course. There must be some substantial reason for the transfer.]

Quite so. If I can show that the particular Magistrate can testify to the credibility

of a principal witness for the prosecution, I am entitled to cite that Magistrate as a witness and so necessarily the case is to be transferred from the Court of the Magistrate, whom I want to call as a witness, to the Court of some other Magistrate. For the ends of justice the application should be allowed.

JUDGMENT.

CHITTY, J.—The question before us on this Rule is whether the case now pending against the petitioners before Mr. K. B. Das Gupta should not be transferred to some other Magistrate, on the ground that that gentleman is a necessary witness for the defence. In applying for a transfer of this kind I think that an accused must satisfy this Court that the Magistrate whom he desires to call as a witness will be a necessary and essential witness for the defence. In this case the accused say that the Magistrate is required to give his evidence as to the credit of another witness Karuna Bhusan Banerjee, who is no doubt one of the principal witnesses for the prosecution, and that his evidence will be admissible under section 155 (1) of the Evidence Act. In support of this application they have put forward certain facts which they claim to have elicited from the witness Girija in cross-examination. It is not suggested that the witness Girija has said anything in his examination-in-chief which is relevant to the present enquiry into the guilt of the petitioners. It is, therefore, unnecessary for the petitioners to impeach Girija's credit in the way that they suggest. Their application is solely having reference to the evidence of Karuna. We have been taken through the evidence of Girija more than once by Sir B. C. Mitter, but we are quite unable to find in that evidence any definite statement that Karuna was either a Bench clerk of Mr. Das Gupta, which admittedly he never was, or that he was so brought into contact with him in the office that Mr. Das Gupta would be in a position to express any opinion as to his credibility as a witness. Mr. Das Gupta himself has submitted an explanation to this Court in which, at the outset, he frankly admits that he has no desire to try the case, but that on the contrary it would be a great relief to him if it were transferred from his file. But, taking the facts alleged in the petition, he gives them one and all a categorical denial. It appears from his explanation that, during the years that he has been at Lall Bazar, at Jorabagan and at Bankshall Street, Karuna Bhusan Banerjee has never worked under him in any capacity either in his Court or in any office of which he has been in charge. He never worked as his Bench clerk or interpreter or process-clerk, nor did he work in the Jorabagan office when Mr. Das Gupta was in charge of that office, nor in the copying department or accounts department or in the record room of which the Magistrate has been in charge for over two years. The Magistrate further states that he had no occasion to know anything about his conduct or credibility as he never worked under him and that he held no enquiry regarding his conduct in any matter in any of the Courts. He adds that there is no such post as "Office Master" used by the witness Girija, possibly taking it from the cross-examining Counsel. Turning to Girija's evidence, his statements amount to this that he expresses an opinion as to Mr. Das Gupta's possible knowledge of certain subordinates in the Police Court of whom Karuna is one. He does not, however, make any statement from which it can be necessarily inferred that Karuna was at any time under Mr. Das Gupta in a way in which that Magistrate would be brought to judge of his conduct or credibility. It is said that the Magistrate has only referred to the enquiry into Karuna's own defalcation, with which enquiry the Magistrate admittedly had nothing to do. It is said that there was another enquiry in 1914 into Girija's conduct. It is suggested that in that enquiry Mr. Das Gupta must have also enquired into Karuna's conduct. That enquiry was with reference to certain events which took place in the copying department. This witness cannot say whether Karuna was ever in the copying department but thinks he was either in the copying department or statistics department. He is not able to say which. There is certainly nothing to show that Karuna was in any way connected with the enquiry into Girija's conduct in 1914 or that he was in any way implicated in the charges which were then made against that clerk and other clerks in that office. It is not suggested on the part of the petitioners that the simple word of the accused is to be accepted in

matters of this kind. They must show that the Magistrate is an essential and necessary witness and they must show that to the satisfaction of this Court. In this case I am clearly of opinion that they have wholly failed to show anything of the kind. I would, therefore, discharge this Rule.

SMITHER, J.—When an accused person applies to this Court for a transfer of his case on the ground that he wishes to examine as a defence witness the Magistrate who is trying the case, I do not think that we should make the transfer as a matter of course. We should look into the question whether the Magistrate can give material evidence, and we must look into that question in this case. It is said that this Magistrate can give evidence as to the credibility of Karuna, the principal prosecution witness. The suggestion is that the Magistrate has formed an opinion about the witness, because the Magistrate has been working as a Presidency Magistrate in charge of certain offices and the witness has been working as a clerk in the Presidency Magistracy offices. But this witness has not worked under this Magistrate at all, so far as I have been able to see, either in an office under his control or as a Bench clerk. On the other hand he has worked under other Magistrates as a Bench clerk, and in offices controlled by those other Magistrates; and the proper persons to give evidence on the lines on which the defence says it wishes to examine this Magistrate are those other Magistrates—one of whom is the Chief Presidency Magistrate, who is already a witness in this case.

Rule discharged.

PUNJAB CHIEF COURT.

CRIMINAL REVISION PETITION NO. 117 OF 1918.

March 15, 1918.

Present:—Mr. Justice Scott-Smith.

DEVI DAS AND OTHERS—CONVICTS—PETITIONERS

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 96, 99—Private defence, right of—Complainant provoking fight and receiving injuries—Offence.

An attaching party went to the house of the judgment-debtor and began looking for the property when *S.* assaulted them. The consequence was a fight in which *S.* received slight injuries:

Held, that as the fight was provoked by *S.* and no very grievous injuries were inflicted upon him, the attaching party could not be said to have exceeded their right of private defence and were, therefore, not guilty of any offence. [p. 684, col. 1.]

Petition for revision, under section 439 of the Criminal Procedure Code, of the order of the Sessions Judge, Shahpur, at Sargodha, dated the 20th December 1917, modifying that of the Magistrate, 1st Class, Shahpur, dated the 30th October 1917, convicting the petitioners.

Mr. *Nand Lal*, for the Petitioners.

JUDGMENT.—In this case Devi Das, Kirpa Ram, Ramji Mal and Diwan Chand were convicted by a 1st Class Magistrate of causing grievous hurt under section 325, Indian Penal Code. Devi Das was sentenced to one month's rigorous imprisonment and to pay a fine of Rs. 500, and the remaining accused were sentenced to one month's rigorous imprisonment and to pay a fine of Rs. 100 each. They appealed to the Sessions Judge, who acquitted Diwan Chand and reduced the sentences on the other appellants to a fine of Rs. 100 each, the sentence of imprisonment being remitted. These three persons have filed an application for revision to this Court, and it is contended that on the findings of the lower Appellate Court they should have been acquitted.

The following extracts from the judgment of the learned Sessions Judge will show clearly what his opinion about the case is:—

"I do not propose to go further into the evidence which I have examined carefully. Suffice it to say that the evidence for the prosecution tells a story which I am unable to credit."

"It is admitted that accused went to the house without sticks, for they picked up sticks there."

The learned Sessions Judge goes on to say that surely Sunder Singh, who is said to have received the grievous hurt, was the person who resisted the decree-holder and his party. He says, (*a*) "It must have been Sunder Singh, who provoked the fight. That a man like Devi Das, a typical *bania*, himself assaulted Sunder Singh with a heavy stick, I decline to believe for one moment."

EMPEROR v. BIR KISHORE RAI.

(*b*). "The only truth in the evidence for the prosecution is in my opinion the statement that Sunder Singh was given some kind of a beating by the attaching party. I am inclined to the opinion that he was not badly hurt. But that he received some blows is proved by the Police record of his first report. On the other hand, the Police certainly recorded some slight signs of injury on Devi Das when he went to report at the *thana*."

(*c*). "I have not the slightest doubt that what happened was this. The attaching party went naturally to Mehr Singh's house and began looking for property. Sunder Singh resented this and probably actually assaulted Davi Das. The attaching party lost their tempers and beat Sunder Singh. * * * * * * * * * In any case the assault although certainly provoked went far beyond any right of private defence. * * * * * * * * * * * *"

(*d*). "As I put no reliance on the complainant's oral evidence regarding the actual assault, I am not prepared to uphold the conviction of Diwan Chand whose presence is not admitted by the accused."

The above extracts show that the learned Sessions Judge put no reliance upon the complainant's evidence regarding the actual assault but held that there was a fight in which the aggressor was Sunder Singh and not any of the petitioners. Having regard to the fact that he has not believed any of the oral evidence for the prosecution, it is difficult to see on what he has based his finding that the petitioners went far beyond their right of private defence. Seeing that there was a fight which was provoked by Sunder Singh and that no very serious injuries were inflicted upon him, I am unable to maintain the finding that the petitioners exceeded their right of private defence. I hold that on the lower Appellate Court's own view of what really occurred the petitioners are entitled to an acquittal.

I, therefore, allow the revision and setting aside the order of the lower Appellate Court acquit the petitioners and direct that the fines, if paid by them, be refunded.

Revision allowed.

PATNA HIGH COURT.

CIVIL REFERENCE No. 2 OF 1918.

April 12, 1918.

Present:—Mr. Justice Mullick, Justice Sir Ali Imam, KT., and Mr. Justice Thornhill.

EMPEROR—PROSECUTOR

versus

BIR KISHORE RAI—ACCUSED

Legal Practitioners Act (XVIII of 1879), s. 13 (b)—Pleader—Professional misconduct—Acting for both parties in one suit.

A Pleader, who acts for one party at one stage of a suit or proceeding and then, without the leave of the Court, acts for the opposite party in the same suit or proceeding, although he may not act out of any improper motive, is guilty of gross carelessness and disregard of the rules of the profession, amounting to gross misconduct in the discharge of professional duties within the meaning of section 13 (*b*) of the Legal Practitioners Act. [p. 685, col. 2.]

Civil reference from the District Judge of Cuttack.

The Government Advocate, for the Crown.

Messrs. *Pugh, C. C. Pal, Lalmohan Ganguli* and *Gajendra Prasad Das*, for Bir Kishore Rai.

JUDGMENT.

MULLICK, J.—This matter arises out of a reference under the Legal Practitioners Act, XVIII of 1879, from the District Judge of Cuttack regarding a Pleader named Bir Kishore Rai. The learned Judge has found the Pleader guilty of three charges under section 13, clause (*b*), of the Act and has referred the case under section 14 of the Act for our orders. Pending the investigation the learned Judge has suspended the Pleader from practice with effect from the 7th of February 1918.

The charges are three:—the first relates to a mortgage suit of 1914 in which the Pleader signed a plaint on behalf of the plaintiff and subsequently, it does not appear how long afterwards, accepted a Vakalatnama on behalf of one of the defendants, the mortgagor, and filed a written statement in which he admitted the claim of the mortgagee, although a number of the other defendants who were transferees from the mortgagor contested it. When the case went up on appeal from the decree of the Munsif, it was discovered that the Pleader had acted for both sides and upon that being brought

to the notice of the Court, the Pleader for the mortgagee, who happened to be the Pleader's father-in-law, on behalf of his client compromised with the transferee and the case was finally disposed of on that footing.

The next charge relates to Execution Case No. 219 of 1915 of the Court of the Subordinate Judge. In that case the Pleader on the 15th of March 1915 filed an execution petition on behalf of the judgment creditor; on the 10th of November 1915 he filed an application on behalf of the judgment-debtor praying for an order to set aside the sale.

The third charge relates to Execution Case No. 347 of 1914 of the Court of the Subordinate Judge of Cuttack. In that case the Pleader filed an execution petition on behalf of the decree-holder on the 2nd of April 1914; on the 9th of March 1915 he appeared on behalf of a claimant under Order XXI, rule 58, of the Civil Procedure Code whose claim was dismissed on the 10th of March 1915. The sale was held on the 16th of March 1915, and on the 13th of April 1915 the same Pleader filed a petition on behalf of the judgment-debtors to set aside the execution sale.

In the mortgage suit as well as in the two execution cases the Pleader's father-in law was engaged on the opposite side. It is urged that the conduct of the Pleader in signing the Vakalatnamas and acting for both sides in the same case was grossly improper conduct within the meaning of clause (*b*) of section 13 of the Legal Practitioners Act. The Pleader's explanation is that he acted carelessly but not with any improper motive and that in the two execution cases, as soon as the matter was brought to his notice by the Court, he immediately expressed his regret and declined to take any further part in the case on behalf of the judgment-debtors. Mr. Pugh on behalf of the Pleader urges that grossly improper conduct within the meaning of section 13 means conduct involving moral turpitude and that it does not extend to cases of negligence of the rules of the profession such as that with which the Pleader has now been charged. Now, whatever the rule may be with regard to the other branches of the legal profession, so far as Pleaders are concerned, the matter seems to have been settled in this Court by the decision of the Special Bench in *In the matter of two Pleaders* (1). In that case the matter turned upon Order III, rule 4, sub-clause (2), which enacts that "every appointment of a Pleader, when accepted, shall be filed in Court and shall be considered to be in force until determined with the leave of the Court, by a writing signed by the client or the Pleader, as the case may be, and filed in Court or until the client or the Pleader dies or until all proceedings in the suit are ended so far as regards the client." It was held by the Special Bench in the case above referred to that although the Pleader may not have acted out of any improper motive, gross carelessness and disregard of the rules of the profession cannot be overlooked and constitute gross misconduct in the discharge of professional duties within the meaning of section 13 (*b*) of the Legal Practitioners Act. The Pleader urges in his explanation that he had no intention to defraud any person and that in fact neither the plaintiff in the mortgage suit nor the judgment-creditors in the execution cases have so far raised any objection in regard to his conduct. He further brings it to our notice that this proceeding has been initiated upon information supplied by a discharged clerk of his. We are willing to accept the assurance of the Pleader that he had no fraudulent motive, but we cannot accept the explanation that his disregard of the rules was not intentional. In our opinion his disregard of the rules was gross and intentional, and we do not think that a mere warning will have the effect of impressing upon members of the Bar in the Mufassil the necessity of strict observance of the provisions of the law. We are unable to accept Mr. Pugh's contention that in order to make the Pleader liable to punishment under section 13, it is not sufficient to prove that he has intentionally disobeyed the rules but that there must be some act involving a moral stigma or proof of actual injury to a litigant. That in our view is not the law as interpreted in this Court. That

(1) 41 Ind. Cas. 328; 2 P. L. J. 259; 1 P. L. W. 83; (1917) Pat. 217; 18 Cr. L. J. 808.

In the matter of A VAKIL.

being so, the only question we have to consider is the punishment which should be inflicted in this particular case. We have taken into consideration the fact that the Pleader is a young man who at the time that he committed the offences had only been four years in practice, that he was working under the guidance perhaps of his father-in-law and that he did not realize the gravity of his offence. We think, however, that we must impose some period of suspension and that a mere warning will not be sufficient in this case. We direct that the Pleader, Babu Bir Kishore Rai, be suspended for a period of six months commencing from the 7th of February 1918.

IMAM, J.—I agree.

THORNHILL, J.—I agree.

Pleader suspended.

CALCUTTA HIGH COURT.

CIVIL RULE No. 138 OF 1918.

March 7, 1918.

Present:—Mr. Justice Fletcher and Justice Sir Shamsul Huda, KT.

In the matter of A VAKIL.

Criminal Procedure Code (Act V of 1898), ss. 195, 476—Qualifications mentioned in s. 195, whether incorporated in s. 476—Courts in the Presidency towns, power of, to act under s. 476.

Per *Curiam* (*Fletcher, J., dubitante*).—Section 476, Criminal Procedure Code, does not apply to an offence committed before a Court in presidency towns. Consequently it is not competent to the High Court, acting under section 476, to direct the prosecution of a person for the offence of forgery or abetment of forgery brought to its notice in the course of hearing an appeal in a Probate case. [p. 687, cols. 1 & 2.]

The qualifications mentioned in section 195, Criminal Procedure Code, are to be treated as incorporated in the provisions of section 476, Criminal Procedure Code. [p. 687, col. 2.]

Rule issued against a Vakil.

FACTS appear from the judgment.

Mr. *N. Sarkar* (with him Babus *Atulya Charan Bose*, *Sarat Chandra Roy Chowdhury* and *Satya Charan Sinha*), for the Vakil.—The Rule was issued by this Hon'ble Court under section 476 of the Criminal Procedure Code, but it has been held that section 476, Criminal Procedure Code, does not apply to the case of an offence before a Court within the presidency town, but the case can only be sent for enquiry or trial to the nearest Magistrate of the first class. Refers to *Kedar Nath Kar* v. *King-Emperor* (1). Further the qualifications mentioned in section 195, Criminal Procedure Code, must be read with section 476, Criminal Procedure Code. There is no doubt some conflict of decisions on this point, but the majority of the decisions supports my contention. Refers to *Jadunandan Singh* v. *Emperor* (2), *Debilal* v. *Dhajadhari Goshami* (3). A contrary view, however, was taken in *Akhil Chandra Sen* v. *Queen-Empress* (4). If your Lordships do not accept the authorities which support my contention, the case, I submit, should be referred to a Full Bench for authoritative decision.

JUDGMENT.—This is a Rule issued on a Vakil calling on him to show cause why under the provisions of section 476 of the Code of Criminal Procedure proceedings should not be taken against him in respect of the evidence given by him in Appeal from Original Decree No. 248 of 1916, or why such other order should not be made with reference to the offences committed by the said Vakil before this Court or brought to its notice in these proceedings, as to this Court may seem fit. The appeal was heard by myself and Mr. Justice Shamsul Huda. It was a Probate case, and agreeing with the decision of the learned District Judge, we found that the Will was a forgery. Sanction to prosecute the appellant in the appeal had been granted by the lower Court and, on the Will or the document said to be the Will, the Vakil's name appeared as one of the attesting witnesses. The Vakil did not give evidence in the Court below, nor did he appear before the Commissioner under the commission issued by the lower Court for the purpose of taking his evidence. He stated that the parties had informed him that they did not require his evidence. We directed him to appear before us and with the consent of all parties his evidence was taken in this Court. He swore that the signature appearing on the alleged Will, where his name appeared as one of the attesting witnesses, was not his signature. We did not agree with that view. We had before us documents which

(1) 3 C. L. J. 357; 3 Cr. L. J. 329.

(2) 4 Ind. Cas. 710; 37 C. 250; 14 C. W. N. 330; 10 C. L. J. 564; 11 Cr. L. J. 37.

(3) 9 Ind. Cas. 577; 15 C. W. N. 565; 12 Cr. L. J. 101.

(4) 22 C. 1004; 11 Ind. Dec. (N. S.) 667.

had been filed in this Court by him—Vakalatnamas—for the purpose of comparison and we came to the conclusion that the signature apparently was his. Having regard to his evidence and the circumstances of the case, we thought that we should not allow the case to rest where it was, more especially so as the person against whom this Rule was issued was a person practising in this Court as one of the qualified practitioners. We, therefore, issued the present Rule.

On the hearing of the Rule, it has been objected, *first* of all, that section 476, Criminal Procedure Code, does not apply to an offence committed before a Court in the presidency town and, *secondly*, that even if it does the qualification in section 195, Criminal Procedure Code, must be read into section 476 and, therefore, except as regards the statements made in his evidence, it would not be competent to this Court acting under section 476 to direct the prosecution of the Vakil for the offence of forging or abetting the forging of the Will. To deal with the first point first, reliance has been placed on the decision of this Court in the case of *Kedar Nath Kar* v. *King-Emperor* (1), where the learned Judge remarked: "We have considered the course which we should take in the matter. Section 476 of the Criminal Procedure Code does not appear to provide for the case of an offence before a Court in a presidency town. It empowers a Court to send a case for enquiry or trial to the nearest Magistrate of the first class. But the nearest Magistrate, namely, the Presidency Magistrate is not a Magistrate of the first class." Speaking for myself, I think that it may be open to question whether the nearest Magistrate of the first class is not a person who can be quite easily distinguished from the nearest Magistrate. The nearest Magistrate of the first class can be distinguished from all other Magistrates surrounding the High Court, whether they fall under the distinction of Presidency Magistrates salaried or not or Magistrates of a class inferior to the first. However, the decision referred to is in favour of the Vakil and in my opinion, before we can differ from that decision, it would be necessary for us to send this case for the consideration of the Full Bench. While I follow this decision with hesitation, I think in a case like the present, rather than to send the case for the decision of the Full Bench which would involve considerable time, it would be more convenient to adopt the procedure that was suggested in that case and to send the case to the Legal Remembrancer with the present judgment for such action as he may think proper.

The other point, namely, whether the qualification mentioned in section 195 ought to be read into section 476 is again a matter on which judicial decision is not all one way. There is the decision in *Akhil Chandra Sen* v. *Queen-Empress* (4). It seems to follow from the judgment that the qualification in section 195 is not to be read into the provisions of section 476. But again there is a decision the other way reported as *Jadunandan Singh* v. *Emperor* (2). There the learned Judges held, whilst recognizing that the course of decision was not all one way, that the recent decision of this Court was in favour of the view that the qualification mentioned in the former section, that is, section 195 was to be treated as incorporated in the latter provision, that is, section 476. The same view was taken in the case of *Debilal* v. *Dhajadhari Goshami* (3). Again in that conflict of authority, I think it would not be right for us in this case, specially in a case of this nature, to depart from the more recent authorities and to hold that the qualification mentioned in section 195 does not apply to section 476. That is a matter which, I think, if it has got to be determined, ought not to be determined in a case of the present nature but in some other proceedings where both sides are properly represented.

In the result, we follow the course adopted in the case of *Kedar Nath Kar* v. *King-Emperor* (1) and direct that the judgment and the papers in the case be laid before the Legal Remembrancer for enquiry and for such action as he thinks proper. In the event of the Legal Remembrancer desiring to take action in the matter, he should apply on notice to the party to be proceeded against and stating the result of such enquiry for sanction to prosecute. The Rule is discharged.

Rule discharged.

TAHER KHAN *v.* EMPEROR.

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 421 OF 1917.

August 14, 1917.

Present :—Justice Sir Charles Chitty and Mr. Justice Richardson.

TAHER KHAN AND OTHERS—PETITIONERS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss. 366, 494, 498—Abduction of married woman—"Marry", meaning of.

Section 366 of the Penal Code applies to the case of the abduction of a married woman. The word "marry" in this section has the same meaning as it has in section 494 of the Code, *i. e.*, the going through a form of marriage, whether the marriage should prove in fact legal and valid or illegal and invalid.

Criminal appeal against the order of the Sessions Judge, Faridpur, dated the 29th June 1917.

Babus *Manmatha Nath Mukerjee*, *Amarendra Nath Bose* and *Pankaj Kumar Ganguli*, for the Petitioners.

Messrs. *Orr* and *Camell*, for the Crown.

JUDGMENT.—The four appellants were tried before the Sessions Judge of Faridpur sitting with two Assessors on a charge framed under section 366, Indian Penal Code. The Assessors were for acquitting the appellants. The learned Sessions Judge has convicted them and sentenced them each to rigorous imprisonment for two years.

The actual facts are simple enough. The abducted woman Wazidunnessa had been living with her husband at Dhubri. On her husband's death she returned as a widow to live with her mother Abdunnessa at Paikandi in the Faridpur district. While there she received a proposal of marriage from one Daliladdi. The proposal was distasteful to her—Daliladdi being an old man with wife and children, and she, therefore, refused. She and her mother, however, came to the conclusion that it was desirable that she should marry a man who would reside with them and also maintain the mother. She accordingly, on the 18th April last, entered into a marriage in *nika* form with one Piziraddin. On the following day the four appellants with Daliladdi came to her house and took her away by force to the house of the appellant Mobarak Ali. There is evidence that while she was at that house, she received another proposal of marriage from Daliladdi.

The abduction took place in broad daylight and does not seem to have been accompanied with much force or violence; but there is no reason to suppose that the woman Wazidunnessa went with the appellants willingly. Both the learned Sessions Judge and the Assessors appear to have been agreed as to the facts proved in their main outline. The Assessors, however, felt some difficulty in finding that the intention charged, namely, that the woman should be compelled to marry Daliladdi against her will, had been sufficiently established by the evidence. We have been taken through the depositions of the witnesses; and, having considered those depositions, we are satisfied that the learned Sessions Judge was right in the conclusion that the accused abducted the woman with the criminal intent necessary to an offence under section 366, Indian Penal Code.

In this Court it is suggested that section 366 does not apply to the case of the abduction of a married woman. It is suggested that that might be an offence under some other section of the Code, for instance section 498. We see no reason to doubt, however, that the word 'marry' in section 366 has the same meaning as the same word has in section 494. What it means is—the going through a form of marriage, whether the marriage should prove in fact legal and valid or illegal and invalid. If the facts and the law applicable to them are as we have stated, the question in this case narrows down simply to the question of sentence.

The appellants, as we have said, have been sentenced each to two years' rigorous imprisonment. In the circumstances, that sentence seems to us to be excessive. If we reduce it, however, it is in the hope that the appellants will not molest either Wazidunnessa or her mother or husband again. If they do so, they may find themselves in a worse position than they are now. On the whole, we are of opinion that the ends of justice will be met by reducing the sentence passed on each of the accused to a sentence of rigorous imprisonment for six months; and we order accordingly.

Sentence reduced.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 273 OF 1917.

January 10, 1918.

Present:—Mr. Justice Oldfield and Mr. Justice Sadasiva Aiyar.

MUTHU KARAU VENA ALAGAPPA CHETTIAR AND OTHERS—DEFENDANTS NOS. 2, 4, 5 AND 6—APPELLANTS

versus

KANAKASABAI PILLAI AND OTHERS—PLAINTIFF AND DEFENDANTS NOS. 1 AND 7—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 32, 34—Compromise decree, breach of terms of—Damages, suit for, maintainability of—Cause of action.

A judgment-debtor, who does not voluntarily satisfy a decree, does not commit an actionable wrong for which the decree-holder can recover compensation by a separate suit.

Where, therefore, the defendant, who was under an obligation under the terms of a compromise decree to endorse certain promissory notes in plaintiff's favour, failed to do so, with the result that the promissory notes became barred:

Held, that plaintiff's remedy was to proceed in execution under Order XXI, rule 32 or rule 34, and not to seek compensation by a separate suit.

Saratmani Debee v. *Bata Krishna*, 35 C. 1100; 12 C. W. N. 614; *Kolintavita Mama Amma* v. *Kolintavita Haji Kandi*, 31 M. 37; 17 M. L. J. 543; 3 M. L. T. 97 and *Quamzal Huda* v. *Kumud Nath*, 7 Ind. Cas. 248, distinguished.

Appeal against the decree of the Court of the Temporary Subordinate Judge, Tanjore, in Appeal Suit No. 74 of 1916, preferred against the decree of the Court of the District Munsif, Negapatam, in Original Suit No. 4 of 1914.

Mr. *C. V. Anantakrishna Iyer*, for the Appellant.

Mr. *T. Nalasivam Pillai*, for the Respondents.

JUDGMENT.—This appeal can be disposed of with reference to only one of the grounds taken, that the lower Appellate Court erred in its decision in favour of plaintiff's right to proceed by suit. The 1st defendant was under obligation, under Exhibit A1, a compromise decree, to endorse certain promissory notes in plaintiff's favour and to execute a power-of-attorney and do other things within a fixed time. He did not comply with his obligation; and plaintiff, instead of compelling him to do so by process under Order XXI, rule 34 or 32, has now sued him and the present appellants, certain trustees alleged to be in possession of his property, for damages on the ground that the notes are now time-barred and worthless.

The lower Appellate Court has held that such a suit will lie on the strength of certain authorities, of which (to mention only those in which section 47 of the Civil Procedure Code of 1908 was pleaded) *Saratmani Debee* v. *Bata Krishna* (1) was decided in special circumstances and *Kolintavita Mama Amma* v. *Kolintavita Haji Kandi* (2) and *Quamzal Huda v. Kumud Nath* (3) dealt with causes of action arising subsequently to, and independently of, the decree. Here the cause of action is not that the notes are barred, but that 1st defendant failed to comply with the decree and enable plaintiff to sue on them, before they became so barred; and the authorities referred to are not in point. In the absence of authority, we are not prepared to accept the proposition involved in plaintiff's contention that a judgment-debtor, who does not voluntarily satisfy a decree, commits an actionable wrong, for which the decree-holder can recover compensation by separate suit. Taking this view, we must hold that the suit is not sustainable.

We have been asked, in the alternative, to treat the plaint, as an execution petition and to allow the plaintiff to recover damages under Order XXI, rule 32. But, apart from any objections to such execution on its merits, we are not, in view of the delay, after which this relief has been claimed, and the course of the litigation, prepared to use our discretion to do so.

The result is that the appeal is allowed, the suit being dismissed with costs throughout.

M. C. P.

Appeal allowed.

(1) 35 C. 1100; 12 C. W. N. 614.
(2) 31 M. 37; 17 M. L. J. 543; 3 M. L. T. 97.
(3) 7 Ind. Cas. 248.

BASIRUDDIN *v.* SADHU TANTI.

CALCUTTA HIGH COURT.
CIVIL RULE No. 85 OF 1918.
February 18, 1918.
Present:—Mr. Justice Richardson
and Mr. Justice Walmsley.
Sheik BASIRUDDIN—PLAINTIFF—PETITIONER
versus
Sheik SADHU TANTI—DEFENDANT—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. IX, r. 13, O. XLIII, r. 1 (d)—Compromise decree, application to set aside, by person not party to decree, nature of—Application rejected—Appeal, whether lies.

Per *Curiam* (*Richardson, J., dubitante*). An application to set aside compromise decree on the ground that the applicant was no party to the compromise and that he had given no authority to file the petition of compromise, is an application within the scope of Order IX, rule 13, Civil Procedure Code. An appeal lies from an order refusing such application.

Rule against the order of the District Judge, Midnapore, in Miscellaneous Appeal No. 169 of 1917.

FACTS appear from the judgment.

Babu *Jyotish Chandra Hazra*, for the Petitioner.—Upon the admitted facts of the case the proceedings in question were not and could not be proceedings under Order IX, rule 13, of the Civil Procedure Code as they purport to be, and so the appeal to the lower Appellate Court was not competent. The decree, as it stands, shows that it was passed on consent. So the remedy of the opposite party is not by way of an application under Order IX, rule 13. The opposite party wants to impeach the decree on the ground of fraud. Therefore, his remedy is either to bring a regular suit for setting aside the decree or to apply under Order XLVII, rule 1 of the Civil Procedure Code. The case of *Damodar Misra* v. *Hirnashi Naik* (1) is in my favour. See also the case of *Hemmo Mayee Dayee* v. *Watson & Co.* (2).

Babu *Sarada Charan Maity*, for the Opposite Party.—The defendant has got three remedies. He is not confined to the two mentioned by my learned friend on the other side. The petition to the Munsif is capable of being dealt with as an application for setting aside an *ex parte* decree under Order IX, rule 13, and it was so treated in this case. Therefore, the appeal to the District Judge against the order of the Munsif rejecting the application for setting aside the *ex parte* decree was competent. Refers to *Koroona Moyee Dossee* v. *Nubo Kishore Sein* (3), *Bholai Naskar* v. *Alach Naskar* (4), *Golab Koer* v. *Badshah Bahadur* (5).

Babu *Jyotish Chandra Hazra*, in reply.—The ruling in *Damodar Misra* v. *Hirnashi Naik* (1) is the latest case on the point and supports my contention. If your Lordships do not agree with the view taken in *Damodar Misra* v. *Hirnashi Naik* (1) the case should be referred to a Full Bench.

JUDGMENT.

RICHARDSON, J.—The petitioner in this Rule brought a suit against the opposite party and others. In that suit a petition of compromise was filed, to which the opposite party was apparently a party. Accordingly a consent decree was made founded on the petition. When the petitioner took steps to execute the decree, the opposite party applied to the trial Court to set aside the decree on the ground that as against him it was an *ex parte* decree. The learned Munsif on the merits refused the application. The opposite party then appealed to the District Judge, who took a different view of the facts and set aside the decree by his order of the 4th January 1918. That order is the subject-matter of this Rule. It is contended that the proceedings were not proceedings under Order IX, rule 13, as they purport to be and that the appeal was incompetent.

Now it is not disputed that it was open to the opposite party to apply to the trial Court to set aside the compromise decree on the ground that he was no party thereto and that he had given no authority to file the petition of compromise. The question is, what is the nature of such an application. Is it an application to the Court in its inherent jurisdiction or is it an application within the scope of Order IX, rule 13. It appears to have been held in the cases of *Koroona Moyee Dossee* v. *Nubo Kishore* (3) and *Bholai Naskar* v. *Alach Naskar* (4) that it is open to the Court to deal with

(1) 27 Ind. Cas. 227; 19 C. W. N. 118.
(2) 14 W. R. 299.
(3) 6 W. R. Mis. 36
(4) 3 C. L. J. 158.
(5) 2 Ind. Cas. 129; 13 C. W. N. 1197; 10 C. L. J. 420 at p. 440.

such an application as an application to set aside an *ex parte* decree. The case of *Hemmo Mayee Dayee* v. *Watson & Co.* (2) has perhaps an opposite tendency but that case was distinguished in the case of *Bholai Naskar* v. *Alach Naskar* (4). The subsequent case, however, of *Damodar Misra* v. *Hirnashi Naik* (1) is in direct conflict with the decision in *Bholai Naskar* v. *Alach Naskar* (4). It was held in *Damodar Misra's case* (1) that a petition to set aside a consent decree, obtained in circumstances similar to those which exist in the present case, could not be treated as a petition under Order IX, rule 13. Speaking for myself, if there had been no previous decisions, I should have preferred to adopt the view expressed in that case by Mr. Justice Stephen and Mr. Justice Mullick. The previous cases, however, were apparently not brought to their notice. There is also this to be said that the case of *Bholai Naskar* v. *Alach Naskar* (4) has been cited with approval in the subsequent cases of *Kunjo Behari Ghose* v. *Durgamoni Dassi* (6) and *Golab Koer* v. *Badshah Bahadur* (5). In the circumstances regard being had to the state of the authorities on a question which is one of procedure and not of principle, I think we ought to follow the decision in the case of *Bholai Naskar* v. *Alach Naskar* (4). If the application to the Munsif was capable of being dealt with under Order IX, rule 13, then an appeal lay to the District Judge from the Munsif's order rejecting the application and the District Judge's order cannot be successfully challenged on the merits. We cannot go behind the District Judge's finding.

The result, therefore, is that this Rule must be discharged with costs, one gold *mohur*.

WALMSLEY, J.—I agree that the Rule should be discharged. I only wish to add that I do not share my learned brother's preference for the view expressed in the case of *Damodar Misra* v. *Hirnashi Naik* (1).

Rule discharged.

(6) 3 C. L. J. 160 at p. 163.

PATNA HIGH COURT.

FIRST CIVIL APPEAL No. 213 OF 1915.

April 9, 1918.

Present:—Sir Dawson Miller, KT., Chief Justice, and Mr. Justice Jwala Prasad.

Syed ZAKIR RAZA—DEFENDANT—APPELLANT

versus

MADHUSUDAN DASS AND OTHERS—PLAINTIFFS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 59—Mortgage executed by pardanashin *lady—Attestation—Witnesses on one side of* pardah—*Muhammadan Law—Gift, validity of—Burden of proof—Mortgage suit—Title paramount, question of, whether can be gone into.*

In the case of a document executed by a *pardanashin* lady, it is not necessary that the attesting witnesses should be actually inside the *pardah*: they are deemed to be present at the execution of the document in such a case, although they may be screened off from the executant by a *pardah*. [p. 693, col. 1.]

The onus of proving the *bona fides* and validity of a gift executed by a *pardanashin* lady lies upon those seeking to claim under it. They must point out and prove the circumstances connected with the transaction. [p 693, col. 2.]

In an ordinary mortgage suit, title paramount to and independent of the mortgagor is not a necessary issue and should, as far as possible, be excluded from the trial of the suit, but that is not an absolute principle which should apply to the circumstances of each case. Where the leaving of such an issue undetermined would lead to inconvenience or hardship, it is proper that it should be tried in a mortgage suit. [p. 698, col. 1.]

Appeal from a decision of the Subordinate Judge, Purnea, dated the 15th February 1915.

Messrs. *Sultan Ahmad* and *Khurshed Hasnain*, for the Appellant.

Messrs. *R. L. Dutt* and *H. N. Singh*, for the Respondents.

JUDGMENT.

MILLER, C. J.—This is a first appeal from a judgment of the Subordinate Judge of Purnea, dated the 15th February 1915. The plaintiffs in this case are money-lenders and they instituted a suit on the 22nd September 1913 against the defendants to recover a sum of Rs. 6,435-8-0, being the principal and interest due on a mortgage-bond dated the 8th May 1909, under which certain properties of the executants of the bond were hypothecated to secure a loan of Rs. 5,000 advanced by the plaintiffs. The executants of the bond are three ladies. They were the widow and two daughters of Ausaf Ali Khan, who died in or before the year 1908 leaving two widows, three sons and two daughters, who succeeded to his property

the widows taking a 1 anna share, the daughters one-ninth of the balance and the remainder going to the sons. The estate of Ausaf Ali Khan was somewhat encumbered and he left other debts besides money due on mortgages. These ladies who succeeded in part to his estate found it necessary to borrow a sum of Rs. 3,000 to pay the rent due for their share of the estate in order to save the Patni Mahals which had been advertised for sale by the Zemindar, and there can be no doubt that the mortgage by which they hypothecated a part of their property to secure the loan was a *bona fide* transaction and justified by the necessities of the case. The widow and two daughters of Ausaf Ali Khan who executed the mortgage in favour of the plaintiffs were *Musammat* Mahmoudanissa the widow and *Musammat* Ekbalanissa and *Musammat* Syedanissa the daughters. Syedanissa is the defendant No. 1. Mahmoudanissa and Ekbalanissa died before the suit was instituted, the widow having before her death made over her property to Ekbalanissa who herself died sometime towards the end of 1912. The other defendants in the suit are the heirs of Ekbalanissa. Defendant No. 2, Zakir Raza, is her son by her first husband Mohsin Raza, who died in 1908. Defendant No. 3, Roshinara, is her daughter by her second husband, Yusuf Raza, whom she married in 1909. Defendant No. 4 is her second husband himself. There is another member of this family, named Nawab Afrosanissa Begum, who may be conveniently introduced here as she played a conspicuous part in the events which led up to the defence of the suit by defendant No. 2. Zakir Raza, the infant son of Ekbalanissa, who is the only one of the defendants who has appeared to contest the suit. Afrosanissa was Ekbalanissa's mother-in-law, being the mother of her first husband and the grandmother of Zakir Raza defendant No. 2. In 1913, she was appointed guardian of Zakir Raza by the District Judge.

The payment of the principal and interest on the mortgage bond having fallen into arrears, the present suit was instituted against the defendants and as already stated none of the defendants contested the suit except Zakir Raza, a boy of some 8 or 9 years at the time when the suit was instituted who was sued through his guardian Afrosanissa. His defence was, *first*, that the mortgage bond was invalid as it was not executed in the presence of two witnesses, and *secondly*, that Ekbalanissa his mother had transferred to him her whole interests in her father's estate including the mortgaged property by a *hiba-bil-ewaz*, dated the 17th July 1908, that is some 10 months earlier than the mortgage deed. The validity of the *hiba-bil-ewaz* was disputed by the plaintiffs. The Subordinate Judge found that the mortgage deed was duly executed and attested. He also found that the deed of gift was not a genuine document, there being no *bona fide* intention to transfer the possession of the property to the donee, and that the whole object of the transaction was to defraud the creditors of Ausaf Ali Khan whose estate he said was heavily encumbered. He was further of opinion that the three mortgaged properties were not in fact included in the deed of gift as they were not specifically mentioned in that document.

The only properties with which we are concerned in this appeal are the share which Ekbalanissa inherited from her father in the three mortgaged properties which are specified in the mortgage deed at page 5 of the paper-book and which Zakir Raza claims as his own by virtue of the *hiba-bil-ewaz*. The other mortgagors were content to let judgment go against them.

This appeal was argued at considerable length both as to the facts and as to the law and several points of law were argued before us, but as we have arrived at a clear conclusion on the facts of the case it is not necessary to deal with all the points of law which were raised by the respondents upon the assumption that a different conclusion of fact might be arrived at. As to the first point, I think the evidence was sufficient to justify the finding that the mortgage bond was duly executed and attested. It is true that the Subordinate Judge treated the scribe Sheo Nandan Das who wrote the bond and signed it as such as if he were one of the attesting witnesses to the bond. He gave evidence and said that the bond was executed in his

presence and that he saw the ladies sign, but he said that he signed it as Katib and not as a witness. But apart from him there were six people altogether who signed the mortgage bond as witnesses. Some of them have since died, but one of them Murad Buksh gave evidence as to the execution and there were in addition five other witnesses called on behalf of the plaintiffs who supported the plaintiffs' case. The story told by the plaintiffs' witnesses agreed in all material respects. It was to the effect that the bond was executed by the ladies in the presence of Murad Baksh, who was himself inside the room where the transaction took place and inside the Pardah actually in the presence of the executants at the time the deed was executed. The other attesting witnesses were on the other side of the Pardah on the verandah. The bond was read over and explained to the ladies. Ekbalanissa signed her own name and also that of Mahmoudanissa, who was illiterate and who made her mark by a thumb impression. Leakat Hussain, who was the husband of the other lady Syedanissa, signed the bond on her behalf as her guardian and he was also present inside the Pardah when the bond was executed by the other two signatories. He then took the deed to the other side of the Pardah and signed it himself on behalf of Syedanissa in the presence of the attesting witnesses, who then signed the document. The scribe Sheo Nandan was outside the Pardah, but says he caught hold of it as it was dangling in the air and saw more or less what was going on inside. He corroborates Murad Baksh as to the manner in which the deed was executed. In the case of a document executed by a Pardanashin lady it is not necessary that the witnesses should be actually inside the Pardah, and there is ample authority to the effect that they are deemed to be present at the execution of the document in such a case although they may be screened off from the executant by a Pardah. The evidence in the present case is, in my opinion, quite sufficient to prove the proper execution of the deed, and that it was attested by at least two witnesses other than the scribe Sheo Nandan.

The second defence based upon the *hiba-bil-ewaz* must also, in my opinion, fail. It is well established that the onus of proving the *bona fides* and the validity of a gift of this nature executed by a Pardanashin lady lies upon those seeking to claim under it. It appears that Ekbalanissa was living with her own people at her late father's house in the Purnea district when she heard of her husband's illness. She at once proceeded to Lucknow where her husband resided and arrived only in time to find him dead. She remained at Lucknow under the care of her mother-in-law and within one or two months of the date of her husband's death the *hiba-bil-ewaz* was executed. It purported to transfer the whole of Ekbalanissa's interest in her late father's estate together with a plot of land which she had purchased at Lucknow to her son Zakir Raza, and so far as the evidence goes there is nothing to shew that she had any other property at that time. If that is so, the effect of the transfer would be to leave her practically penniless. It is suggested, possibly with some force, that a lady in her position would in all probability be in possession of considerable jewellery and other effects. That may be so, but I have only to observe that in the present case there is no evidence at all to that effect and I may point out that it is for those who are seeking to take the benefit of a gift of this sort to prove clearly that the gift was a *bona fide* and valid document. One of the questions which is material in cases of this sort is whether the gift in fact transferred all the property of the donor or a portion only. I do not wish to imply that that question is one which in itself and alone would determine the matter. But it is one of those facts which are always taken into consideration and as I have already said, it is for those setting up the deed to point out and prove what the circumstances connected with the transaction were. Reading the evidence in this case, it seems to me that the influence of Ekbalanissa's mother-in-law Afrosanissa is apparent at every turn. The three witnesses to the deed were relations of Afrosanissa. Wazir Bahadur was her sister's husband. Ahsan Raza was her son, a boy of 12 or 13 years. Mirza Inayet Hussain was her Mukhtear-am or general agent and her brother's brother-in-law. The deed itself was written at the instance of Inayet Hussain and on his own admission he never consulted

Ekbalanissa about it or had any conversation with her in regard thereto. Moreover, the whole transaction seems to have been conducted in secrecy and in a hurry. None of the neighbours and none of Ekbalanissa's own people knew anything about it either then or for a long time afterwards. Ekbalanissa had no independent advice nor was any lawyer consulted. The consideration for the gift was a diamond ring provided by Afrosanissa and which no doubt was handed over formally to Ekbalanissa, but what happened to it afterwards is not known. The deed itself is careful to describe the transferred property as the whole interest of Ekbalanissa in her father's estate, but the specification of the properties transferred is incomplete and inaccurate and no Tauzi numbers are given. The Sub-Registrar before whom the deed was registered was not called as a witness. It is true, as has been pointed out, that one of the witnesses called on behalf of the defendants, who was the scribe who wrote out this deed, does say that when the deed was registered he read it out to Ekbalanissa in the presence of the witnesses, Ekbalanissa being at that time behind the Pardah—she is said to have signed it. That is, except for the statement on the registration itself made by the Registrar, the only evidence there is that this deed was ever read over to or explained to Ekbalanissa and it does not appear that this witness, the scribe who read over the document to Ekbalanissa, was personally acquainted with her. Afrosanissa was the only person who is alleged to have discussed the matter at all with Ekbalanissa, and she no doubt could have given very useful and material evidence as to the state of mind of Ekbalanissa before and at the time when this deed was executed, but she for some reason which has not been explained has not given evidence in this case and, therefore, we have not had the advantage of hearing from anybody anything to shew what was the real state of mind of Ekbalanissa or any evidence to shew that she had ever expressed any intention of executing a deed of this sort or that she ever fully appreciated what the effect of it was. The deed itself recites that the gift is made to Zakir Raza, a minor of tender years, through his pateral grandmother and guardian Nawab Afrosanissa Begum, and it continues in this way: "I the donor have put in my place the donee through the aforesaid guardian in possession and occupation of the gifted property and I shall get recorded the name of my son aforesaid donee in the Purnea Collectorate in the columns of Zemindars and Patnidars by getting my name removed therefrom." It may be observed here that according to the Muhammadan Law Afrosanissa was not in fact the natural guardian either of the person or property of her grandson, nor had she at that time been appointed guardian. The natural guardian of his property would be his paternal grandfather, who was alive and living apart from his wife Afrosanissa. It has been stated by the learned Vakil on behalf of the defendant that the grandfather, Afrosanissa's husband, was of unsound mind but there is no evidence of this before us, and even if it is so Afrosannissa was not the natural guardian of her grandson. This matter is perhaps not one of very great importance, and I would not refer to it but for the fact that when the defendants were confronted with the argument that Ekbalanissa's subsequent conduct in dealing with the property after the *hiba-bil-ewaz* had been executed was entirely inconsistent with that of a person who had transferred her property, because she both sold and mortgaged parts of the property in her own name, they asked us to treat this dealing of the property by Ekbalanissa as if she were herslef the guardian of her child. If that is so, it seems to me that it is entirely inconsistent with the statement in the deed itself that Afrosannissa was the guardian of Ekbalanissa's infant son. Although the deed recited that the son's name will be recorded in the Collectorate and in the columns of the Zemindari and Ekbalanissa's name will be removed therefrom, no attempt was made at any time to transfer the property to the name of Zakir Raza in the Collectorate at Purnea or in the Zemindar's *sherista*, although Ekbalanissa returned to Purnea a few months later and resided there until her death in 1912. It was contended, as I have already said, that Ekbalanissa remained in possession of the property as

guardian of her son, but even she was not the legal guardian of his property, and there is evidence that she was in possession as owner and not as guardian of Zakir Raza and that she made her own collections separately from her co-sharers, and indeed the whole of Ekbalanissa's subsequent actions point to the conclusion either that she was not aware of the effect of the deed that had been executed or that she never had any real intention of transferring the property, either of which findings would be fatal to the validity of the gift. No accounts were kept on behalf of the transferee by Ekbalanissa or by anybody else and parts of the property were sold in January 1912 by Ekbalanissa and her co-sharers for a sum between Rs. 19,000 and Rs. 20,000 in order to pay off mortgage and money decrees of an earlier date, and the Kabalas by which this property was transferred described Ekbalanissa as the owner of her share of this property and so far from making any mention of the *hiba-bil ewaz*, they recited that except for the mortgage to pay off which the proceeds of the sale were utilised, no transfer in respect of the land in question had been effected by way of sale, gift, mortgage, etc., of any sort at any place, and the property was transferred to the possession of the vendee. The Subordinate Judge found that the estate of Ausaf Ali Khan was heavily encumbered at his death and he found *inter alia* that the *hiba-bil-ewaz* was executed in order to defraud or delay the creditors of Ausaf Ali Khan. There is some justification on the evidence for arriving at this conclusion, but how far that finding may possibly be justified is a matter of opinion. There certainly was evidence that the estate was encumbered to a considerable extent, but I am not inclined to base my decision upon such a finding. There may have been some such motive in the mind of Afrosannissa which induced her to bring about the transfer, but I am not satisfied that Ekbalanissa was any party to any such proceeding, that is to say, that Ekbalanissa herself ever had any intention of executing this deed with a view to defeating the creditors. It does appear to me, however, after a careful review of the whole of the evidence, that the defendants have entirely failed to discharge the burden which is upon them of making out that Ekbalanissa knew and appreciated the effect of the deed or that she ever had any intention of passing the property to her son. At the time in question she was a young woman. Her exact age is a matter of conjecture, but probably she was not much more than about 20 years old. The circumstances under which she found herself when she arrived at her mother-in law's house were calculated to cause her acute mental distress, her husband having just died. She had none of her own people to consult with or advise her, no legal advice was taken and the only person who is alleged to have spoken to her on the subject of the gift was her mother-in-law Afrosannissa, who, as I have said, has not been called as a witness and whose interest it was to see that her grandson was provided for even at the expense of the mother. Her motives are not far to seek. Ausaf Ali Khan's estate was to some extent at all events encumbered and there were money debts in addition. Moreover, Ekbalanissa was a young woman who might marry again and have other children, as in fact happened before her death. Then again the hurry in which the whole thing was rushed through within two months at most of her husband's death, the secrecy attending the transaction, the absence of legal advice or assistance which is apparent from the careless manner in which the deed is drafted, are matters calculated to cast considerable suspicion upon the *bona fides* of those responsible for the transaction. No explanation is given of any of these matters and Afrosannissa, whose agent took a leading part, no doubt by her instructions, in carrying the matter through, is not called as a witness and the conduct of Ekbalanissa in dealing with the property after the deed was executed is entirely inconsistent with that of a person who had knowingly transferred her property to another. I have no hesitation in holding that the defendants have failed to discharge the burden of proving that the deed of gift was a *bona fide* document or that the donor ever had any intention of passing the property therein referred to.

As I said at the beginning of this judgment, there were other defences raised by the respondents upon the assumption

that the facts might be found in favour of the appellants. I have already said that in my opinion there was no intention on the part of Ekbalanissa to defraud or defeat her creditors and I need not deal further with that point, but the main contentions of the respondents in addition to those which I have already mentioned were that the gift was invalid, as no sufficient specification of the properties had been made in the document, that is to say, no sufficient specification of the mortgaged properties had been set out in the deed of gift and that in fact the mortgaged properties were not shown to have been included in the *hiba-bil-ewaz* and that under the registration law such specification is necessary, and in these circumstances the document must be taken not to have been duly registered and cannot affect the mortgaged properties. The only other point of any substance which was taken was that the deed of gift itself was void under the Muhammadan Law of Moosha, on the ground that there was confusion of the property. Having regard to the finding of fact at which I have arrived in this case it is unnecessary to deal with these points.

There is one other matter which I think I ought to deal with before concluding this judgment. It was contended, as I have said, that Ekabalnissa was really after the execution of this deed in possession of the property as guardian of her minor son and that her action in executing the two sales of a portion of the property, which it is contended had been transferred to him, was done by her on his behalf as his guardian, and that these sales were legally justified on the ground that they were made in order to pay off the debts which were due either under mortgages on the property or for money decrees obtained against the estate of Ausaf Ali Khan and that in either case she would be perfectly justified in selling the property to carry out that purpose, that the minor son would be bound by it and, therefore, that there was nothing inconsistent in her attitude in effecting these sales with the suggestion that she had in fact transferred the property to her son. Once that proposition is accepted, it becomes quite clear that the mortgage in question in this suit, which was executed in order to raise money to pay the rent of the property then due, would be equally binding upon the minor Zakir Raza and, therefore, on that ground alone it would be obvious that Zakir Raza could have no defence to this action brought on the mortgage bond. On realising where the result of their contention led and that if the dealings of Ekabalanissa were justified on the gound which I have mentioned the defendant No. 2 would have no just grounds for opposing the mortgage deed, at a late stage in the proceedings we were asked to deal with the matter solely upon that ground and to confine our decision to dismissing the suit on that ground only, and not to determine the question of whether or not the *hiba-bil-ewaz* was a valid document. We were asked to pass a decree merely in favour of the mortgage suit without deciding whether the *hiba-bil-ewaz* was a valid document or not. But as from the very start one of the issues in the case has been whether Ekbalanissa made a gift of her property to defendant No. 2, a point which the plaintiffs were quite justified in asking to have determined as it was a matter set up by the defendants themselves and as the greater part of this appeal has been argued upon the question whether or not this gift to defendant No. 2 was a valid instrument, I do not feel inclined now to dismiss that part of the case from consideration and merely to grant a decree without deciding the matters which have been raised both in the Court below and on appeal before us. To do so would, in my opinion, merely be encouraging fresh litigation upon a question of fact which has been raised and thoroughly discussed in the present suit, and, therefore, I think that in this suit we are entitled to come to a conclusion upon the question of validity or otherwise of the *hib-bil-ewaz*. In my opinion this document cannot stand and this appeal should be dismissed.

There is only one other matter which I wish to say a word about, and that is as to the form of the decree in the Court below. By the judgment of the Subordinate Judge the suit was decreed with costs and he ordered that the defendants to pay the plaintiffs this day six months what will be found due on the bond on taking an account with interest at the bond rate

during the period of grace on the principal sum, and the decree which issued in pursuance of that judgment is in the same form. It was pointed out to us that in awarding interest at the bond rate the learned Subordinate Judge has taken no account of the period between the time when the suit was instituted and the date of the judgment. This is obviously an oversight on his part, and we think it ought to be rectified and the decree ought accordingly to be in a somewhat modified form. It should be ordered that the suit be decreed with costs and that the defendants pay to the plaintiffs within six months from the date of the decree of the Subordinate Judge such sum as shall be found due on the bond on taking an account with interest at the bond rate from the date of the suit to the expiry of the period of grace on the principal sum and after the period of grace the aggregate amount will bear interest at 6 per cent. per annum. Costs will also bear interest at 6 per cent. per annum throughout. In default of payment as directed, the mortgaged properties should be sold and the sale-proceeds applied to the satisfaction of the decree according to law. The present appeal will be dismissed with costs. The respondents will also get their costs on the principal sum and interest found due between the date of institution of the suit and the date of the decree in the lower Court.

JWALA PRASAD, J.—I do not think I can usefully add to the judgment of the learned Chief Justice just delivered.

The suit out of which this appeal has arisen was an ordinary suit to recover sums due, principal and interest, on a mortgage bond, dated the 8th May 1909. Defendant No. 2, who is the appellant here, Zakir Raza, was impleaded as a party to the mortgage suit on account of his having inherited some shares in the mortgaged property from his mother Ekbalanissa. In the plaint there is no reference to the deed of gift set up by defendant No. 2, nor is there any mention of his having been made a defendant on account of his occupying any other capacity than that of an heir to Ekbalanissa. The other heirs of Ekbalanissa did not enter any appearance. Defendant No. 2, the appellant, in his written statement set up a title independent of the mortgagor Ekbalanissa, executant of the bond. He asserted that he was in possession of the mortgaged property on the strength of a deed of gift executed by his mother Ekbalanissa long prior to the mortgage bond in suit. The deed of gift was dated the 17th July 1908. The defendant, therefore, raised issue No. 2 set forth in the judgment of the Subordinate Judge, *viz.*, "whether Ekbalanissa made a gift of the property to defendant No. 2 as alleged by him, and if so, was the mortgage bond binding upon defendant No. 2." This issue was seriously pressed by the defendant No. 2 and elaborate evidence to prove the *hiba-bil-ewaz* and his title to the mortgaged property based upon that *hiba* was offered in the Court below. Upon the trial of that issue the learned Subordinate Judge held that the *hiba* set up by the defendant No. 2 was not an operative document and that it was not executed by Ekbalanissa with a view to transfer any interest in the property conveyed by the deed, and that defendant No. 2 was not in possession of the property on the strength of that deed. In the present appeal before us the same point was strenuously urged by the learned Counsel appearing on behalf of the appellant. It was not at all suggested in the course of the long address of the learned Counsel on behalf of the appellant that the said issue was improper and irrelevant and that it should not have been tried by the Court below and that we in appeal ought to refuse to determine it. Only yesterday the learned Vakil who appeared for the appellant on account of the absence of his Counsel, while replying to the arguments for the respondents, for the first time urged that the issue should be expunged from the record and that an ordinary decree based upon the mortgage bond should be given without any determination of the title of the defendant based upon the *hiba* set up by him. It is impossible to concede to the contention of the learned Vakil at this stage and to ignore the *hiba* set up by defendant No 2. According to the plaintiff he inherited a portion of the mortgaged property from his mother Ekbalanissa and had necessarily to be made a party to the suit. He, however, claimed to have acquired the property by virtue of a

deed of gift executed by Ekbalanissa in 1908, and it was for him in the first instance while filing his written statement to take up the position of an heir of Ekbalanissa or to stand upon the deed of gift set up by him. Having chosen the latter position, it was incumbent on the Court to decide that position in order to give effect to the mortgage decree that was to be passed in the case, so that the purchasers in execution sale might not be in doubt or difficulty as to the title to the property in suit. I am quite alive to the principle that in an ordinary mortgage suit, title paramount to and independent of the mortgagor is not a necessary issue and should, as far as possible, be excluded from the trial of a mortgage suit, but that is not an absolute principle which should apply to the circumstances of each case. Where the leaving of such an issue undetermined would lead to inconvenience or hardship, it is proper that it should be tried in a mortgage suit. This was the view taken in the case of *Hare Krishna Bhowmik* v. *Robert Watson and Co.* (1). The facts of that case apply to those of the present case. I, therefore, agree with the learned Chief Justice that the issue raised by the defendant No. 2 was properly decided in the Court below and should as well be decided by us in this appeal.

The defendant set up a title derived from a deed of gift executed by Ekbalanissa. There can hardly be any question that it was for him to prove that the deed was validly executed and was intended to transfer the property to him. The evidence on the point has been summarised by the learned Chief Justice and I need hardly repeat it. Suffice it to say that it has not at all been proved in this case that the document was read over and explained to Ekbalannissa, or that she executed it knowing fully the effect of the transfer of all the property then held by her, in favour of her son defendant No. 2. A faint attempt was made to prove it from the evidence of Syed Muhammad Nawab, witness No. 3, the scribe of the deed. This man belongs to the Registration Department and his profession is that of a scribe. He admits in his evidence that Ekbalanissa did not appear before him, nor did she hold any conversation with him. He, therefore, is not competent to prove that the document was explained to Ekbalanissa. Nawab Wazir Bahadur, witness No. 1, examined by commission on behalf of the defendant, a relation of Ekbalanissa, was the proper person to prove the reading over of the document and the explanation of it to Ekbalanissa. He does not say a word about it. Ahsan Raza, another witness to the deed who is referred to as having been present when the document was read over and explained to the *Musammat*, was not asked a single word about it. Afrosannissa the mother-in-law of Ekbalanissa, the only competent person who could prove the circumstances connected with the execution of the deed, has not been examined at all. It has, therefore, not at all been proved in this case that the document was properly executed by Ekbalanissa after fully understanding its nature and effect.

In the deed of gift the grandmother Afrosannissa is said to be the guardian for the purposes of the deed. The mother Ekbalanissa knew full well that under the Muhammadan Law she had no right to be the guardian of the property of her minor son, and it is with this knowledge of the law that it has been mentioned in the deed that Aforsannissa was the guardian of the minor for the purposes of that deed. Afrosannissa did not at all deal with the property on behalf of the minor. Ekbalanissa continued to be in possession on her own account. There is no reason to disbelieve the evidence on the point given by the plaintiffs' witnesses, one of whom is the Tahsildar who made the collections in respect of the property in dispute. It is futile to contend that the mother managed the property on behalf of the minor. To my mind her interest was antagonistic to that of the minor. It became so undoubtedly in the year 1909, a year after the execution of the deed of gift when she married for the second time. Her children by the second marriage are the defendants Nos. 3 and 4. Under the Muhammadan Law the mother's right to the custody of an infant is forfeited by her marrying a stranger. In 1909, therefore, after her

(1) 8 C. W. N. 365.

second marriage Ekbalanissa could not possibly be said to have been dealing with the property in the interests of her minor son, defendant No. 2. The mortgage bond itself executed by her along with her mother and sister goes to shew that she mortgaged the property not intending to act on behalf of her minor son, but in her own right as holding possession of the property as heir of Ausaf Ali Khan. This was only ten months after the execution of the deed of gift. Throughout her conduct has been that of asserting the right in her independent of or antagonistic to her being guardian of her son, defendant No. 2, as stated by the deed of gift. There can, therefore, be no doubt as to the absence of intention on her part to transfer the property by virtue of the deed of gift, which as has been shown so thoroughly by the learned Chief Justice was executed in secrecy shortly after the death of her husband at a place where she had no relations to advise her and in circumstances where she could not possibly know the consequences of divesting herself of all interest in the property. We have been through this record for a week and reading it carefully the only impression which has been left upon my mind, and I believe upon the mind of the learned Chief Justice, is that the document was not an operative document and that it was executed on the advice of Afrosannissa, for some purpose best known to her and not disclosed at the trial. Some inkling of that purpose might be had from the evidence of defence witness No. 1, Ahsan Raza, that "the document was executed because Ekbalanissa thought she was only a woman and her son only a minor and fearing lest some one else might take possession of the property she executed the *hibanama*." I have no hesitation, therefore, in agreeing with the view of the learned Chief Justice in this matter.

It is unnecessary to enter into any detail as to the contention of the learned Counsel on behalf of the appellant regarding the proof of the mortgage bond in suit. The bond was executed not only by Ekbalanissa but by her mother and her sister. The document was properly read over and explained to her, and the evidence of Murad Buksh read with the evidence of the scribe can leave no manner of doubt that the execution and attestation of the document was carried out according to the formalities prescribed by the terms of the Transfer of Property Act. I agree, therefore, that the mortgage bond was duly executed and was for a consideration of Rs. 3,000 due as rent from the property of the mortgagors. I agree that the appeal should be dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM ORDERS NOS. 368 AND 417 OF 1917.

March 21, 1918.

Present:—Mr. Justice Fletcher and Justice Sir Syed Shamsul Huda, Kt.

SURENDRA NATH SAHA—APPLICANT—APPELLANT

versus

BOLA RAM PODDAR AND ANOTHER—DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 17, 22—Sale in execution without notice to or substitution of legal representative of deceased judgment-debtor, whether invalid against other judgment-debtor—Sale of part of attached properties—Proceeds sufficient to satisfy decree—Subsequent sale of other lots, validity of.

One of several judgment-debtors died after their properties were duly attached in execution of an *ex parte* decree passed against them. The widow of the deceased judgment-debtor made an application for setting aside the *ex parte* decree, which was dismissed for default. Thereafter the decree-holder, without making an application to execute the decree against the widow of the deceased judgment-debtor and without serving a notice on her under Order XXI, rule 22, Civil Procedure Code, put up the attached properties to sale after due publication of sale processes, and they were sold to a stranger to the decree on two successive days. An application made by all the judgment-debtors including the widow of the deceased judgment-debtor to set aside the sale having been dismissed, an appeal was preferred to the High Court by the judgment-debtors excepting the widow:

Held, (1) that as the widow of the deceased judgment-debtor was not a party to the appeal, the mere fact that the sale might have been capable of being avoided or void against the widow on account of the failure of the Court to issue a notice under Order XXI, rule 22, Civil Procedure Code, could not affect the sale as against the other judgment-debtors—more especially when the appeal was preferred only on their behalf and the widow was satisfied with the judgment of the lower Court, holding that the interest of her husband was liable

SURENDRA NATH SAHA v. BOLA RAM PODDAR.

be sold in execution of a decree according to which each of the judgment-debtors was liable to pay the whole decretal amount; [p. 700, col. 2.]

(2) that the question whether the sale was invalid was *res judicata* between the purchasers in execution and the widow of the deceased judgment-debtor by reason of the decision of the Courts below, namely, that the interest that her late husband had in the property was liable to be sold in discharge of his judgment-debt so that it could not be re-opened by the other judgment-debtors in support of their contention that the whole sale was invalid on account of irregularity in conducting it as against the widow [p. 700, col. 2; p. 701, col. 1.]

Order XXI, rule 17, Civil Procedure Code, has nothing to do with the invalidity of the sale made to a stranger who bought without notice of the fact that the amount realised by a previous sale of other lots of the property attached was more than sufficient to satisfy the decree in execution. [p. 701, col. 1.]

Appeal against the orders of the District Judge, 24-Perganas, dated the 11th August 1917, affirming those of the Subordinate Judge, Alipur, dated the 24th April 1917.

Babus *Mohini Mohan Chatterjee*, for the Appellant in No. 368 of 1917.

Babu *Satish Chandra Ghatak*, for the Appellant in No. 417 of 1917.

Sir *Rash Behari Ghose*, Babus *Panchanan Ghose* and *Monmotho Nath Ganguli*, for the Respondents.

JUDGMENT.

No. 368 OF 1917.

FLETCHER, J.—This is an appeal against the decision of the learned District Judge of the 24-Perganas, dated the 11th August 1917, affirming the decision of the Subordinate Judge at Alipore. The appeal arises in this manner. The appellant along with one Keshab and others had a decree for money obtained against them on the 12th June 1915, and their property duly attached. Then Keshab died. On the 24th August 1915, Keshab's widow applied to set aside the *ex parte* decree which had been obtained on the 12th June 1915. That application was dismissed for default on the 11th March 1916. On the 20th April 1916, execution was applied for. That was followed by notices and proper publication of the sale proclamation. Eventually, on two dates, namely, on the 20th and the 21st November 1916, the property attached was sold to a stranger, the respondent to the present appeal. Thereupon, all the judgment debtors including the widow of Keshab applied to the Court of the Subordinate Judge to set aside the sale in execution. Both the Courts below have found that the attached property was sold for its full value and that there was no material irregularity in conducting the sale. It would be noticed that to this appeal Keshab's widow is not a party. She is satisfied with the judgment of the Courts below, which have found that the interest of her husband was properly sold. Now, the point that has been raised in this appeal is this: That, under the provisions of section 50, Civil Procedure Code, the Court ought to have issued notice on the widow of Keshab as being his representative and that the Court had no jurisdiction to sell the property except on an application made to the Court to execute the decree against Keshab's widow and after serving a notice on her under Order XXI, rule 22, Civil Procedure Code, and it is said that the failure of the Court to issue a notice under Order XXI, rule 22, on an application to execute the decree against Keshab's widow renders not only the sale void as regards the interest of Keshab but as regards the interest of all the judgment debtors. That is a view which, in the circumstances of the case, cannot, I think, be maintained. The decree was a decree for money obtained against these named persons described as carrying on business under a particular style, but each of the judgment debtors, according to the terms of the judgment, was liable to pay the whole of the amount and execution could be taken out as against him for the whole amount. The mere fact that the sale might have been capable of being avoided or void against Keshab's widow cannot affect the sale as against the other judgment-debtors—more especially so, when the appeal is only preferred on behalf of the other judgment-debtors and Keshab's widow is satisfied with the judgment of the Court holding that the interest of her husband was liable to be sold in satisfaction of the decretal amount. I think the view put forward by the appellant cannot be sustained. The matter as between the purchaser in execution and Keshab's widow is *res judicata* by reason of the decision of the Courts below, namely, that the interest that her late husband had in the property was liable to be sold to discharge his judgment-debtor. That point having

been adjudicated on, and finally adjudicated on, between the purchaser in execution and Keshab's widow cannot be relied upon by the other parties, who have no interest in Keshab's property at all. I think it is impossible at the instance of the present appellant to dispute the judgments of the learned Judges of the Courts below that the appellant cannot rely upon the irregularity or invalidity of the sale as against Keshab's widow.

Then, another point is made that, under the terms of Order XXI, rule 17 of the Code, the whole sale was void on the ground that the first two lots sold were more than sufficient to satisfy the decretal amount. It is stated that there are other decrees against these judgment-debtors which require satisfaction. But Order XXI, rule 17, has nothing to do with the invalidity of a sale made to a stranger who bought without notice of the fact that the amount realized by the sale was more than sufficient to satisfy the decree in execution.

No grounds have been shown to us in this case, having regard to the findings of fact made by the learned Judge of the lower Appellate Court which are binding on us, why the sale should be set aside. The present appeal, therefore, fails and is dismissed with costs. We asses the hearing fee at one hundred rupees for the auction-purchaser and at one gold *mohur* for the decree-holder.

SHAMSUL HUDA, J.—I agree.

No. 417 OF 1917.

This appeal will be governed by the above judgment. It is accordingly dismissed with costs, one hundred rupees to the auction-purchaser and one gold *mohur* to the decree-holder.

Appeal dismsissed.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 40 OF 1917.

December 10, 1917.

Present:—Mr. Justice Spencer and Mr. Justice Kumarasami Sastriar.

SUNDARA SINGH—PETITIONER—APPELLANT

versus

PAZHAMALAI PADAYACHI AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 104 (2), O. XLIII, r. 1 (j)—Petition by auction-purchaser to set aside sale, dismissal of, in appeal—Appeal, second, whether lies.

No second appeal lies against an order passed in appeal upon a petition by an auction-purchaser to set aside a sale on the ground that the judgment-debtor had no saleable interest in the property.

Appeal against the order of the District Court of South Arcot, in Civil Miscellaneous Appeal No. 9 of 1916, preferred against the order of the Court of the District Munsif, Virdhuachallam, in Execution Petition No. 1 of 1915, in First Appeal No. 3 of 1915, in Miscellaneous Petition for Revision No. 373 1915, in Original Suit No. 1536 of 1914.

Mr. *M. S. Ramanuja Ayyangar* for Mr. *V. Mahadeva Ayyar*, for the Appellant.

Mr. *V. K. Venugopala Naidu* for Mr. *K. Ramachandran*, for the Respondents.

JUDGMENT.—The appellant is a purchaser at a Court auction. No second appeal lies against an order passed in appeal upon his petition to set aside a sale by Court on the ground that the judgment-debtor had no saleable interest.

See section 104 (2) and Order XLIII, rule 1, (*j*) of the Code of Civil Procedure, and *Surendra Mohini Debi* v. *Loharam Chattopadhya* (1) and *Parameswara Aiyar* v. *Veerakutti Patter* (2) in this Court.

It is suggested for appellant that he was a representative of the judgment-debtor and that section 47, therefore, applies, but it has been held in *Nadamuni Narayana Iyengar* v. *Veerabhadra Pillai* (3) that this is not so where, as in this case, the sale was in execution of a money decree. We have been asked to treat this appeal as a petition for revision but there are no grounds for doing so. The appeal is, therefore, dismissed with costs.

M.C.P.

Appeal dismissed.

(1) 14 Ind. Cas. 67; 39 C. 687; 16 C. W. N. 570.
(2) A. A. A. O. No. 111 of 1916.
(3) 8 Ind. Cas. 429; 34 M. 417; (1910) M. W. N. 662; 9 M. L. T. 152; 21 M. L. J. 928.

DWARKA NATH DEY *v.* SAILAJA KANTA MULLIK.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 603 OF 1916.

March 12, 1918.

Present:—Mr. Justice Fletcher and Justice Sir Syed Shamsul Huda, KT.

DWARKA NATH DEY CHOWDHURY —PLAINTIFF—APPELLANT

versus

SAILAJA KANTA MULLIK—DEFENDANT —RESPONDENT.

Landlord and tenant—Suit for arrears of rent—Decree with limitation that it should not be executed against tenant personally, validity of.

Where in a suit for rent the Court finds that the defendant-tenant is liable, it should pass a decree in favour of the landlord-plaintiff in the ordinary way without any limitation as to the execution of the decree, *e. g.*, that the decree shall only be executed against the *jama* in default and not against the nant personally. [p. 703, col. 1.]

Where in a suit for rent the Court, holding that the plaintiff's evidence as to the defendant's possession of the *jama* was meagre and unsatisfactory, but was not so bad as could be wholly discarded, made a decree in favour of the landlord with the limitation that the defendant-tenant would not be personally liable under the decree:

Held, that the decree must be set aside and the case remanded for a re-hearing and a clear finding whether the defendant was or was not liable for rent in respect of the *jama*, and that on that finding there should either be a decree in the ordinary manner without any limitation or the suit should be dismissed altogether. [p. 703, col. 1.]

Appeal against the decree of the Additional Subordinate Judge, Nadia, dated the 28th September 1915, modifying the decree of the Munsif, Additional Court at Ranaghat, dated the 28th September 1915.

FACTS appear from the judgment.

Babu *Jogesh Chandra De* (with him Babu *Khitish Chunder Chakraburtty*), for the Appellant.—The appeal arises out of a suit for rent of three *jotes*. The defence was, *first*, that the plaintiff had no title to the land in suit, *secondly*, that the suit for rent was not maintainable as the boundaries of the *jotes* were not given in the plaint, *thirdly*, that there was no relationship of landlord and tenant between the parties. On all the issues raised the Court of first instance found in favour of the plaintiff, and decreed the suit in full. On appeal by the defendant, the learned Judge, holding that the plaintiff shall not be entitled to follow the defendant personally for the amount due under the decree but that the decretal amount shall be realised by the sale of the *jamas*, modified the decree of the first Court. The limitation so placed by the lower Appellate Court upon the decree is not warranted by any law or authority. There is nothing in law which can tie the hands of the landlord-decree-holder in following the tenant-defendant personally for the realization of the rent due under the decree for rent. In view of the above facts the qualified decree ought to be set aside.

Babu *Sasi Sekhar Bose*, for the Respondent.—The defendant does not claim the *jamas*, and he is not at all affected if the decree be executed by the sale of the *jotes*. The reason given by the learned Judge is that as the defendant denies possession of the lands in suit, and as the evidence as regards defendant's possession is not satisfactory, the plaintiff should realise the decretal amount by following the properties.

Babu *Jogesh Chandra De*, in reply.

JUDGMENT.—This is an appeal by the plaintiff against the decision of the learned Subordinate Judge of Nadia modifying the decision of the Munsif of Ranaghat. The plaintiff brought the suit to recover rent in respect of three *jamas*. The defences raised were three. *First* of all, that the plaintiff had not got the title, *secondly*, that the suit could not proceed owing to the boundaries of the *jotes* not being given and *thirdly*, that there was no relationship of landlord and tenant. The first Court decided the suit wholly in favour of the plaintiff. On appeal, the lower Appellate Court has reversed that decision and has given a decree to the plaintiff as regards one *jama* only. We are not concerned with that *jama*, because the learned Judge of the lower Appellate Court concurred with the Judge of the Primary Court as regards that and there is no appeal with reference to it. It is only with regard to the other two *jamas* which are called Mudafat Kamal Chand Mullik and Biswa Nath Mullik that our decision is invited, and with respect to them the learned Judge of the Court of Appeal below stated that the evidence was meagre, that there was no evidence on the plaintiff's side that the defendant was in possession of them and that he was not favourably impressed with the witnesses. The learned Judge also remarked that he was not prepared to discard the evidence on the plaintiff's side as concocted or forged

but that he must say that it was not sufficient to make the defendant personally liable for the rent of those two *jamas*. As argued by both sides, that, however, cannot stand. Either the defendant is liable or is not. There is no half way between these two and the case must go back to the learned Judge of the lower Appellate Court to re-hear the appeal with regard to these two *jamas* Mudafat Kamal Chand Mullik and Biswa Nath Mullik and to come to a clear finding as to whether the defendant is or is not liable for rent in respect of them. If he finds that the defendant is liable, he must pass a decree in favour of the plaintiff in the ordinary way without the limitation that has been attempted to be imposed in the judgment appealed against. If the evidence does not establish the defendant's liability, he must decide it that way. Costs will abide the result of the re-hearing by the lower Appellate Court.

Case remanded.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2181 OF 1915 AND LETTERS PATENT APPEAL No. 56 OF 1915.

March 20, 1917.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Bakewell.

R. S. RAMA SHENOI AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

M. A. HALLAGNA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss 13 (b), (d), 44, O. XXI, r. 63—Foreign Court, judgment of—Execution in British India—Mistake of law, effect of—Burden of proof, wrong view of, whether 'opposed to natural justice'—Execution—Attachment—Claim.

Under Order XXI, rule 63, Civil Procedure Code, the burden is on the plaintiff to establish his claim. [p. 704, col. 1.]

A wrong view of a Foreign Court as to onus of proof will not have the effect of rendering its judgment one 'not given on the merits' within the meaning of section 13 (*b*), Civil Procedure Code, or of rendering the judgment erroneous on the face of it. [p. 704, col. 2.]

A foreign judgment is not liable to be vacated merely on the ground of its containing a mistake of law There must be something in the procedure anterior to the judgment which is repugnant to 'natural justice'. A mere incorrect view of law by a foreign Court will not give the British Indian Courts jurisdiction to say that the judgment is opposed to 'natural justice' within the meaning of section 13 (*d*), Civil Procedure Code. [p. 704, col. 2; p. 705, col. 1.]

Second appeal against the decree of the Court of the District Judge, South Malabar, in Appeal Suit No. 528 of 1914, preferred against the decrees of the Court of the Subordinate Judge, Cochin, in Original Suit No. 3 of 1913.

Appeal under clause 15 of the Letters Patent preferred against the decision of Mr. Justice Ayling, in Second Appeal No. 999 of 1914, preferred against the decision of the District Court, South Malabar, in Appeal Suit No. 144 of 1914, preferred against the decree of the Court of the Subordinate Judge, Cochin, in Original Suit No. 7 of 1911.

Dr. *K. Pandalai* and Mr. *C. V. Ananthakrishna Aiyar*, for the Appellants.

Mr. *C. Madhavan Nair*, for the Respondents.

JUDGMENT.—A decree was obtained against the elder brother of the plaintiff in the Cochin Court. In the cause title, he was described as the manager of the joint family. Apparently the plaint alleged that the family property was liable for the claim as the debt was contracted for family purposes. The defendant in the Cochin Court pleaded that no decree should be passed against him as manager. Therefore issue No. 7 was framed. The Cochin Court held that the burden of proving that the defendant was not the manager and that the debt was not binding on the family lay upon him, and passed a decree against him personally and against the family properties. The decree was executed against the Cochin properties and then transferred to the British Court under section 44 of the Code of Civil Procedure. In our Court, a claim was preferred by the plaintiff against the attached properties on two grounds:—(*a*) that the defendant in the Cochin suit had become divided from the plaintiff before suit and (*b*) that the decree was otherwise not executable against the properties in the possession of the plaintiff. The claim was rejected. The plaintiff has brought this suit to establish his right. The Courts below have dismissed the suit. Hence

this second appeal. Dr. Pandalai for one of the brothers, the appellant in Second Appeal No. 2181 of 1915, contended that it was the duty of the Courts below to have decided whether there was a division prior to the Cochin suit and whether the brother who was sued in that Court was the manager. It is clear under rule 63, Order XXI, that the burden of proof is on the plaintiff to establish his claim. Beyond stating that he was divided, he has asked for no issue; and has adduced no evidence on the question of division or managership; the plaintiff is not, therefore, entitled to ask us to send the case down for a finding on that question.

The learned Counsel further contended that as the Cochin Court was wrong on the question of the burden of proof, the judgment must be deemed not to have been given on the merits. We are unable to accept this contention. In the Cochin Court, the general law administered relates to Marumakatayam Tarwads; and as in a suit against the Karnavan as such the decree would be binding on the Anandravans, unless the latter could show that the Karnavan was not acting on behalf of the Tarwad, the idea seems to have gained ground that in the case of suits against managers of Marumakatayam families, the onus is on the other members to show that the debt is not binding on them. This is not the law as it obtains in British India. It is for the creditor to prove that the debt is recoverable against the members of the family; we may, therefore, take it that the Cochin Court was right in its view of Hindu Law. Does that render the judgment one not given on the merits? We have not before us all the materials on which the Cochin judgment was based. Consequently, we are unable to hold that the decision was not on the merits. The decision of the Judicial Committee in *Keymer* v. *Viswanatham Reddi* (1) has no bearing on the present case. There is no warrant for the proposition that a wrong view as to onus would have the effect of rendering a foreign judgment one not given on the merits.

(1) 38 Ind. Cas. 683; 40 M. 112; 21 M. L. T. 78; 15 A. L. J. 92; 32 M. L. J. 35; 5 L. W. 342; 19 Bom. L. R. 206; 21 C. W. N. 358; 25 C. L. J. 233; 10 Bur. L. T. 175 (P. C.).

Mr. Ananthakrishna Aiyar who appeared for another brother, the appellant in the connected appeal, raised a more serious contention. He argued that as the Cochin Court was manifestly wrong on a point of Hindu Law, the judgment was contrary to natural justice. In this connection, we notice that the language of clause (*d*) of section 13 has undergone change. In the old Code, the words were "if it is in the opinion of the Court before which it is produced contrary to natural justice." The present language in section 13 (*d*) is "where the proceedings in which the judgment was obtained are opposed to natural justice." This change carried out the view of Bramwell, B., in *Crawley* v. *Isaacs* (2). The learned Baron there said: "I think the term 'natural justice' which has been used in reference to foreign judgments refers rather to the form of procedure than to the merits of the particular case" (page 531). Consequently the mere fact that a judgment is wrong in law is not enough. There must be something in the procedure anterior to the judgment which is repugnant to natural justice. That cannot be said of the present case. Further as pointed out by Lord Chelmsford in *Liverpool Marine Credit Co.* v. *Hunter* (3), a mere incorrect view of law by a Foreign Court would not give jurisdiction to our Courts to say that the judgment is opposed to natural justice. See also per Cockburn, C. J., in *Imrie* v. *Castrique* (4) and *Scott* v. *Pilkington* (5). Mr. Ananthakrishna Aiyar drew our attention to *Messina* v. *Petrococchino* (6). In that case it was pointed out that unless there was a manifest error or fraud in the proceedings of the judgment, the British Court should give effect to it. A wrong view as to onus does not render a judgment erroneous on the face of it. Moreover having regard to *Liverpool Marine Credit Co.* v. *Hunter* (3) we are unable to hold that a mistake as to law, which is all

(2) (1867) 16 L. T. 529.

(3) (1868) 3 Ch. 479; 37 L. J. Ch. 386; 18 L. T. 749; 16 W. R. 1090.

(4) (1860) 141 E. R. 1222; 8 C. B. (N. S.) 405; 30 L. J. C. P. 177; 4 L. T. 143; 9 W. R. 455; 7 Jur. (N. S.) 1076; 125 R. R. 705.

(5) (1862) 121 E. R. 978; 2 B. & S. 11; 31 L. J. Q. B. 81; 6 L. T. 21; 8 Jur. (N. S.) 557; 127 R. R. 244.

(6) (1872) 4 P. C. 144; 41 L. J. P. C. 27; 26 L. T. 561; 20 W. R. 451.

that can be alleged against the decision in the present case, would be sufficient to vacate the foreign judgment. For these reasons, we think the decision of the Courts below is right and we dismiss the second appeal with costs. The Letters Patent Appeal also follows.

M. C. P.

Appeals dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 342 OF 1915.

July 25, 1917.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Beachcroft.

DURGA CHARAN ACHARJEE—DEFENDANT No. 3—APPELLANT

versus

KHUNDKAR ENAMAL HUQ AND OTHERS—PLAINTIFFS—RESPONDENTS.

Joint owner placed in exclusive possession of some lands by mutual arrangement, whether can be disturbed by co-sharers—Partition, suit for—Joint possession, proof of.

One of the joint owners of an estate, who by mutual arrangement with the other co-sharers has been placed in exclusive occupation of some of the joint lands as representing his share, cannot be equitably disturbed by the latter, unless they seek a partition of all the lands comprised in the estate. [p. 705, col. 2.]

It is essential in a suit for partition that the plaintiffs should establish that they and the defendants are not only joint owners but are also entitled to joint possession, because the object of the suit is to transform the joint possession into possession in severalty [p. 706, col. 1.]

Appeal against the decree of the Subordinate Judge, Hooghly, dated the 26th October 1914, affirming that of the Munsif, Serampur, dated the 25th July 1913.

Babu *Nagendra Nath Ghose*, for the Appellant.

Maulvi *A. K. Fazlul Haq*, for the Respondents.

JUDGMENT.—This is an appeal by the third defendant in a suit for partition of joint property. The lands are comprised in three plots and are included in an *ayma* estate within the Hooghly Collectorate. The case for the plaintiffs is that they have acquired a nine-tenths share of the lands and the third defendant has acquired the remaining share. The plaintiffs accordingly seek to have these lands partitioned. One of the defences is that this is really a suit for a partial partition and is consequently not maintainable. The Court of first instance overruled this contention, on a ground which cannot be sustained and which need not be examined for our present purpose. Upon appeal, the Subordinate Judge has confirmed the decree of the Trial Court but the reasons assigned by him in support of his conclusion are not intelligible. He sets out the first question for determination in these terms; namely, whether the suit is one for partial partition and whether it is maintainable. But his discussion of the point is difficult to follow. The third defendant has purchased the lands in suit from the fourth defendant and the recital in the conveyance shows that according to the vendors of the appellant he had a certain share in the entire estate and that the lands conveyed were in his occupation as representing that share. This is not admitted by the plaintiffs. If the allegation is true, it may furnish a complete answer to the claim for partition: *Mahomed Fazlur Rahman* v. *Mahomed Fayzur Rahman* (1), *Burugapalli Sriramulu* v. *Nandigam Subbarayadu* (2), *Sris Chandra* v. *Mahima Chandra* (3). If the fourth defendant, who was interested in all the lands of the estate, was, by mutual arrangement with his co-sharers, placed in exclusive occupation of the lands now in controversy, as representing his share, that arrangement cannot equitably be disturbed by the plaintiffs, unless they seek a partition of all the lands comprised in the estate. In the present suit, however, they have limited their claim to the disputed lands which form only a small part of the entire land of the estate. Consequently the plaintiffs must establish that, in respect of the lands in suit, they and the third defendant are joint owners and entitled to joint possession. In order to determine whether they are entitled to joint possession, it must be found whether the vendor of the third defendant was entitled to exclusive possession or to joint possession. This point has not been investigated by either of the Courts below, and till the point

(1) 10 Ind. Cas. 354; 15 C. W. N. 677.
(2) 10 Ind. Cas. 57; 10 M. L. T. 313.
(3) 33 Ind. Cas. 17; 23 C. L. J. 231.

has been determined, the validity of the claim for partition cannot be decided. It is essential in a suit for partition that the plaintiffs should establish that they and the defendants are not only joint owners but are also entitled to joint possession, because the object of the suit is to transform the joint possession into possession in severalty *Atrabannessa Bibi* v. *Safatullah Mia* (4).

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and the case remanded to him for re-consideration. Costs will abide the result.

Appeal allowed; *Case remanded.*

(4) 31 Ind. Cas. 189; 22 C. L. J. 259; 43 C. 504.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 53 OF 1917.

April 17, 1918.

Present:—Sir Dawson Miller, KT, Chief Justice, and Mr. Justice Jwala Prasad.

E. G. STONEWIGG—DEFENDANT 1ST PARTY—APPELLANT

versus

Babu DWARKA SINGH AND OTHERS—PLAINTIFFS AND DEFENDANTS 2ND PARTY—RESPONDENTS.

Bengal Tenancy Act (VIII B.C. of 1885), s. 22—Lease of share in joint proprietary right—No specific plot mentioned in lease for cultivation—Tenure-holder—Occupancy right, acquisition of, by lessee—Part proprietor, whether can create ryoti right.

Where a lease is executed in respect of a certain share in a Zemindari and no specific land is mentioned in the lease which the lessee has to cultivate, the lease creates only a tenure. [p. 709, col. 2.]

A tenure-holder cannot acquire a right of occupancy in the lands comprised in his *ijara* or farm while holding the village as an *ijaradar* or a farmer. [p. 711, col. 1.]

In order to determine whether the right conferred by a lease is that of a tenure-holder under the Bengal Tenancy Act, the intention of the parties has to be looked into. The principal object of giving the lease of an entire village or a share therein is to enable the lessee to collect rents from tenants. The fact that the lessee may bring under cultivation some lands in the village will not alter the character of the tenure created by the lease. There can be no lease for the purpose of cultivation in a village where no lands to be cultivated are specified in the lease [p. 709, col. 2.]

A lessor, who is a part proprietor in an *ijmali* or joint village, has no right to create any right in respect of any specific lands in the village to the prejudice of the other co-proprietors without their consent [p. 711, col. 1.]

A co-proprietor in a village cannot acquire any occupancy or non-occupancy right in the village. [p. 711, col. 2.]

Appeal from a decision of the District Judge, Darbhanga, dated the 2nd February 1917.

Mr. *Rajendra Prasad*, for the Appellant.

Mr. *Ganesh Dutt Singh*, for the Respondents.

JUDGMENT.

MILLER, C. J.—I have had an opportunity of consulting with my learned brother in this case and I entirely agree with the judgment he is about to pronounce.

JWALA PRASAD, J.—This appeal arises out of a suit brought by the plaintiffs for partition of their share in Mouzah Damodarpore, Chak Giasuddin, bearing Tauzi No. 4044. The said village is held by the plaintiffs and the defendants as follows:—The plaintiffs have a share of 2 annas odd, defendant No. 1, 1st party, 4 annas odd, defendants Nos. 2 to 12, 2nd party, 4 annas odd and defendants Nos. 13 to 31, 3rd party, the remaining share in the village. Defendant No. 32, 4th party, is a purchaser from defendant No. 12, one of the defendants 2nd party. The share of the plaintiffs and defendants 2nd party, *viz.*, 6 annas 11 Gandas 3 Kauris 1 Karant 17 Rains, 8 Paras in the village out of the entire 16 annas was leased to the defendant No. 1 under two separate leases executed jointly by the plaintiffs and defendants 2nd party in favour of defendant No. 1. The first lease was executed on the 15th June 1882 and was for a term of 9 years, 1299 to 1298. The second lease was executed on the 20th December 1896 and was for a term of 15 years, 1304 to 1318. In the interval, that is from 1299 to 1303, defendant No. 1 is said to have been in possession of the property under a verbal lease, as negotiation for the second lease executed on the 20th December 1896 was going on between the parties. The second lease expired in 1911. Yet the defendant No. 1 continued to be in possession of the

property and refused to give up possession. The plaintiffs further alleged that while in possession of the said share of 6 annas odd leased to him the defendant No. 1 fraudulently got his name recorded as a non-occupancy Raiyat in respect of 45 Bighas 14 Cottas 7 Dhurs in Khatas Nos. 156 and 246 of the Survey Record of Rights finally published in the years 1899 and 1900, although the said lands belong to all the proprietors in the village as their Khas lands and defendant No. 1 has no Raiyati right in the said lands and was only a Thiccadar or farmer in respect of the share of six annas odd, the leasehold property.

On the above allegations the plaintiffs prayed for partition and separate possession of their own share in the village and for declaration that the defendant No. 1 has no right to remain in possession of the leasehold property after the expiry of the lease and that he has no Raiyati interest in respect of the specific 45 Bighas odd which belong exclusively to all the Maliks in the village.

There does not appear to be a serious contest with regard to the claim of the plaintiffs for partition and for recovery of possession of their share in the village leased to the defendant No. 1.

The real dispute relates to the specific lands of 45 Bighas odd referred to above recorded in Survey Khatas Nos. 156 and 246. Defendant No. 1 claims that the said lands were in his possession long prior to the leases referred to above, and that he has acquired a right of occupancy in the said lands. Defendant No. 1, therefore, resists the claim of the plaintiffs to have a partition of the said lands among the proprietors and to recover possession of their share in these lands. The Court below decreed the plaintiffs' suit, holding that defendant No. 1 has acquired no Raiyati right in the lands and that the plaintiffs are entitled to Khas possession of their share in the same. There is a further direction awarding mesne profits to the plaintiffs as claimed by them for the period of their dispossession. Defendant No. 1 has appealed to this Court.

The contention of the defendant that he was in possession of the lands as a tenant prior to the leases referred to above has no substance in it. The evidence on behalf of the defendant to prove his possession previous to the first lease of 1882 is wholly unreliable. It consists of the statement of two witnesses, both of whom are cultivators in the village. They say in their evidence recorded in 1917 that defendant No. 1 was in possession of the land for the last 30 to 35 years, that is, from or just a little before 1882 when the first lease was executed. It is neither alleged nor even disclosed in evidence as to how defendant No. 1 came to be in possession of the lands as a tenant before he took lease of the village. No settlement is alleged to have been made with him of the lands in suit by the proprietors of the village. No receipts in proof of payment of rent to any of the landlords are produced on his behalf. In short, there is absolutely no documentary evidence on his behalf to show that he acquired any tenancy right prior to the lease in the lands. On the other hand, the evidence on behalf of the plaintiffs is reliable and shows clearly that defendant No. 1 was not in possession of the lands previous to the leases in question. The learned Vakil appearing on behalf of the appellant has rightly refrained from relying upon the oral evidence on his side. He, however, relies upon the entries in the Survey Record of Rights (Exhibits B and C). Exhibit B shews that the Record of Rights was finally framed and published on the 17th April 1900, whereas Exhibit C shows that it was published on the 9th June 1899. The former recorded defendant No. 1 as *Gair Dakhilkar* (non-occupancy tenant) in respect of Khata No. 246 for 6 years and the latter as *Gair Dakhilkar* for 7 years in respect of Khata No. 156. It is said that the aforesaid entries shew that defendant No. 1 was in possession of the lands as a non-occupancy tenant in or about the year 1892, that is, a year after the expiry of the first lease and 4 years prior to the execution of the second lease of 1896. In the first place, this falsifies the allegation of the defendant that he was in possession of the lands prior even to the first lease. In the second place, the fact that he was in possession after the expiry of the first lease and previous to the execution of the second lease goes only to shew that he simply held over after the expiry of the first lease, as negotiations were

going on between the parties for the execution of a fresh lease. There is positive evidence to the effect that defendant No. 1 held over and continued to be in possession after the expiry of the first lease on the same terms as those mentioned in the lease. The Court below has accepted this evidence. I agree with the Court below in its finding that in the interval between the expiry of the first lease and the execution of the second lease, the defendant No. 1 simply held over and was in possession of the lands as a lessee of the 6 annas odd share under the first lease of 1882. He, therefore, came to be in possession of the lands in suit on account of and under the lease executed by the plaintiffs and defendants 2nd party. The absence of rent receipts goes to show that defendant No. 1 was in possession under the lease and not independent of it.

As to the contention of the defendant that the presumption of the entry in the Record of Rights that he was in possession of the lands as a non-occupany tenant should prevail, it is enough to state that the evidence and the circumstances of this case have fully rebutted the presumption, if any. The entry in the Record of Rights is simply an inference and opinion of the Assistant Settlement Officer as to the status of the defendant.

The next contention on behalf of defendant No. 1 is based on the terms of the lease in question. It is said that he was given a lease for cultivating purposes, that he has been in possession of the lands for over 12 years and has thus acquired an occupancy right in them. The first lease of 1882 has not been produced, but it is agreed at the Bar that the terms of that lease were exactly similar to those of the lease of 1896 which is on the record. The lease executed by the plaintiffs and defendants 2nd party is printed at page 14 and the Kabuliyat or the counterpart of it executed by defendant No. 1, at page 8 of the paper-book. The terms of both are the same and the following is an extract from the lease at page 14:—

"We (the plaintiffs and defendants 2nd partly) have given in lease to Mr. E. G. Stonewigg and Mr. John Stonewigg, Englishmen, by occupation indigo planters and proprietors, Managers and residents of Indigo Factory at Gungauli, (1) the entire and whole 6 annas, our ancestral share, and 11 Gandas 3 Kauris 1 Karant 17 Rains and 8 Paras, our purchased share, *in all* 6 *annas* 11 *gandas* 3 *kauris* 17 *rains and* 8 *paras out of* 16 *annas of Mouzah Damodarpore, Chak Ghyasuddin, asli mai dakhli, together with Tolas and Badhs appertaining to the said Mouzah, Pergana Saraisa, bearing Tauzi No.* 4022 (*apparently a mistake for* 4044) *at an annual jama of Rs.* 668-4-6 (2) 3 Kauris 2 Karants 1 Dant and 5 Rains out of 4 Gandas 2 Kauris 2 Karants 2 Dants 17 Rains and 4 Paras, which covers an area of 8 Bighas 16 Cottahs and 3 Dhurs according to our quota, *i.e.*, after excluding 4 Bighas 15 Cottahs and 12 Dhurs of land which is in our possession, the remaining area to the extent of 4 Bighas and 11 Dhurs at an annual Jama of Rs. 24-2-6 at the rate of Rs. 6 per Bigha situate in Mouzah Bhushan Tara, Pergannah Saraisa, Ijmali Patti Touzi No. 12759, Thana Dalsingh Serai, Division Samastipore, district Darbhanga, together with Malwajhat, Saer Wajhat, all grains, Jalkar, Bankar, Ahar, Pokhar, water, reservoir, tanks, Pucca and Kutcha wells, palms, and date trees, gardens of mangoes and jack trees, bamboo topes, fruit bearing and non-fruit bearing trees, occupied and non-occupied houses of tenants, Mutharfa, Bardana, salt, Sayer and fishery rights, etc., in the Mahal, in other words, *all the zemindari rights appertaining thereto* (3) and 26 Bighas 13 Cottahs and 6 Dhurs, at Rs. 7 per Bigha and 6 Bighas 7 Cottahs and 12 Dhurs at the rate of Rs. 6 per Bigha, in all 33 Bighas and 18 Dhurs of the Zerait Khudkasht lands situated within our partitioned Pattis in Mouzah Bhushar Tara, Pergannah Saraisa aforesaid, at an annual Jama of Rs. 24-15-0 excepting the items of Barhmotar, Shibator, Nesz Dargah, Chanda of Chandadarans, which have been coming down from before, *i.e.*, we have let out on lease the above shares on a consolidated, fixed and uniform annual Jama of Rs. 917 0-0 in Company's coin, half of which is Rs. 458-11-0, as including road and public works cess for a term of 15 years extending from 1304 to 1318. We have received Rs. 3,000 as Zerpeshgi bearing interest at the rate of 12 annas per cent. per mensem and have appropriated the same. The said Saheb, *the Thiccadar, should remain in*

possession and occupation of the leasehold property up to the end of the term, should make proper cultivation thereof at ease of his mind or should get the same cultivated by others by sowing indigo or any other crops according to his desire; and should enjoy the produce of the same. Having set off the principal amount of the Zerpeshgi money and its interest against the aforesaid amount of fixed rent he shall pay to us the proprietors, on taking receipts and Farkhati, such sums out of the amount of profit as may be found due to us instalment after instalment and year after year...*and he shall cease to have any connection with the leasehold property on the expiry of the term.* The expenses relating to boundary disputes and new items of *expenditure shall be borne by us the proprietors. The eexpenses relating to the Thana and Police shall be borne by the Thiccadar and the duty of compliance with the orders which may be passed by the officers under the law now in force or that may come in force hereafter shall also rest with him.* In the last year of the term, *i.e.*, in 1318, the said Saheb shall retire from the Zerait lands of indigo on payment of rent for 10 annas Kist to us the proprietors for 1319 Fasli according to the above rate if any such Zerait will be found to exist with the Khas partitioned Patti of us the executants in Mouza Bhushat Tara, Parganna Saraisa."

The lease was given to defendant No. 1 of the 6 annas odd share of the plaintiffs and defendants 2nd party in village Damodarpore Chak along with certain shares in another village Bhushar Tara, some specific lands detailed and described in the lease measuring 33 Bighas odd out of the Zerait Khudkasht lands situate in Bhushar Tara. No specific land was leased as appertaining to village Damodarpore Chak with which we are concerned in this litigation. The lands in dispute, 45 Bighas odd, are not at all specifically leased to defendant No. 1, nor are they mentioned in the lease. The lease in question is of a twofold character, (1) it confers a right upon the lessee to hold possession of certain shares in the village in place of the lessors, *i.e.*, to collect the rents of the same and possibly to have some direct cultivation of such lands as the lessee himself could cultivate and (2) it gives the right to cultivate specific lands mentioned in the lease, of the Zerait Khudkasht lands in village Bhushar Tara. The lessee is, therefore, a tenure-holder in respect of 6 annas odd share leased to him in village Damodarpore Chak and a lessee for cultivating purposes in respect of the specific lands mentioned above in Bhushar Tara. In order to meet the double right conferred by the lease a general clause is added, namely—'The said Saheb, the Thiccadar, should remain in possession and occupation of the leasehold property, should make proper cultivation hereof, or should get the same cultivated by others by sowing indigo or any other crops according to his desire'. This clause has been relied upon by the learned Vakil for the appellant as conferring upon his client a right to cultivate lands in Damodar Chak and hence it is said that the lease was for cultivating purposes and was not a lease of a tenure. In order to determine whether the right conferred by the lease is that of a tenure-holder under the Bengal Tenancy Act, the intention of the parties has to be looked into. The principal object of giving the lease of an entire village or a share therein is to enable the lessee to collect rents from tenants. The fact that the lessee may bring under cultivation some lands in the village will not alter the character of the tenure created by the lease. There could be no lease for the purpose of cultivation in village Damodarpore Chak when no lands to be cultivated are specified in the lease. 'Raiyat' has been defined in the Bengal Tenancy Act to mean "a person who has acquired a right to *hold land* for the purpose of cultivating them." If any Raiyati interest was intended to be conferred in respect of the lands situated in Damodarpore Chak, it would have been surely specified and described in detail as in the case of land situated in Bhushar Tara. The Zemindari rights in the share in Damodarpore Chak were clearly intended to be leased to defendant No. 1, as is obvious from the words used in the lease itself. The rights given by the lease have been summed up in the words 'All the Zemindari rights appertaining to it' and the lessee has been described in the lease as Thiccadar. The concluding words quoted in the extract from the lease will shew that there is a special stipulation in

respect of the Zerait lands leased to defendant No. 1 for the purpose of cultivating indigo. There is no such stipulation with regard to such lands as the lessee might directly cultivate in Mouzah Damodarpore Chak with which we are concerned. I am, therefore, of opinion that the terms of the lease, particularly the clause relied upon by the appellant, do not confer on the lessee the right of a cultivating tenant or Raiyat in respect of the lands situated in Damodarpore Chak but that in respect of that Mouzah he occupies the position of a tenure-holder. The learned Vakil has relied upon the case of *Ramdhari Singh* v. *Mackenzie* (1) for the construction that, he contends, should be put upon a lease of this kind. The lease quoted in that case shews that Mr. Mackenzie was given a lease of 2 annas 13 Gandas share in a village and also of specified lands of 18 Bighas 1 Cottah of Zerait together with 4 Bighas 1 Cottah which he had obtained from certain tenants in the village. The suit in that case related only to the said specific lands of 18 Bighas and 4 Bighas mentioned in the lease. It was found as a fact by the Courts below in that case that about 11 Bighas out of 18 Bighas were Mr. Mackenzie's Kasht lands (Raiyati lands) prior to the execution of the lease and that 4 Bighas were the Kasht lands of other tenants acquired by Mr. Mackenzie. It was further found as a fact by the lower Courts that Mr. Mackenzie was holding land in the village for more than 12 years. In second appeal on the facts found by the lower Courts Rampini and Caspersz, JJ., held that the lease of the particular lands specified therein was only for cultivating purposes and conferred upon the lessee the rights of a Raiyat. The real reason for the decision in that case appears (at page 354) to be that the lessee could not divest himself of his Raiyati right acquired prior to the lease by describing it as a Zerpeshgi lease or the lands as Zerait of the proprietors. It further appears that the share of 2 annas 13 Gandas odd leased to Mr. Mackenzie was held by the lessor landlord exclusively and without any joint ownership with anybody else; whereas in the present case the 6 annas share leased to defendant No. 1 was held jointly by the lessor with other co-proprietors. The facts of that case and the decision in that case with regard to the lease of specific lands cannot be any guide for the construction of the lease in the present case, where we are concerned with the lease of Zemindari rights of a joint share in a village given to defendant No. 1. On the other hand, the lease in the present case agrees in all its material terms with the lease referred to in the case of *Bujrangi Raut* v. *Mackenzie* (2) decided by Rampini and Brett, JJ. Mr. Justice Rampini who was a party to the decision of the case in *Ramdhari Singh* v. *Mackenzie* (1) makes a distinction, with which I entirely agree, between a lease of specific lands and the lease of certain shares in a village. He says:-

"Now the learned District Judge has interpreted these leases as being cultivating leases and as giving occupancy rights to the defendants; and there is not the slightest doubt that as regards the first lease, that is, the lease of the 4th December 1861 relating to the 15 Bighas, he is perfectly right. But we cannot take the same view as he has done of the remainder of the leases. In the first place it will be seen that in Exhibit F, the grantee is spoken of as Thiccadar and in Exhibit H, dated the 12th April 1874, the grantee is described in a similar manner. Although this latter lease gives to the grantee the right to cultivate personally the share of the Mouzah or to cause it to be cultivated by others, yet there are certain provisions in it which seem to us to convey but the rights of a tenure-holder, as it will be seen that the plaintiffs convey to the grantee by this document all Zemindari rights save and except Brohmotar, Shebattar and Bishnuprit land, etc., prohibited by law". This view was upheld in the case of *Raghubar Mahto* v. *H. Manners* (3), decided by Mookerjee and Teunon JJ., where the decision in *Ramdhari Singh* v. *Mackenzie* (1) was distinguished and where the lease was similar in its terms to that in the present case. The interpretation put upon the lease in that case would, therefore, apply to the

(1) 10 C. W. N. 351.

(2) 7 C. L. J. 475.

(3) 11 Ind. Cas. 389; 13 C. L. J. 568.

present case. I have, therefore, no hesitation in holding that the lease in question conferred upon the defendant only the rights of a tenure-holder in respect of the lands in village Damodarpore Chak.

If defendant No. 1 was a tenure-holder, he could not acquire a right of occupancy in the lands in suit comprised in his Ijara or farm while holding the village as an Ijaradar or farmer, *vide* clause 3, section 22 of the Bengal Tenancy Act, as it has already been shewn that he came to be in possession of the land in suit after the execution of the first lease as a lessee and that he was never in possession of the lands in suit prior to that lease. Again the lessors in this case were part proprietors of the village which was an Ijmali or joint village. They had no right to create any right in respect of any specific lands in the village to the prejudice of the other co-proprietors without their consent. Defendant No. 1 acquired only such rights to hold possession of the lands as the lessor had. The lessor could cultivate specific lands; he could not possibly acquire a tenancy right as against the other co-proprietors, inasmuch as he could not hold adversely to himself and other co-proprietors. This principle has recently been pointed out in *Ram Lal Sukul* v. *Bhela Gazi* (4). It has not been suggested, and in fact there is absolutely nothing on the record to shew, that defendant No. 1 acquired a tenancy right in the lands in suit as against the other co-proprietors.

It was urged on behalf of the respondents that the defendant No. 1 is a co-proprietor in the village and was co-proprietor when the lease was executed. He could not, therefore, under clause 2 of section 22 of the Bengal Tenancy Act acquire any occupancy right in the village. This point does not appear to have been raised in the Courts below. There is no issue, nor any finding on it. On the other hand, the learned Vakil on behalf of defendant No. 1 tried to shew that the defendant No. 1 acquired his proprietary interest in the lands from 1895 to 1915, that is, subsequent to the execution of the lease. A reference has been made to certain entries in a certified copy of extracts from Register D of the Collectorate. This Register shews that the defendant No. 1's name was mutated in respect of 4 annas odd in place of other proprietors from 1895 to 1915 on the basis of purchases made by him from time to time from proprietors, but when those purchases were actually made is not mentioned. Possibly these purchases were after the lease taken by the defendant. But with respect to 14 Gandas he has been entered in the Register as original proprietor without any date. That would shew that he was a part proprietor in respect of 14 Gandas soon after the Land Registration Act came into force in 1876 and hence prior to the first lease of 1882. If that is so, then clause 2 certainly bars him from acquiring any right of tenancy, occupancy or non-occupancy, in the lands.

The defendant lastly relies upon clause 2, section 22 of the Bengal Tenancy Act, for his contention that he cannot be dispossessed from the lands but that he is only liable to payment of rent to the co-proprietors. This might have been so as long as the village was held jointly by all the proprietors, but on a partition of the lands the defendant as co-proprietor has no right to claim possession of the lands under clause 2, section 22 of the Act. The clause is intended to prevent a co-proprietor from acquiring occupancy rights in the lands transferred to him: *vide Ram Lal Sukul* v. *Bhela Gazi* (4). In the next place the argument of the defendant is based upon the assumption that he acquired an occupancy right in the land. But as a matter of fact, as already shewn, neither under the lease nor upon evidence on the record the defendant acquired any Raiyati interest, occupancy or non-occupancy in the lands in suit. I fail to appreciate the contention of the learned Vakil for the appellant that conceding that he could not acquire an occupancy or non-occupancy, right under clause 2 as a co-proprietor, still he has some interest under clause 2, section 22, and that he could not be deprived of that right to hold possession of the lands. But the defendant was either a Raiyat or a landlord. It has been shown that he is not a Raiyat and is only a co-proprietor. He is, therefore, bound to

(4) 6 Ind. Cas. 370; 37 C. 709; 14 C. W. N. 814; 12 C. L. J. 15.

give up possession of the lands held by him as a lessee and to allow the lands to be partitioned and distributed between the co-proprietors of the village.

As a matter of fact there is absolutely no evidence on behalf of the defendant No. 1 that the lands were either cultivated by himself or on his behalf. All that is said in evidence is that the lands were in his possession, which would be so as he was a lessee of the share in the village and as also he was holding the entire 16 annas of the village partly as a lessee and partly as a co-proprietor (*vide* evidence of plaintiffs' witness No. 2, Genda Lal Patwari, page 13 of the paper-book). Thus it is clear that even if under the lease the defendant No. 1 could acquire tenancy right in respect of such lands as he would cultivate himself or through others, he has failed to shew that the lands in question were actually in his cultivating possession directly or through others and hence he could not acquire any Raiyati interest in the lands. The claim of the defendant No. 1 to hold the lands as a Raiyat or tenant must, therefore, fail and the plaintiffs are entitled to have them brought under partition.

The third point urged by the appellant is that the suit of the plaintiffs is barred by limitation. This contention is based upon Schedule III-1 (*a*) of the Bengal Tenancy Act, which requires that suits for ejectment of non-occupancy tenants should be brought within six months from the expiry of the lease under which the lands are held. In this case there is no claim by the plaintiffs to eject the defendant from the lands. The plaintiffs' suit is principally and solely a suit for partition of his share in the village. It is simply prayed that the lands in suit be declared to be the lands of the Maliks and not the lands in respect of which defendant No. 1 has acquired occupancy or non-occupancy rights. This declaration was necessary to obtain the principal relief. Again, as held above, defendant No. 1 has neither occupancy nor non-occupancy rights in respect of these lands and, therefore, Schedule III-1 (*a*) has no application. The Full Bench case of *Janki Singh* v. *Jagannath Das* (5), relied upon by the appellant, does not go far enough to hold that the present suit is barred by limitation. I, therefore, hold that the suit is not at all barred by limitation.

I would dismiss the appeal with costs.

Appeal dismissed.

(5) 44 Ind. Cas. 94; 3 P. L. W. 1.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 35 OF 1917.

January 25, 1918.

Present:—Mr. Justice Richardson and Mr. Justice Walmsley.

MIDNAPORE ZEMINDARY COMPANY, LIMITED—DECREE-HOLDERS—APPELLANTS

versus

DINA NATH SAHU AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Execution, application for, dismissal of—Fresh application, maintainability of—Limitation—Bengal Tenancy Act (VIII B. C. of 1885), Sch. III, cl. 6.

In execution of a rent-decree, the property of the judgment-debtor was sold, but the sale was afterwards set aside on the latter's application. The decree-holder taking no further steps, the executing Court thereupon passed the following order: "Sale set aside; the decree-holder taking no further steps, the case is dismissed for default." On a second application for execution being made by the decree-holder, beyond the three years' period limited by clause (6) of Schedule III of the Bengal Tenancy Act:

Held, that the second application could not be regarded as one in continuation of the previous application for execution, which ended with the order of the Court dismissing that execution case for default of the decree-holder. [p. 713, col. 2.]

Appeal against the order of the District Judge, Midnapore, dated the 14th November 1916, affirming that of the Munsif, 4th Court at that place, dated the 21st July 1916.

FACTS of the case appear from the judgment.

Mr. *U. N. Sen Gupta*, (with him Babu *Probodh Kumar Das*), for the Appellants.—The decree-holder applied for execution on the 6th March 1914. The property of the judgment-debtor was sold on the 25th April 1914. On the 23rd June 1914, the judgment-debtor made an application for setting aside the sale, which was set aside on 16th September 1914. On 28th September 1914 the execution case was dismissed for default on the part of the decree-holder.

After the setting aside of the sale and within one month from 16th September 1914, the decree-holder appealed against the order setting aside the sale and the appeal was dismissed on 2nd January 1915. On 16th February 1916 the decree-holder made this application.

This application is in continuation of the previous application. I rely on *Abdul Khayar Abdul Haque Chowdhury* v. *Reazuddin Ahmad Chowdhury* (1). The case of *Abdul Khayar Abdul Haque Chowdhury* v. *Reazuddin Ahmad Chowdhury* (1) is exactly in point, there also the sale was set aside.

[RICHARDSON, J.—What case is against you?]

The case of *Sarup Ganjan Singh* v. *Robert Watson & Co.*, (2) is against me.

The Judge says that it is against but really it is not so, it is distinguishable. See also *Keramit Ali* v. *Nagendra Kishore Roy* (3) and *Manorath Das* v. *Ambika Kanta Bose* (4).

[RICHARDSON, J.—That was decided under the old Code.]

Babu *Santimoy Majumdar*, for the Respondents.—The execution case was dismissed for default. As long as the dismissal order is there, no application can be treated as an application in continuation. See *Bharat Chandra Nath* v. *Yasin Sarkar* (5).

JUDGMENT.—This appeal arises out of proceedings in execution of a rent decree and the question for determination is whether an application for execution of the decree, is or is not out of time. An application for execution of a rent decree must be made within the period limited by clause (6) of Schedule III of the Bengal Tenancy Act. For the present purpose that period is 3 years from the date of the decree, which was made on the 14th June 1911. The relevant dates are as follows: The first application for execution was made on the 6th March 1914; on the 25th April of the same year the property of the judgment-debtor was sold by the Court. On the 23rd June following the judgment-debtor applied to have the sale set aside and on the 16th September the sale was set aside. On the 28th September the Court made this order: "Sale set aside, decree-holder taking no further steps, case dismissed for default." The decree-holder appealed from the order setting aside the sale. It does not appear whether the appeal was filed before or after the 28th September but the appeal was dismissed on the 2nd January 1915. The decree-holder took no further step for over a year. Then on the 16th February 1916 he made the application to which the appeal relates. The Courts below have held that the application is out of time, because it was made more than three years after the date of the decree.

It is contended, however, for the decree-holder that this application is merely a continuation of his previous application of the 6th March 1914 His learned Pleader relies on the case of *Abdul Khayar Abdul Haque* v. *Reazuddin Ahmad Chowdhury* (1) and if it were not for the order of the 28th September 1914 dismissing the previous application for default there might be something to be said in decree-holder's favour But there is that order on the record It is not a mere order striking a case off the file for the convenience of the Court. It is an order by which the decree holder was bound. He took no steps by way of review to have the order set aside or modified and he waited for more than a year before he came into Court with his present application. In my opinion the previous application ended with the order of the 28th September 1914, and in that view there can be no continuity between the previous application and the present application. I agree with the conclusion arrived at by the Courts below and would dismiss this appeal with costs, one gold *mohur*.

WALMSLEY, J.—I agree.

Appeal dismissed

(1) 1 Ind. Cas. 341; 13 C. W. N. 521.
(2) 6 C. W. N. 735.
(3) 40 Ind. Cas. 78; 21 C. W. N. 571.
(4) 1 Ind. Cas. 57; 13 C. W. N. 533 at p. 534; 9 C. L. J. 443.
(5) 41 Ind. Cas. 586; 21 C. W. N. 769 at p. 770.

RAJABALA DASSI v. SHYAMA CHARAN BANERJEE.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 477 OF 1914.

November 21, 1917.

Present:—Mr. Justice Fletcher and Justice Sir Syed Shamsul Huda, KT.

Srimati RAJABALA DASI—PLAINTIFF—APPELLANT

versus

SHYAMA CHARAN BANERJEE AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Inheritance—Unchaste female, right of. According to the Bengal School of Hindu Law, any female heiress who was leading an unchaste life before the date when the succession opened out is excluded from inheritance. [p. 714, col. 2.]

Appeal against the decree of the Subordinate Judge, 1st Court, Burdwan, dated the 31st July 1914.

Babus *Satish Chunder Ghose*, *Baidyanath Dutt* and *Bhupendra Coomar Ghose*, for the Appellant.

Babus *Mohendra Nath Roy*, *Haradhan Chatterjee*, *Baranashibashi Mukerjee*, *Ram Chandra Mazumdar* and Babu *Phanindra Lal Sinha*, for Babu *Chandra Sekhar Banerjee*, for the Respondents.

JUDGMENT.

FLETCHER, J.—This is an appeal by the plaintiff against the decision of the learned Subordinate Judge of Burdwan, dated the 31st July 1914. The plaintiff, who is a Hindu female, brought the suit for a declaration of her title as the reversionary heir of her deceased father to certain properties and for recovery of possession, following on the declaration that a certain deed of compromise entered into in Suit No. 21 of 1910 was inoperative and that certain transfers made by the plaintiff's mother following on the compromise were invalid and without legal necessity. The various defendants in the suit, excepting the defendants Nos. 6 and 7 who are the plaintiff's sons and who took no part in this litigation, filed different defences. The defendant No. 5 raised a distinct plea that the plaintiff before the time the succession opened was leading an unchaste life and was, therefore, according to the Hindu Law, incapable of inheriting on the death of her mother. It has been argued before us that that view of the Hindu Law is not accurate and a text-book has been cited in support of that contention. We are not concerned with the Hindu Law as it has been interpreted in other presidencies. On the decisions of learned Hindu Judges of this Court, it is established without doubt that the rule as it obtains in the Bengal School of Hindu Law is that any female who was unchaste before the succession opened out is excluded from the inheritance. There cannot be any doubt as to that. It is sufficient to refer to the two cases that were cited, namely, the cases of *Ramnath Tolapattro* v. *Durga Sundari Debi* (1) and *Ramananda* v. *Raikishori Barmani* (2). In each of those cases, one of the learned Judges was a Hindu and the cases they cited in the course of their judgments carried the case back much earlier than the dates of those cases. It is much too late now to raise that that is not the rule according to the Bengal School of Hindu Law. The question is, "was the learned Judge of the Court below right when he held that the plaintiff, before the date when the succession opened, that is the date of the death of her mother, was leading an unchaste life?" The evidence consists, first of all, of the statement on oath subjected to cross-examination of the mother, who stated without doubt that her daughter, the plaintiff, was leading an irregular life with the person who was looking after the present suit on behalf of the plaintiff—a man called Lahori Koer, who is the father-in-law of the elder son of the plaintiff. This man was the Mukhtear of the mother and that this man was living on the closest terms with this woman, the plaintiff, cannot be doubted on the evidence. They lived in the same house and the documentary evidence shows that, on the 10th June 1910, the plaintiff and Lahori Koer were convicted of an offence under section 294, Indian Penal Code, that is, singing an obscene song in a public place. It has been suggested that the Rajendra Bala mentioned in the record of the Court in that criminal case is some other Rajendra Bala. Well, first of all, the plaintiff herself in her deposition has not sworn that she was not con-

(1) 4 C. 550; 2 Shome L. R. 89; 2 Ind. Dec. (N. S.) 349.

(2) 22 C. 347; 11 Ind. Dec. (N. S.) 233.

victed by the Magistrate of an offence under section 294, Indian Penal Code. Although, in the first place, in her deposition in the present case she said that she was not, but eventually she said that she could not remember whether she was. Another fact is that Lahori Koer who conducted the case on behalf of the plaintiff and who was present in Court did not go to the witness-box to explain who was the Rajendra Bala who was convicted along with him of an offence under section 294, Indian Penal Code. Then there is the evidence of one Haripada Mandal who is a cousin of the plaintiff, and his statement is that the plaintiff and Lahori Koer were living together and leading an irregular life. On that evidence the learned Judge came to the conclusion that the evidence established that the plaintiff was leading an irregular and unchaste life at the time when the succession opened. I think the evidence can lead to only one result, and that is that the plaintiff was unchaste at the time the succession opened out to her. She was found singing an obscene song with a man in a public place and was taken before a Magistrate and fined Rs. 15 or 20 or, in the alternative, was sentenced to 15 days' rigorous imprisonment; and no explanation has been given to show how this woman, if she was leading the ordinary life of a modest woman in the house of Lahori Koer, came to be out with him singing these sing-songs, which apparently they sang in concert or unison, on the day when the complaint was made by the gentleman named Satya Kinkar Mukerjee. If that is right, what is the position of the plaintiff's suit? First of all, if the compromise is binding, this suit must fail. This suit only asks for relief that the compromise is void and illegal. If the compromise is binding the present suit must fail and the rights which the plaintiff has got under the compromise she can enforce in a proper suit. If the compromise is not binding, then what interest has the plaintiff got to maintain the present suit? If the compromise is not binding, the only right she has got would be as the heiress of her father on the death of her mother. But it has been found by the learned Judge of the Court below that at the time the succession opened out to her—a finding in which I agree, the plaintiff was unchaste. According to the rules of the Hindu Law, the plaintiff would be excluded from succession which she would have taken if she had been leading a chaste life. In that view, the present suit cannot succeed. The plaintiff, as already stated, if the compromise is binding, has got the right to enforce it in a proper suit. If it is not binding, which is the present case, then she cannot maintain the present suit, on the ground that she is excluded from succession. I think that, on that view, the present appeal fails and must be dismissed with costs. The hearing fee will be divided amongst the defendants who have appeared on the following scale: Defendant No. 1 Rs. 150; defendants Nos. 2, 3, 4 and 5 Rs. 75 and defendants Nos. 8 and 9 Rs. 75.

SHAMSUL HUDA, J.—I agree.

Appeal dismissed.

BOMBAY HIGH COURT.

ORIGINAL CIVIL JURISDICTION APPEAL No. 36 OF 1917.

December 11, 1917.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Batchelor.

GIRJASHANKAR DAYASHANKAR VAIDYA—PLAINTIFF—APPELLANT

versus

THE B. B. & C. I RAILWAY—DEFENDANT—RESPONDENT.

Master and servant—Liability of master for wrongful act of servant—Railways Act (IX of 1890), ss. 108, 121, 128, 131.

A master is liable for the wrongful act of his servant where the servant, acting in a matter which is within the scope of his authority, that is, within the course of his employment, commits a wrong by exceeding the authority vested in him. The act itself which constitutes the wrong may be in excess of the servant's authority, but if in thus transgressing his authority the servant is doing in the master's interests one of the class of acts which the master has employed him to do, then the master is liable. [p. 719, col. 1.]

Plaintiff was travelling in one of the defendant Company's trains. The compartment occupied by the plaintiff was greatly overcrowded to the inconvenience and discomfort of the occupants. After ineffectual efforts to obtain assistance from the guard or the station master at a station, the plaintiff stopped the train by pulling the communication chain. Thereupon the driver and the guard got down from the train, the driver pulled the plaintiff out of

e compartment and cuffed and slapped him, the guard assisting in this assault. The plaintiff sued the defendant Company for damages for the assault committed on the plaintiff by the company's servants:

Held, that the offence of pulling the communication chain without reasonable and sufficient cause was one in respect of which the Company itself had no power of arrest and that, therefore, the assault committed by its servants was outside the scope of their authority and the course of their employment and the Company was not liable therefor. [p. 720, col. 1.]

FACTS appear from the following judgment of

KAJIJI, J.—The plaintiff, Girjashankar Dayashankar Vaidya, who is a managing clerk in a firm of Solicitors, claims from the defendant Railway Company Rs. 3,000 as damages for the wrongful and tortious acts of the servants of the defendant Railway Company. It appears that the plaintiff and his wife were, on 18th March 1916, travelling in a third class compartment from Charni Road Station to Choltan. It is alleged that there were nine passengers in the compartment when the train left Charni Road Station and more got in at the intermediate stations and when the train reached Mahalaxmi Station, there were in all about twenty five passengers in a compartment intended to hold ten. The plaintiff attempted to communicate with the guard and the station master at the Mahalaxmi Station but could not. After the train left Mahalaxmi Station, some of the passengers attempted to molest the plaintiff. The plaintiff and his wife got frightened, so the plaintiff pulled the emergency chain and the train stopped. The plaintiff called out for the guard, but before the guard could come up the driver of the train ran up to the plaintiff's compartment, caught hold of him, pulled him out of the compartment, struck him several times with his fist. In the meantime the guard came up to the spot and he slapped the plaintiff several times on his face. The defendants denied that the gurard or driver was acting in discharge of his employment when he committed the alleged assault upon the plaintiff. They never authorised their guard or driver to commit any assault upon the plaintiff and that if any assault was committed, it was done in direct defiance of the orders, rules and regulations of the defendants. Hence the present suit. As the plaint stood, certainly did not disclose any cause of action against the defendants, so I allowed the plaint to be amended and it was amended by inserting at the end of paragraph 8 of the plaint the following:—

"The plaintiff says the said wrongful and tortious acts were done by the said driver and guard in the course of their employment and in the discharge of their duty as the servants of the Company and whilst acting within the scope of their authority. The plaintiff, therefore, prays that the defendant Company is liable for the said acts of their servants."

On this, Counsel for the defendants raised the following additional issue, *viz.*:

Whether the acts complained of were done in the course of their employment or in discharge of their duty as servants of the Company and whether they were within the scope of their employment?

Counsel for the defendants admitted that the compartment in which the plaintiff was travelling was overcrowded, the that emergency chain was pulled by him twice, that the driver and the guard were, on 18th March 1916, and are still in the defendant Company's service and that the driver and the guard committed the assault as alleged. The only question for the determination of the Court is whether the acts complained of were done by the driver and the guard in the course of their employment or in discharge of their duty and whether they were within the scope of their authority, for which the defendant Company would beliable in damages to the plaintiff. The general rule is that a master is liable for the acts and neglects and defaults of his servants in the course of their service or employment. We have, therefore, to see what is meant by the course of service or employment. The injury in respect which a master becomes subject to this kind of vicarious liability may, according to Pollock, be caused in the following four ways:—(1) It may be the natural consequence of something being done by a servant with ordinary care in execution of the master's specific orders. (2) It may be due to the servant's want of care in carrying on the work or business in which he is employed. (3) The servant's wrong may consist in excess or mistaken execution of a lawful authority. Or (4) it may even be a wilful wrong, such as assault, provided the act is done on the master's behalf and

with the intention of serving his purposes. It will be seen that (1) and (2) ways do not apply to the facts of this case. Therefore, to establish a right of action against the master in such a case as the present it must be shown that (*a*) the servant intended to do on behalf of his master something of a kind which he was in fact authorised to do, and (*b*) the act, if done in a proper way or under the circumstances erroneously supposed by the servant to exist, would have been lawful. It is clear that the cause which led to the assault is the pulling of the emergency chain. It is contended by the plaintiff's Counsel that under the Indian Railways Act if, in the opinion of any railway servant, anybody pulls the emergency chain without reasonable and sufficient cause and stops the train, he thus obstructs a railway servant from the discharge of his duty, *viz.*, moving, it is the duty of the railway servants to arrest such a person and take him to the station master. It, therefore, becomes necessary to consider sections of the Indian Railways Act which are applicable to this case. Section 108 deals with the pulling of the emergency chain. Section 108 runs as follows:—

"If a passenger, without reasonable and sufficient cause, makes use of or interferes with any means provided by a railway administration for communication between passengers and the railway servants in charge of a train, he shall be punished with fine which may extend to fifty rupees."

It is contended by plaintiff's Counsel that section 121 of the Indian Railways Act must also be read with section 108. Section 121 runs as follows:—

"If a person wilfully obstructs or impedes any railway servant in the discharge of his duty, he shall be punished with fine which may extend to one hundred rupees."

According to plaintiff's contention a person who pulls the emergency chain, without reasonable and sufficient cause, wilfully obstructs or impedes a railway servant in the discharge of his duty, *viz.*, of running the train, and thus makes himself liable for prosecution under sections 108 and 121 of the Indian Railways Act. In support of this contention Counsel for the plaintiff says that railway officials think so too and places reliance on a passage which appears in Exhibit B, which is a letter, dated 1st May 1916, from the General Traffic Manager to the Loco. and Carriage Superintendent. The passage relied on is :—

"I may add that in such cases the Company's servants are under the Railway Act authorised to remove passengers who obstruct the Company's servants in their duty of running the train."

The first remark I should like to make in this connection is that what railway officials thought is in no way binding and that this was written by the Traffic Manager after consulting the Company's Pleader who was defending the driver in the Police Court and in mitigation of his offence for lessor sentence, and this remark in no way binds the railway company and it is not the view which either the driver or the guard took of the situation. Therefore, in my opinion, the plaintiff's contention is not only far-fetched but absolutely untenable and that section 121 of the Indian Railways Act has no application to the facts of the present case, and, in my opinion, the only section which is applicable is section 108 of the Indian Railways Act. The result is that in a case where a person without sufficient and reasonable cause pulls the emergency chain he will render himself liable for prosecution under section 108 only, and not under section 121 also for preventing the running of the train and thus obstructing or impeding a railway servant in discharge of his duty. The reason why Counsel for the plaintiff put forward this contention is obvious, for if a person commits an offence under section 121 of the Indian Railways Act then such person can be arrested under section 131 of the same Act without warrant or other written authority by any railway servant or by any other person whom he may call to his aid without any other requirements being first complied with. But if the offence committed is one under section 108, then in such a case a person who has committed such offence can be arrested only after the requirements set out in section 132 of the Indian Railways Act are complied with and those requirements are shortly : (1) there is reason to believe that he will abscond; (2) his name and adress are unknown; (3) refuses on demand to give name and address; (4) there is reason to believe that the name or address given by him is incorrect. There is no evidence in this case to show that any railway official or servant or engine

driver or guard ever asked plaintiff his name or address, much less he refused to give one, and I think from the evidence it is clear that the engine driver had obsolutely no reason to believe that the plaintiff would abscond as he was safe in the compartment. Under these circumstances the Railway Company itself would have had no authority under the Indian Railways Act to commit or do the acts complained of with a view to arrest the plaintiff, much less its servants, and the driver and guard by doing the acts which they have done in this case cannot make the Railway Company liable in damages, and that this is the law is clear from the passage at page 255 of Volume XX of Halsbury's Laws of England. The passage I refer to is as follows:—

"The master is not liable merely because the servant, in doing the act, honestly believed that he was acting in his master's interests and intended the act to be for the master's benefit: *Byrne* v. *Londonderry Tramway Co.* (1)."

The case which is in point is *Poulton* v. *London and South Western Railway Co.* (2). I have carefully considered every case which has been cited by Mr. Wadia for the plaintiff and the important of them, like *Goff* v. *Great Northern Railway Company* (3), v. *Seymour Greenwood* (4), *Limpus* v. *London General Omnibus Company Limited* (5), have been considered and distinguished by the learned Judges in *Poulton* v. *London and South Western Railway Co.* (2). To my mind it is clear that the defendant Company had no power under the Indian Railways Act to arrest the plaintiff for pulling the emergency chain; therefore, authority cannot be implied to have been given to the servants to do an act outside the scope of the employment. I, therefore, hold that the acts complained of were not done in the course of their employment or in discharge of their duty as servants of the Company and they were not within the scope of the employment. The result is that the suit must be dismissed.

(1) (1902) 2 I. R. 457; 35 I. L. T. R. 205; 6 Ir. L. R. 808.
(2) (1867) 2 Q. B. 534 at p. 536; 8 B. & S. 616; 36 L. J. Q. B. 294; 17 L. T. 11; 16 W. R. 309.
(3) (1861) 30 L. J. Q. B. 148; 3 El. & El. 672; 7 Jur (N. S.) 286; 3 L. T. 850; 121 E. R. 594; 122 R. R. 889.
(4) (1861) 30 L. J. Ex. 327; 7 H. & N. 355; 9 W. R. 785; 4 L. T. 833; 158 E. R. 511; 123 R. R. 568.
(5) (1862) 32 L. J. Ex. 34; 1 H. & C. 526; 9 Jur. (N. S.) 333; 7 L. T. 641; 11 W. R. 149; 158 E. R. 993; 130 R. R. 641.

I think it is but fair to add that the defendants have in their letter and in their written statement expressed their regret that the plaintiff should have suffered any indignity or injury while travelling in the train and have punished both the driver and the guard departmentally.

Suit dismissed with costs.

Messrs. *Setalwad*, *Wadia* and *Rangnekar*, for the Appellant.

Messrs. *Strangman*, *Weldon* and *Campbell*, for the Respondent.

JUDGMENT.

BATCHELOR, J.—The appellant before us was the plaintiff in the Court below, his suit having been dismissed by Kajiji, J. The plaintiff, who is a managing clerk in a firm of Bombay Solicitors, brought the suit to recover damages from the defendant Railway Company, on account of the wrongful and tortious acts of their servants, an engine driver and a guard.

Owing to various admissions made by the parties at the trial, the facts have not been elicited from the witnesses with the usual completeness, but there can be no doubt upon the record what the essential facts are, and Mr. Campbell for the Railway Company did not press his attempt to give to them any other complexion than that which appeared to the learned trial Judge. These facts are as follows:—

On the night of the 18th March 1916, the plaintiff was a third class passenger in one of the defendant's trains. The plaintiff's compartment was greatly overcrowded to the inconvenience and discomfort of the occupants. After ineffectual efforts to obtain assistance from the guard or the station master at a station, the plaintiff stopped the train by pulling the communication chain. The train was re-started, but no other incident then occurred, nor was any step taken to relieve the overcrowdedness of the compartment. Consequently when the train had gone some little distance further on its journey, the plaintiff again stopped it by pulling the communication chain. Thereupon the driver and the guard got down from the train: the driver pulled the plaintiff out of the compartment and cuffed and slapped him, the guard assisting in this assault. The degree of violence used is not now material: it was, I think, probably not much, but the assault is admitted, and

the plaintiff naturally resents the indignity and affront to which he was subjected. The plaintiff was arrested by the driver and guard at Dadar Station, where he was handed over to the station master: his statement having been recorded by the Police, he was released and allowed to go on to his destination. The guard and driver were prosecuted to conviction before the Magistrate, who fined them for the assault.

The only question in appeal is whether, in the above state of facts, the Railway Company are liable for the wrongful acts of their servants.

Now the general proposition of law applicable to the question of the master's liability for the wrongful acts of his servants may, for our present purposes, be stated thus: the master is liable where the servant, acting in a matter which is within the scope of his authority, that is, within the course of his employment, commits a wrong by exceeding the authority vested in him. The act itself which constitutes the wrong may be and usually is in excess of the servant's authority, but if in thus transgressing his authority the servant is doing in the master's interests one of the class of acts which the master has employed him to do, then the master is liable. It is unnecessary to refer to decided cases in support of this general proposition, which, as a broad statement of the law, is well established and has been accepted by both sides at the Bar.

It remains to see how this principle is to be applied in such a case as this, where a person is arrested and wrongfully assaulted by the servant. Here, in conformity with the general principle, the law, as I understand it, is this: the assault being an incident of the arrest, and being an excess of the servant's authority, the master is liable if, and only if, the arrest was within the servant's authority. In other words, if the supposed offence for which the person was arrested was an offence for which the master himself would have had authority to make the arrest, then the master will be liable: he will not be liable where he himself, for the alleged offence, would not have been justified in arresting the offender, for in such a case the arresting would be beyond and outside the course of the servant's employment, and the added assault would not be referable to any of the class of acts which the master had impliedly put the servant there to do.

This principle may be illustrated by a comparison of two decisions, that in *Poulton* v. *London and South Western Railway Co.* (2) and that in *Bayley* v. *Manchester, Sheffield and Lincolnshire Railway Co.* (6). In the former case the plaintiff was detained in custody under a station master's orders because he refused to pay the railway fare for a horse travelling by one of the defendant Company's trains. It was held that the Company were not liable for the wrongful arrest on the ground that, since the Company themselves would not have had the power to arrest the plaintiff on the assumption that he had wrongfully taken the horse by the train without paying, there could be no authority implied from them to the station master to arrest the plaintiff on this assumption. *Bayley's case* (6) fell on the other side of the line. Bayley, a passenger on the defendant Company's railway, sustained injuries in consequence of being violently pulled out of a railway carriage by one of the defendant's porters, who acted under the mistaken impression that Bayley, the plaintiff, was in the wrong train. The Court held the Company liable on the ground that the removal of a passenger from a carriage by a porter was an act within the porter's authority, so that the injuries caused by the plaintiff's violent ejection were caused by the porter in the course of doing one of the class of the acts which the Company had put him there to do.

There are numerous other cases in the books which illustrate the same principle, notably, *Dyer* v. *Munday* (7), and Rowlatt, J.'s decision in *Ormiston* v. *Great Western Railway Company* (8). But probably no more concise or lucid statement of the distinction could be found than the words used by Mr. Justice Blackburn, as he then was, in the course of the argument in *Poulton's case* (2). Counsel for the plaintiff

(6) (1872) 7 C. P. 415.
(7) (1895) 1 Q. B. 742; 64 L. J. Q. B. 448; 14 R. 306; 72 L. T. 448; 43 W. R. 440; 59 J. P. 276.
(8) (1917) 1 K. B. 598; 86 L. J. K. B. 759.

there contended that the station master was the person in authority to do all acts required by the exigency of business, and that consequently the Company were bound by his act in arresting the plaintiff: and Counsel cited, in support, a case where a passenger was wrongfully arrested on the mistaken assumption that he had not paid his fare: *Goff* v. *Great Northern Railway Company* (3). Blackburn, J., interposing said:—"In that case there *was* a power to arrest, on the assumption that the facts were as the officer arresting supposed; here there is no such power."

The application of these principles to the present facts raises the question whether the defendant Company would have had authority to arrest the plaintiff for the offence for which the Company's servants arrested him. That offence was, clearly on the evidence, the pulling of the communication chain "without reasonable and sufficient cause," an offence made punishable under section 108 of the Indian Railways Act, 1890. It is unnecessary to decide whether the plaintiff had, or had not, reasonable and sufficient cause. I will assume, in favour of his present suit, that he had not, and that, in consequence, he laid himself open to punishment under section 108. But for this offence, it is admitted that, under the Act, the defendant Company had no authority to arrest him. It follows, as my learned brother, Kajiji, J., held, that the Company cannot be held liable for the assaults committed by their servants in the course of the arrest. To escape from this difficulty Mr. Setalvad for the plaintiff ingeniously contended that the offence for which the arrest must be taken to have been made was an offence falling, not only under section 108, but also under sections 121 and 128. If this contention were sound, the plaintiff would, no doubt, be entitled to succeed, for persons offending under section 121 or section 128 may, as provided by section 131, be arrested without warrant by any railway servant. In my opinion, however, the contention is not sound. Section 121 deals with the obstructing of any railway servant in the discharge of his duty, and section 128 (so far as we are now concerned with it) provides punishment for any person who obstructs any rolling stock upon any railway. It is admitted that, owing to the working of the mechanical contrivance, the pulling of the communication chain automatically stops the train, which cannot be re-started till the vacuum has been restored. Mr. Setalvad consequently contended that the plaintiff's action here obstructed the driver in the discharge of his duty to keep the train running, and obstructed the rolling stock of the train by bringing it to a stop. It may be admitted that, as a mere matter of words, some colour may be lent to this argument from the generality of the phraseology in sections 121 and 128, and if section 108 did not exist, the plaintiff's offence might perhaps be brought within the scope of either of the later sections. But interpreting the Act as we have it, I think that Mr. Setalvad's construction is forced and unnatural. Reading the sections together, the fair conclusion seems to me to be that the stopping of the train by the wrongful pulling of the communication chain is one special kind of obstruction, for which the Legislature has made special provision. It has ordained a particular punishment, which is lighter than that allowed for other obstructions, presumably because the stopping of the train by this mechanical means is not likely to be attended with any danger to the travelling public. This differentiation of the consequences or results seems to me strongly in favour of the view that the special provisions of section 108 are not to be controlled by the more general language of the wider sections. If Mr. Setalvad's contention were allowed, it would follow that in every case where a passenger wrongfully pulled the communication chain, he would be liable to imprisonment for a term of two years under section 128; but in section 108 the Legislature expressly enacts that for this particular offence the maximum penalty shall be a fine of Rs. 50. Remembering that we are dealing with penal sections, I think that the imposition of the heavier punishment would be a result wholly outside the contemplation of the Legislature; in other words, the plaintiff's offence is, under the Act, punishable under section 108, and not under section 121 or section 128. The

rule of construction here applied is but a particular case of the general principle embodied in the maxim, *generalia specialibus non derogant*, which is invoked in the interpretation of a later general Act bearing upon an earlier special Act. In explaining this maxim in *Barker* v. *Edger* (9), Lord Hobhouse used the following language, which, *mutatis mutandis*, appears to me to guide us to the true meaning of the earlier and the later sections in the Act now under consideration:—"When", said his Lordship, "the Legislature has given its attention to a separate subject, and made provision for it, the presumption is that a subsequent general enactment is not intended to interfere with the special provision..." So here: the earlier special provision must be held to control the general provision *quoad* the particular case specially provided for.

On these grounds I come to the conclusion that for the offence for which defendants' servants arrested the plaintiff, the defendants themselves would have had no authority to arrest him, and, consequently, that the defendants are not liable for the assaults committed by their servants. The appeal, therefore, fails and must be dismissed with costs.

SCOTT, C. J.—I concur.

Appeal dismissed.

(9) (1898) A. C. 748 at p. 754; 67 L. J. P. C. 115; 79 L. T. 151.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 3101 OF 1915.

July 31, 1917.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beacheroft.

SATYESH CHANDRA SARKAR AND OTHERS—DEFENDANTS—APPELLANTS

versus

HAJI JILLAR RAHMAN—PLAINTIFF—RESPONDENT.

Landlord and tenant—Apportionment of rent—Joint landlords, right of, to recover rent proportionately to their shares.

Before the rent of a holding is actually apportioned, either by an amicable arrangement between all the parties concerned or by a decree, one of the joint landlords cannot, as a matter of right, claim from the tenants what he estimates to be his proportionate share of the rent. [p. 722, col. 1.]

Joint landlords cannot at their choice collect rent in separate shares even after giving due notice to the tenants of their separate demands. [p. 722, col. 1.]

Appeal against the decree of the District Judge, Burdwan, dated the 26th August 1915, affirming that of the Subordinate Judge, Burdwan, dated the 30th June 1914.

Babus *Dwarka Nath Chuckerbutty*, *Hemendra Nath Sen* and Babu *Nakuleswar Mukherjee* for Babu *Kalidas Sarkar*, for the Appellants.

Babus *Mohendra Nath Ray* and *Mohesh Chandra Banerjee*, for the Respondent.

JUDGMENT.—This is an appeal by the tenant defendants in a suit for apportionment of rent and for recovery of arrears at the rate settled by the decree. The Courts below have decreed the suit. On the present appeal, the tenants do not attack the decree for apportionment of rent, but they contend that the claim for arrears should have been dismissed, inasmuch as at the date of the institution of the suit, there were no arrears due. This contention is based on the fact that between the 15th May 1911 and the 19th August 1912, the tenants had made sixteen deposits in Court under section 61 of the Bengal Tenancy Act. It is not disputed that if these deposits were validly made, no arrears were due at the date of the commencement of the suit. The question in controversy consequently reduces to this: Were the deposits made in accordance with section 61?

This plaintiff and the fourth defendants were, at the date of the institution of this suit, joint landlords of the tenant defendants, and this is the assumption on which the apportionment of rent is claimed. Consequently, the tenants were not bound to pay rent to their landlords, unless they could obtain a joint receipt for such payments as they might make. But, upon the facts which have been brought to light in the course of this litigation, there can be no reasonable doubt that it was not possible for the tenants to obtain such

joint receipts. The case is thus fully covered by section 61 (1) (*c*) of the Bengal Tenancy Act, which provides that when the rent is payable to co-sharers jointly and the tenant is unable to obtain the joint receipt of the co-sharers for the money, and no person has been empowered to receive the rent on their behalf, the tenant may present to the Court, having jurisdiction to entertain a suit for the rent of his tenure or holding, an application in writing for permission to deposit in the Court the full amount of the money then due. The District Judge would have taken this view, if he had not erroneously held that the landlords could, at their choice, collect the rent in separate shares and that if they gave due notice to the tenants, it became the duty of the defendants to comply with the demand. The District Judge has overlooked that his opinion of the relative rights and obligations of joint landlords and their tenants is contrary to the rule enunciated by a Full Bench of this Court in the case of *Iswar Chunder Dutt* v. *Ram Krishna Dass* (1). Sir Richard Garth, C. J., stated in that case that a sale of a share in a tenure, which has been let to a tenant in its entirety, does not of itself necessarily effect a severance of the tenure or an apportionment of the rent; but that if the purchaser of the share desires to have such a severance or apportionment, he is entitled to enforce it by taking proper steps for that purpose. If he takes no such steps, then the tenant is justified in paying the entire rent, as before, to all the parties jointly entitled to it. But if the purchaser desires to effect a severance of the tenure and an apportionment of the rent, he must give the tenant due notice to that effect, and, then, if an amicable apportionment of the rent cannot be made by arrangement between all the parties concerned, the purchaser may bring a suit against the tenant for the purpose of having the rent apportioned, making all the other co-sharers parties to the suit, *Rajnarain Mitter* v. *Ekadasi Bag* (2). In the case before us, the plaintiff instituted the present suit for apportionment of rent on the 13th November 1912. Before the rent has been actually apportioned by the decree made herein, the plaintiff could not, as a matter of right, claim from the tenants what he estimated to be his proportionate share of the rent. The reverse of this position was, undoubtedly, the exact attitude taken by him prior to this litigation. In these circumstances, the tenants were competent to avail themselves of the provisions of section 61 (1) (*c*) of the Bengal Tenancy Act. We hold accordingly that the deposits were validly made, and that at the date of the institution of the suit the amount claimed as arrears was not due.

The result is that this appeal is allowed and the decree of the Court below modified. The decree, in so far as it allows the claim for arrears with costs and interest, will be set aside; but in so far as it apportions the rent will stand confirmed. Under the circumstances, each party will pay his own costs in all the Courts.

Appeal allowed;
Decree modified.

(1) 5 C. 902; 6 C. L. R. 421; 3 Shome L. R. 132; 2 Ind. Dec. (N. S.) 1182.

(2) 27 C. 479; 4 C. W. N. 494; 14 Ind. Dec. (N. S.) 315.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 566 OF 1914.
September 30, 1915.
Present:—Mr. Stanyon, A. J. C.

BHAUJI AND OTHERS—DEFENDANTS —APPELLANTS
versus
BHAGWANT ATMARAM DHONGDI—PLAINTIFF—RESPONDENT.

Mortgage bond made up of principal and prospective interest—Instalments—Default in payment of instalments—Interest, payment of.

Parties had dealings in money with each other and on making up accounts a certain sum was found due from the defendants to the plaintiff. To the sum found due an addition was made as prospective interest and a mortgage bond was executed in respect of the total sum by the defendants on the 4th October 1916. The bond provided for payment by instalments, and it was stipulated that in default of payment of any instalment it should carry interest at 12 per cent. per annum to be compounded every year and that in default of payment of any two instalments the whole sum should become immediately recoverable. Default was made in respect of two instalments on 26th January 1899:

BHAUJI *v.* BHAGWANT ATMARAM DHONGDI.

Held, (1) that plaintiff was entitled to recover (*a*) the principal sum secured by the bond; (*b*) proportionate interest out of the total sum fixed as prospective interest up to the 26th January 1899; and (*c*) compound interest at 12 per cent. per annum on the sum due on the date of the first default from that date up to the 26th January 1899; [p. 725, col. 2.]

(2) that the plaintiff was not entitled to any interest after the 26th January 1899. [p. 725, col. 2.]

Appeal from the decree of the Court of the Divisional Judge, Nagpur, dated the 11th May of 1914, in Civil Appeal No. 70 of 1913.

Mr. *P. S. Kotwal*, for the Appellants.

Mr. *V. R. Pandit*, R. B., for the Respondent.

JUDGMENT.—The facts of this case are simple. The parties had dealings in money. Accounts were made up and a sum of Rs. 5,159-7-0 was found due from the defendants to the plaintiff in 1896. This was made into two sums of Rs. 3,000 and Rs. 2,159-7-0 for two bonds executed on the 4th October 1896, to which I shall refer hereafter as Bond A and Bond B. To each principal sum an addition was made as prospective interest, and instalments were settled for payment of the aggregate. In each bond there were the stipulations that in default of any instalment it should carry interest at 12 per cent. per annum to be compounded every year and that in default of any two instalments the whole sum should become immediately recoverable.

The following are the details of each bond:—

BOND A.

Principal	...	Rs. 3,000-0-0
Prospective interest	...	Rs. 500-0 0
		Rs. 4,200-0-0

Re-payable by 22 instalments of Rs. 182 and one of Rs. 196. Property mortgaged, 2 village shares with *sir* and a house. In default of payment of whole sum when due, property to be foreclosed.

BOND B.

Principal	...	Rs. 2,159-7-0
Prospective interest	...	Rs. 563-9-0
		Rs. 2,723-0-0

Re-payable by 21 instalments of Rs. 119 and one of Rs. 105. Property mortgaged, 18 *muafi* fields and the same village shares as in Bond A. In default of payment the debt was to be recovered from the usufruct.

The plaintiff maintained a single account to cover both bonds and appropriated payments therein. On the 2nd August 1910 he filed two suits one on each bond, alleging that instalment defaults had taken place in respect of both and the whole sum outstanding having become due, he claimed payment of the same or in default foreclosure of the property mortgaged by Bond A, and possession as usufructuary mortgagee of the *muafi* fields mortgaged by Bond B. After making a proportionate allotment of payments between the two bonds the plaintiff claimed Rs. 4,678-7-0 in respect of Bond A fixing the 26th January 1899 as the date when his cause of action arose, and Rs. 2,819-6-0 in respect of Bond B fixing the same date for his cause of action. *Post diem* interest was also claimed. The first Court gave the plaintiff a foreclosure decree for Rs. 6,817-3-3 on Bond A for principal, interest and costs calculated up to the 16th May 1913, the date fixed for payment, the date of the decree being the 16th November 1912. In respect of Bond B it held the plaintiff entitled to the sum due as the result of a calculation made in the same way as in the case of Bond A, but did not work out or declare the sum due, as it certainly should have done. Usufructuary possession of the fields was decreed and the defendants were ordered to pay the costs of the plaintiff. In this case, however, the interest of one of the six defendants was held not bound by the mortgage. The defendants, except defendant No. 6 in the suit on Bond B, appealed to the Divisional Judge and in the case of the non-appealing defendant the plaintiff filed a cross objection. Both appeals were dismissed and the cross-objection allowed. The defendants have now filed two second appeals Nos. 566 and 567 of 1914 and in respect of Bond B the plaintiff has filed a cross-objection. Both appeals and objections relate to the question of interest only; they were heard together and this judgment will govern the disposal of them all.

It seems to me that the mode of calculation adopted by the Courts below is erroneous, because it treats as principal the prospective interest fixed by the bonds. They have not appreciated the fact that

each bond contains stipulations in the alternative. First of all the creditor receives a certain fixed sum as interest for allowing the re-payment of his money to be spread over 23 years in the case of Bond A and 22 years in the case of Bond B. If any instalment is in arrears, he is entitled to add compound interest at 12 per cent. per annum thereto for the period of default. This completes one part of the contract. But the creditor is given the alternative of calling in his money at once if two instalments fall into arrears. In that event no Court of Justice could properly allow him any of the prospective interest fixed for any unexpired part of the term for which that interest was agreed to be paid.

Let me take an analogous case. *A* lets his house to *B* for 20 years for Rs. 2,000, it being agreed'

(1) that *B* shall pay *A* Rs. 100 a year towards the rent;

(2) that every instalment of rent in arrears shall carry interest at 12 per cent. per. annum;

(3) that in case two instalments of rent are not paid when due, *A* may cancel the lease and recover possession of the house.

B makes default in the payment of the first two instalments of rent and *A*. exercising his option of cancelling the lease recovers possession of the house exactly 3 years after the date of the lease. Would any Court hold *A* entitled to more than Rs. 300 *plus* interest on the instalments in arreas for the period of such arrears? I think not. The same principle governs the present case. The plaintiff had the option of allowing his money to remain outstanding for the full period for which prospective interest was agreed to be paid, or in the alternative of calling it in forthwith on two defaults being made. In the former case, in addition to the prospective interest he would also be entitled to interest as stipulated on instalments in arrear. In the latter case the scheme for 22 and 23 years and all the provisions realting to it would be cancelled, and the money recovered as a debt immediately due either in cash or, failing payment, by foreclosure in the case of Bond A and by usufructuary possession of the mortgaged estate in the case of Bond B. The plaintiff has elected to exercise his option by calling in his money in consequence of default made in the instalments for 1896-97 and 1897-98 and he places his cause of action on 26th January 1899. The bonds contain no provision for the payment of any interest after the date when the plaintiff, having cancelled the term contract, calls in the whole sum due to him, and I am unable to see any rule of law or justice under which it should be given to him. The interpretation by which the first Court professed to find an express stipulation for the payment of such interest, despite the admission of the plaintiff's Pleader to the contrary, does not commend itself to me. It was never contemplated by the parties to these contracts that the creditor should call in his money in a lump sum by a purely mental process not communicated to the debtors. It was the creditor's business to communicate the demand of the whole sum to the debtors and notify that interest would run on it until it was paid. It is not the plaintiff's case that he waived the defaults in instalments until he brought this suit. His case is that he treated the debt as exigible from the date on which the two instalments were in default, namely, the 26th January 1899. He kept this position undisclosed till he filed the suit leaving the debtors to think what pleased from his silence. The plaintiff must be held to that position in giving him relief. On the 26th January 1899 the whole sum then outstanding due on both bonds became payable in a lump sum. Therefore, under the contract the plaintiff is entitled only to interest upto that date, and this interest is payable under two stipulations, namely, (*a*) a proportion of the prospective interest; (*b*) compound interest at 12 per cent. per annum on instalments in arrear.

On the 26th January 1899 the contractual stipulations as to interest came to an end as did the stipulations for payment by instalments. There could be no further defaults. If the plaintiff had then notified to the defendants that he claimed payment of the whole sum at once and that he would charge interest on it while it remained unpaid, his claim to reasonable interest on the whole sum could not have been resisted. But he did nothing of the kind. What he has done in this suit is to cancel the instalment arrangement for the purpose of demanding his principal, and yet claimed the prospective

interest and the instalment default interest as if the original stipulations still ran on. This is obviously unjust and cannot be allowed.

For the purposes of this suit it may be taken that each instalment was made up of principal and interest in proportion to the whole sum specified under each head. That is to say, for example, that under Bond A 1200/4200ths, *i.e.*, 6/21ths of each instalment was interest. Default making the whole sum exigible occurred, according to the plaint, on the 26th January 1899, when the third instalment fell due. Therefore, the plaintiff is entitled to the first three instalments of Rs. 182 each or Rs. 546 in all, whereof Rs. 390 represent principal and Rs. 156 represent a proportionate part of the prospective interest. The plaintiff is further entitled to interest at 12 per cent. per annum on all or any part of each of the two first instalments from the date on which it fell due up to the 26th January 1899, such interest being compounded in the case of the first instalment in respect of any continuance of the failure to pay it after the second instalment fell due. In other words, if nothing was paid the first instalment would carry compound interest from the 18th January 1897 to the 26th January 1899 and the second would carry simple interest from 7th January 1898 to the 26th January 1899. If there were payments accepted against these instalments, the calculation would have to be modified with reference to them. The same mode of accounting must be followed with reference to Bond B. In this way it will be possible to arrive at the amount due on each bond on the 26th January 1899, when by reason of the plaintiff's exercise of his option to cancel the term stipulations and treat his whole debt as exigible, no contractual liablity for interest remained. We then have the original principals, Rs. 3,000 on the A Bond and Rs. 2,159-7-0 on the B Bond *plus* a proportion of the prospective interest included in the first three instalments, *plus* interest on arrears of the first two instalments on the credit side and payments made by the defendants on the debit side. A balance drawn from these will show the amount due on the date of the suits. The plaintiff is responsible for the delay in filing those suits and for the interval between the 26th January 1899 and the 2nd August 1910. I will allow him no interest but he is not responsible for the time required to obtain a decree and secure payment by execution thereof. Therefore, from the date of the suits I will allow him simple interest at the Court rate of 6 per cent. per annum until payment or foreclosure in the suit on Bond A and until payment out of the usufruct of the mortgaged property in the suit on Bond B. But if by drawing up the account in the manner above directed the amount found due to the plaintiff works out to less than the difference between the amount already decreed and the amount for which the two appeals now before me are made, then the decree of the Courts blow will be adjusted so as not to give the defendants greater relief than is claimed by them in second appeal. Both appeals must be allowed and the decrees of the lower Appellate Courts must be set aside and the case remanded for fresh decision.

For reasons already given the cross-objection of the plaintiff for even more interest *post diem* than the Courts below gave him fails and is dismissed with costs. This appeal is affirmed, the decree of the lower Court is reversed and the case is remanded for a fresh decision with advertence to the above remarks. There will be no refund of Court-fees. Costs here and hitherto other than the costs of the objection abide the result. The objection is dismissed with costs.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 606 OF 1916.

March 12, 1918.

Present:—Mr. Justice Fletcher and Justice Sir Shamsul Huda, KT.

ISWAR CHANDRA KAPALI—DEFENDANT No. 1—APPELLANT

versus

Sheikh ARJAN AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Ex parte *application, duty of party making—Order extending time for filing appeal, whether can be cancelled by same Court—Appeal—Order refusing to admit appeal filed out of time, whether decree—Limitation Act (IX of*

ISWAR CHANDRA KAPALI v. ARJAN.

1908), s. 5—*Appeal filed beyond time—Sufficient cause—Mistake of legal adviser—Proof.*

When an *ex parte* application is made, it is the duty of the party making the application to call the attention of the Judge not only to the portion of the law or authority in favour of his case but also to the matters that are against him. [p. 727, col. 1.]

On an *ex parte* application made to the District Judge asking him under the provisions of section 5 of the Limitation Act to extend the time for filing an appeal and to give the appellant time for the purpose of paying the Court-fees, the Judge made an order that time would be extended. But subsequently and before the memo. of appeal had in fact been admitted, he re-considered his order and revoked it:

Held, that the Judge had ample authority under the law to revoke or alter his previous order at any time before the appeal was admitted. [p. 727, col. 1.]

Before an extension of time can be granted under section 5 of the Limitation Act on the ground that the appeal has been filed beyond time owing to a mistake made by the legal adviser of the appellant, there must be proper evidence establishing that a mistake was committed and that it was a *bona fide* one. [p. 727, col. 2.]

Quere.—Whether an order refusing to admit an appeal filed out of time is a decree within the meaning of the Civil Procedure Code.

Appeal against the decree of the District Judge, Mymensingh, dated the 30th of April 1915, affirming that of the Munsif, 2nd Court, at Kishoregunj, dated the 5th of February 1915.

FACTS appear from the judgment.

Babu *Chandra Kant Ghose* (with him Babu *Nilkanto Ghose*), for the Respondents, raised a preliminary objection that the appeal was not competent because the order complained of was an order refusing to admit an appeal which was filed out of time, and, therefore, it was not an appealable order nor a decree within the meaning of section 2 of the Civil Procedure Code.

Babu *Birendra Kumar De*, for the Appellant.—The order of the Appellate Court rejecting a memorandum of appeal on account of its having been filed out of time is a decree and hence a second appeal lies. See *Rakhal Chandra* v. *Ashutosh Ghosh* (1).

[FLETCHER, J.—Why was not the appeal filed in time?]

Because the appellant was misled by the wrong and mistaken advice given by his Pleaders in the lower Court. My submission is that the case comes under section 5 of the Limitation Act. The lower Appellate Court was wrong in holding that the appeal could not be admitted as proper Court-fees had not been paid on the memorandum of appeal. Under section 149 of the Civil Procedure Code the Court has discretion in the matter when there is sufficient cause and section 149 is not controlled by the provisions of the Court Fees Act. The learned Judge has not taken into consideration the real grounds of delay. There are authorities to show that even in second appeal your Lordships can interfere in a case like this.

[SHAMSUL HUDA, J.—Section 28 of the Court Fees Act authorizes the Judge to exercise his discretion where a wrong Court-fee is paid, and the Judge has exercised his discretion in this case after considering all the facts and circumstances of the case.]

My submission is that the learned Judge has not exercised his discretion properly. It is one of those cases where a party is going to suffer owing to the mistake of his legal adviser.

The next point is that the order rejecting the appeal was illegal. On the 27th April the Court admitted the appeal under section 5 of the Limitation Act, and the order passed on that date was final and hence could not be subsequently revoked by the Court in the absence of an application for review.

Babu *Chandra Kant Ghose*, for the Respondents, not called upon.

JUDGMENT.

FLETCHER, J.—This is an appeal by the defendant No. 1 against the decision of the learned District Judge of Mymensingh, dated the 30th April 1915. The appeal is preferred against an order refusing to admit an appeal out of time. It is said that it is a decree under the terms of the Civil Procedure Code and is, therefore, appealable. I will assume for the purposes of this case that it is so. There may be some other cases in which there may be arguments for considering whether or not that is a decree within the meaning of the Civil Procedure Code. Now what happened in this case was this. We are told that there was a conflict of legal opinion on this important case. There was a consultation amongst the Pleaders practising in the Munsif's Court as to the course the plaintiff should adopt under the law. That opinion did not, however, agree with a similar consultation that took place amongst the

(1) 19 Ind. Cas. 931; 17 C. W. N. 807.

Pleaders practising in the Court of the District Judge and the appellant before us admittedly allowed the time to expire within which he had to prefer his appeal. On the 27th April 1915, an *ex parte* application was made to the District Judge asking him under the provisions of section 5 of the Limitation Act to extend the time for appealing and to give the appellant time for the purpose of paying the Court-fee. Now, it is a well-established rule in all Courts that when an *ex parte* application is made, it is the duty of the party making the application to call the attention of the Judge not only to the portion of the law or authority in favour of his case but also to the matters that are against him and, apparently, as far as one can gather from the records of this case, the attention of the learned Judge was not called to the provisions of section 28 of the Court Fees Act and the Judge on his order sheet made the order that time would be extended. Subsequently the learned Judge discovered that under the Court Fees Act, the Court-fee ought ordinarily to be paid on a plaint or memorandum of appeal before such plaint or memorandum of appeal is admitted. It is said that the learned Judge was wrong because section 149 of the Code of Civil Procedure is opposed to that view. But so far as appears from the order sheet, the Pleader for the appellant did not call the learned Judge's attention to section 149, Civil Procedure Code, and the learned Judge clearly did not exercise any discretion that he had under section 149. That being so, the learned Judge said that the matter must be heard again. It is said that the learned Judge having discharged his duties on the 27th April 1915 was incompetent to interfere with his order made on that date. With that I do not agree. The memorandum of appeal had not, in fact, been admitted and the Judge had obviously power to revoke or alter that order at any time before the appeal was admitted. It seems to me that there cannot be the slightest doubt that the Judge had ample authority in this case to reconsider his order of the 27th April 1915 when the matter was pointed out to him.

Then the next point is that the Court has not properly considered the case under section 5 of the Indian Limitation Act and that the Judge has not taken into consideration any of the facts. There are a number of decisions now on this point and these authorities turn upon the mistake of the legal adviser. Take the case reported as *Rakhal Chandra* v. *Ashutash Ghosh* (1) There the appeal was sought to be admitted on the mistake of the Pleader. But in these cases we find that the legal adviser never comes forward and states that he made the mistake but somebody else pledges his oath for another and says that the legal adviser made the mistake. As a matter of fact I understand that in this case the legal adviser has not made any affidavit stating that he made the mistake and ordinarily, before a Court can act upon a statement that a gentleman made a mistake, there ought to be proper evidence establishing the fact that a mistake had been committed and that it was *bona fide*. In this case, that has not been established nor do I think there is any ground for interfering with the discretion exercised by the learned District Judge. It is said that it is not shown on what grounds the learned Judge exercised his discretion. The answer is that it is not shown in this appeal that there are grounds on which we are entitled to interfere with the exercise of that discretion. I see no reason in a case of this nature to interfere with the order passed by the learned District Judge. The appeal fails and is dismissed with costs.

SHAMSUL HUDA, J.—I agree.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL APPEAL No. 394 OF 1916.

September 11, 1917.

Present:—Justice Sir William Ayling, KT., and Mr. Justice Seshagiri Aiyar.

SAMBASIVA AYYAR AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

GANAPATHI AYYAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XX, r. 15—Partnership, suit for dissolution of—Decree—Time from

NATHU v. TULSHA.

which partnership is declared dissolved—Discretion of Court, nature of—Date of judgment, whether dissolution can commence from—Contract Act (IX of 1872), s. 25.

The discretion given to a Court by Order XX, rule 15, Civil Procedure Code, to fix a date from which a partnership is to be declared dissolved is a judicial and not an arbitrary discretion.

Ordinarily the Court should direct dissolution from the date of any notice 'given' in that behalf by one of the partners or from the date of the plaint, and where the parties have been at arm's length since the filing of the plaint, it should not declare that the partnership should stand dissolved from the date of the judgment.

Appeal against the revised decree of the Court of the Subordinate Judge, Kumbakonam, in Original Suit No. 47 of 1913.

JUDGMENT.—The Subordinate Judge, in declaring that the partnership shall stand dissolved as from the date of the judgment, has given no reason for fixing that date. Order XX, rule 15 of the Civil Procedure Code, no doubt, gives a discretion to the trial Court to fix the date; but it is a judicial discretion and not an arbitrary one. Ordinarily, as pointed out in Lindley on Partnership, page 644, the Court should direct dissolution either from the date of any notice 'given' in that behalf by one of the partners or from the date of the plaint. Section 25 of the Contract Act shows that in some cases the date of the judgment would be the most convenient date. See also *Lyon* v. *Tweddell* (1).

In the present case, the parties have been at arm's length since the filing of the plaint and an attempt to get a Receiver appointed was resisted by the first defendant. We think, under the circumstances, the partnership should stand dissolved as from the date of the plaint. The decree will be amended accordingly. There must be further consequential amendments in the decree. Each party will bear his own costs.

M.C.P.

Decree varied.

(1) (1881) 17 Ch. D. 529; 50 L. J. Ch. 571; 44 L. T. 785; 29 W. R. 689; 45 J. P. 680.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1280 OF 1916.

April 2, 1918.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

NATHU AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Musammat TULSHA—PLAINTIFF—RESPONDENT.

Hindu Law—Alienation by widow of her husband's property to pay off his debts—Payment undertaken by relative of deceased—Failure of relative to discharge obligation, whether revives debt.

A Hindu widow sold her husband's property in her possession in order to discharge debts of the deceased, which a relative of his had agreed to pay off but which he failed to discharge:

Held, that when the relative of the deceased made himself responsible and agreed to pay off the debts, they ceased to be debts either of the deceased or of his widow, and the mere fact that the relative failed to perform his obligation would not revive the debts so as to make them a good consideration for the alienation of the property by the widow.

Second appeal from a decree of the District Judge, Jhansi.

FACTS.—Gillay, who possessed some immoveable property, died in 1890 leaving one widow and two daughters, Tulsha the plaintiff and Bari Bai. In 1892 one Har Parshad sued the widow for the debts due to him by her deceased husband. Kunji a relative of the deceased undertook to pay the debts and Har Parshad allowed the suit to be dismissed in default. Kunji agreed to pay the money in instalments. He made default and on the 8th of July 1895 Har Parshad obtained a decree against him for the first three instalments. In 1907 the widow sold a part of the property to Nathu and Mannu defendants. The widow died in 1914 and her daughter Bari Bai having died before her. *Musammat* Tulsha being now the sole survivor sued to recover the property from the defendants, on the ground that the sales to them were collusive and obtained by undue influence and not for consideration and legal necessity. The suit was decreed by both the Courts, the lower Appellate Court holding that the contract between Har Parshad and Kunji extinguished Gillay's debt.

Mr. *A. H. C. Hamilton*, for the Appellants.

Mr. *A. P. Dube*, for the Respondent.

JUDGMENT.—We think the view taken by the Court below was correct on the findings of fact arrived at by it. Assuming

that there was a debt due by Gillay which it was the legal and pious duty of the widow to discharge, that debt was discharged by Kunji taking over the liability and agreeing to pay it off by instalments. It then ceased to be a debt either of Gillay or his widow. The mere fact that Kunji did not perform his obligations would not revive the debt so as to make it a good consideration for the alienation of the property. We dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION No. 3425 OF 1914.

January 8, 1918.

Present:—Mr. Justice Oldfield and Mr. Justice Sadasiva Aiyar.

Sri Sri VIKRAMA DEO GARU, K. C. I. E., MAHARAJAH OF JEYPORE—PLAINTIFF—PETITIONER

versus

Sri Raja TYADAPUSAPATI RUDRA SRI LAKSHMI NARASIMHA RUPA SADRUSA ANNAMARAD DUGARAJU DAKSHINA KAVATA DUGARAJU BAHADUR GARU AND OTHERS—DEFENDANTS—RESPONDENTS.

Vizagapatam Agency Rules, Rule X, cl. (5)—*Suit by purchaser of* mokhasa *in Court auction to recover rent illegally collected by judgment-debtor and to restrain further collections, whether suit 'for immoveable property'—Jurisdiction of Agency Court—Leave of Agent, whether necessary—Madras Local Boards Act (V of 1884), s.* 73.

The expression 'suit for land or other immoveable property' in clause 5 of Rule X of the Vizagapatam Agency Rules bears the same construction as in section 12 of the Letters Patent of the Madras High Court. [p. 730, col. 1.]

The plaintiff purchased a *mokhasa* held by some of the defendants in a Court sale in execution of a decree against the 1st defendant the Zemindar, part of whose estate it was. The 1st defendant having collected cess by virtue of his being the registered Zemindar, the plaintiff sued for recovery of the amounts collected by the 1st defendant and for an injunction restraining him from making future collections;

Held, that this was a suit to recognize the plaintiff as a land-holder for the purpose of section 73 of the Madras Local Boards Act and could be filed in the Agency Court, Vizagapatam, without the Agent's permission. [p. 729, col. 2; p. 730, col. 1.]

Petition, under Rule 20 of the Agency Rules, Vizagapatam, praying the High Court that in the circumstances stated therein it will be pleased to direct the Agent to the Governor at Vizagapatam to review his judgment in Appeal Suit No. 4 of 1914, preferred against the decree passed in Original Suit No. 9 of 1913 on the file of the Court of the Special Assistant Agent, Koraput Division.

The Hon'ble Mr. *B. N. Sarma*, for the Petitioner.

Messrs. *G. Venkataramiah*, *P. Narayanamurthi* and *V. Ramesam*, for the Respondents.

ORDER.—No valid objection has been made to the judgment under appeal. But, the question being one of jurisdiction, we are constrained to differ from it and to decide on a ground not referred to in it, though it was considered by the Assistant Agent, that the suit, being one for land or immoveable property, could be filed in an Agency Court without the Agent's previous permission.

Agency Rule X, clause 5, repeats the description "suit for land or other immoveable property," which occurs in the Letters Patent of this High Court, section 12; and we have been shown no reason why the authorities, in which that description was construed in the latter connection, should not be considered also in the former. The decisions of this Court, like those in Calcutta, have given it a wide construction, as covering "all suits, in which a decree is asked for operating directly on the land in accordance with the principle that all questions relating to land should ordinarily be decided by the Court within whose jurisdiction it lies." *Sundara Bai Saheb* v. *Thirumal Rao Saheb* (1). *Srinivasa Aiyangar* v. *Kannappa Chetti* (2) has also been referred to; and although the judgment of Seshagiri Aiyar, J., identifies the description in the Letters Patent only with clauses (*a*), (*c*) and (*e*) of section 16, Civil Procedure Code, that is presumably because

(1) 3 Ind. Cas. 930; 33 M. 131; 6 M. L. T. 263; 20 M. L. J. 103.

(2) 33 Ind. Cas. 906; 30 M. L. J. 120.

reference to clauses (*b*) and (*d*) was unnecessary for the purpose of the case before him, since he expressly referred to the judgment in *Nalum Lakshimikantham* v. *Krishnasawmy Mudaliar* (3) in which the latter clauses also are specified. This is material, because plaintiff-appellant contends that his suit is for land, because it involves a determination of the nature contemplated in clause (*d*) of an interest in immoveable property.

Plaintiff's allegations in his plaint, on which (and not on the defence) the jurisdiction must depend, are that he bought the *mokhasas* held by some of the defendants in a Court sale in execution of a decree against the 1st defendant, the Zemindar, part of whose estate they were; that the Collector held him liable for cess, which he paid; and that he is entitled to recover the amount claimed from the defendants notwithstanding section 73 of the Local Boards Act (Madras Act V of 1884). He has impleaded 1st defendant because the latter, being still the registered Zemindar, is collecting cess and has filed some suits for it. Plaintiff asks for a decree against 1st defendant for the amounts thus collected by him or in the alternative against the others for amounts not yet collected from them and for an injunction restraining 1st defendant from collecting in future or interfering with plaintiff's collecting. In effect, he alleges that the Court sale made him land-holder for the purpose of section 73 of the Local Boards Act and asks the Court to negative 1st defendant's right to deny this. We think that the declaration of plaintiff's character as land-holder under section 73 amounts to a determination of his and 1st defendant's interest in the *mokhasas*, immoveable property; and that, therefore, the suit is for land within the meaning of Agency Rule X, clause 5.

Plaintiff's suit was, therefore, in our opinion, rightly filed in an Agency Court; and no previous permission for its institution there was necessary. The Agent's decission must be set aside and the appeal must be remanded to him for re-admission and disposal on the merits. Costs will abide the event. Those up to date will be provided for in the Agent's final decree.

Appeal allowed.

M. C. P.

(3) 27 M. 157.

CALCUTTA HIGH COURT.

CIVIL REFERENCE No. 1 OF 1917.

August 30, 1917.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Beachcroft.

NEPUSI BEWA—APPELLANT

versus

NASIRUDDIN—RESPONDENT.

Succession Certificate Act (*VII of* 1889), *s.* 4, *applicability of, to substituted plaintiff on death of original plaintiff.*

Without the production of one of the certificates mentioned in section 4 of the Succession Certificate Act, no decree can be passed in favour of a person who has been substituted as plaintiff in a suit for recovery of money due on a bond upon the death of the original plaintiff. [p. 731, col. 1.]

Quære.—Whether the same principle applies to execution proceedings.

Civil reference by the Munsif, Bogra, in Suit No. 997 of 1916.

JUDGMENT.—This is a reference under rule 1 of Order XLVI of the Code of Civil Procedure, 1908. The question referred has been framed by the Court below in these terms: "Whether section 4 of the Succession Certificate Act would apply at all to the case of a person who has been substituted as plaintiff for one who has died pending the suit." The reference, however, must be limited to the true scope of clause (*a*) of sub-section (1) of section 4, as we are concerned with a suit and not with an execution proceeding which is governed by section 4 (1) (*b*).

One Dalimullah Mandal instituted this suit on the 28th August 1916 for recovery of money due on a bond. The plaint was registered, and the case was fixed for disposal on the 21st September 1916. On that date it was reported that the plaintiff was dead, and the case was adjourned. On the 15th December 1916, the widow of the deceased plaintiff applied, for herself and on behalf of her infant sons and daughters, for leave to prosecute the suit and

an order for substitution was accordingly made. The trial Court has now made this reference for the determination of the question, whether the substituted plaintiffs can obtain a decree against the defendant without the production of one of the certificates mentioned in section 4 of the Succession Certificate Act. We are of opinion that a decree cannot be passed in favour of the substituted plaintiffs without the production of such a certificate.

The question raised is really concluded by authority. In the case of *Sahâdev Sukul* v. *Sakhawat Hossain* (1) a suit had been instituted on a mortgage for recovery of the dues of the mortgagee, first by sale of the mortgaged properties, and then by the sale of other properties of the mortgagor. The Court made the usual decree for sale; the mortgaged premises were sold and the sale-proceeds proved insufficient to satisfy the judgment debt. Meanwhile, the mortgagee had died, and his legal representative applied to the Court to pass a personal decree against the mortgagor under section 90 of the Transfer of Property Act Objection was taken on behalf of the mortgagor that a decree could not be made in favour of the applicant except on production of one of the certificates mentioned in section 4 of the Succession Certificate Act. The Court of first instance overruled this objection and passed a decree under section 90. Upon appeal this decision was reversed. On second appeal to this Court, it was argued that as the succession had opened out during the pendency of proceedings in Court, a succession certificate was not necessary. This contention was overruled, and the view taken by the District Judge was affirmed, notwithstanding the doubt expressed in the case of *Baid Nath Das* v. *Shamanand Das* (2) where this particular point did not arise for decision. Precisely the same view was independently adopted by Maclean, C. J., and Coxe, J., in *Abdul Sattar* v. *Satya Bhushan Das* (3), which was decided before the case last mentioned had been reported.

Maclean, C. J., held that having regard to section 4 of the Succession Certificate Act, the Court could not pass a decree under section 90 in favour of the personal representative of the mortgagee, till a certificate had been granted to him under any of the Acts mentioned in that section and that the fact that a certificate had been subsequently granted was not sufficient to get rid of the difficulty in his path created by the clear language of section 4. The view taken in these two cases is in accord with that of Farran, J., in *Torregrosa Vasquez* v. *Pragji Hurji* (4), where he held that upon the death of the plaintiff *pendente lite*, though the suit may be continued by his representative, a certificate in proof of his representative title must be produced before a decree can be passed in his favour. The comprehensive language used in section 4 (1) (*a*), namely, that "No Court shall pass a decree against a debtor of a deceased person for payment of his debt to a person claiming to be entitled to the effects of the deceased person or any part thereof" is undoubtedly capable of the interpretation adopted in these cases. The claim contemplated by section 4 (1) (*a*) is a claim made by a person in the capacity of and as a personal representative of a deceased person, and from the point of view of the purpose of the Statute as set out in the preamble, it is clearly immaterial whether the decree has to be made in favour of a personal representative who has himself instituted the suit or in favour of one who has taken the conduct of the suit in hand after its institution by the original creditor. The essence of the matter is that, in both the cases, when the decree is passed, it is passed in favour of a person who claims to be entitled to the effects of the deceased person and who must consequently produce proof of the representative title. Whether the same principle does or does not apply to execution cases, does not arise for consideration on the present reference, but it may be observed that there appears to be a substantial difference in phraseology between clauses (*a*) and (*b*); the former contemplates the point of time when the decree is passed, the latter refers to the point of time when the Court is called upon to proceed on the basis of the application for execution: *Mahomed Yusuf* v. *Abdur Rahim Bepari* (5). We hold accordingly that section 4 (1) (*a*) of the

(1) 7 C. L. J. 658; 12 C. W. N. 145.
(2) 22 C. 143; 11 Ind. Dec. (N. S.) 97.
(3) 35 C. 767.
(4) 16 B. 519; 8 Ind. Dec. (N. S.) 825.
(5) 26 C. 839; 4 C. W. N. 558; 13 Ind. Dec. (N. S.) 1138.

Succession Certificate Act applies to the case of a person who has been substituted as plaintiff upon the death of the original plaintiff during the pendency of the suit.

The records will be returned to the Court below; if the trial Judge holds that the plaintiffs are entitled to a decree, a reasonable opportunity must be afforded to them to produce the requisite certificate.

Order accordingly.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1279 OF 1916.

April 4, 1918.

Present:—Justice Sir John Woodroffe, KT., and Mr. Justice Smither.

SIBA KRISHNA SINHA SARMA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

JAGAT CHANDRA TALUKDAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Rent, suit for maintainability of, against one of several heirs of deceased tenant—Contract Act (IX of 1872), s. 43, applicability of.

A landlord cannot maintain a suit for arrears of rent against one of several heirs of a deceased tenant without joining the others as defendants. Section 43 of the Contract Act has no applicability to such a case. [p. 734, col. 1.]

Appeal against the decree of the Subordinate Judge, Mymensingh, dated the 18th of April 1916, affirming the decree of the Munsif at that place, dated the 29th of March 1915.

FACTS of the case appear from the judgment.

Babu *Jogesh Chandra Roy* (with him Babu *Rajendra Chandra Guha*), for the Plaintiffs-Appellants.—The suit was to recover arrears of rent in respect of a tenure. This tenure originally belonged to one Ram Saran Bachaspati. On his death, the suit was brought against his heirs Jagat Chandra Talukdar and Nitya Sundari Dasi. So the suit as originally framed was all right and was not open to any objection for non-joinder or misjoinder of parties.

But when the suit came on for hearing, an objection was taken that the interest of one of the heirs Jagat Chandra Talukdar had ceased in the tenure by reason of his having sold it to others. One of these transferees then made an application to be made a party to the suit, but the landlord did not agree to make him a party to the suit, and proceeded with the suit as against the others. It appears that the transfer made by Jagat Chandra Talukdar was not open to any question by the landlord—the landlord's fee was paid and the name of the transferee was recorded in the *khatian*. So the heir Jagat Chandra Talukdar ceased to be a tenant of the landlord and he cannot be made a defendant in this suit for arrears of rent. The whole question in the suit, as it now stands, is whether the landlord can maintain it against one of the heirs of the deceased tenant. Both the Courts below held that the suit could not be maintained without the addition of the transferees of Jagat Chandra Talukdar as defendants and accordingly dismissed the suit. I submit the lower Courts are entirely wrong. They overlooked the provision of section 43 of the Contract Act under which the heirs were jointly and severally liable for the entire rent. Although there was no express contract between the landlord and the heirs of the tenant on the death of the original tenant, still there was the implied contract when the transferees of one of the heirs went to the landlord and got their names recorded and registered in the landlord's books. Referred to *Chamatkarini Dasi* v. *Triguna Nath Sardar* (1). Unless the defendant could show that there was an agreement to the contrary, he is liable for the whole rent and decree should be made against him irrespective of the question, whether the other heir is made a party to the suit or not. He cannot object to the maintainability of the suit as he is jointly and severally liable with the other heirs for the entire rent of the tenure.

Referred to *Jogendra Nath Roy* v. *Nagendra Narain Nandi* (2), *Rameswar Singh* v. *Jaideb Jha* (3), *Joy Gobind Laha* v. *Monmotha Nath Banerji* (4), *Lalit Mohan Sinha Roy* v. *Haran Chand Khamrui* (5) and *Krishna*

(1) 19 Ind. Cas. 989; 17 C. W. N. 833.
(2) 11 C. W. N. 1026.
(3) 6 Ind. Cas. 387; 12 C. L. J. 591.
(4) 33 C. 580.
(5) 36 Ind. Cas. 243.

Das Roy v. *Kali Tara Chowdhurani* (6) in support of his contention.

Except the case in *Surendra Nath Roy* v. *Krishna Sakhi Dasi* (7), all the other cases support my contention. In *Girish Chandra Guho* v. *Khagendra Nath* (8). Mookerjee, J., points out that where all the tenants are not made parties in a suit for arrears of rent, the suit should not be dismissed but a decree could be passed as a money decree. I submit that in this suit the landlord is entitled at least to a money decree.

Babu *Dwarka Nath Chakrabarty* (with him Babu *Kali Kinkar Chakravarty*), for the Respondents.—In this case the transfer of the interest of the heir of the original tenant Ram Saran was complete under section 12 of the Bengal Tenancy Act and the landlord had no option to ignore the transferee. The case of *Krishna Das Roy* v. *Kali Tara Chowdhurani* (6) is rather against the appellant, see page 293.* Section 43 of the Contract Act applies only where there has been a joint promise. The principle of joint and several liability has been fully discussed in *Kashi Kinkar Sen* v. *Satyendra Nath Bhadro* (9), and also in *Rameswar Singh* v. *Jaideb Jha* (3) and in *Krishna Das Roy* v. *Kali Tara Chowdhurani* (6). In *Ahinsa Bibi* v. *Abdul Kader Saheb* (10) the same point has been discussed. Unless it is shown that the liability of the heirs of the original tenant is a joint liability, one of the heirs cannot be liable for the rent. Section 43 of the Indian Contract Act has modified the principle of English Law on the point of joint liability.

Babu *Jogesh Chandra Roy*, in reply.—Whenever there are more than one tenant, there is an implied contract by them to pay rent jointly and severally. The landlord is not bound to realise rents from the tenants in proportion to their shares in the tenure but is entitled to realise the whole rent from one of the tenants. If one of the tenants objects to the payment of the whole rent, the onus is on him to show that his liability is joint and not several. There is nothing in the present case to show that the liability of one of the heirs sued is only joint liability, and not a several liability. In *Lalit Mohan Sinha Roy* v. *Haran Chand Khamrui* (5) Richardson, J., clearly says that "there is nothing in the Indian law to compel the landlords to make all the tenants party to the suit for rents." In conclusion I beg to submit that according to the provisions of the Civil Procedure Code a suit cannot be dismissed for non-joinder of parties.

(6) 44 Ind. Cas. 80; 22 C. W. N. 289.

(7) 9 Ind. Cas. 110; 15 C. W. N. 239; 13 C. L. J. 228.

(8) 9 Ind. Cas. 1001; 16 C. W. N. 64 at p. 66; 13 C. L. J. 613.

(9) 7 Ind. Cas. 840; 12 C. L. J. 642 at p. 645; 15 C. W. N. 191.

(10) 25 M. 26.

*Page of 22 C. W. N.—*Ed.*

JUDGMENT.

WOODROFFE, J.—This was a suit to recover arrears of rent in respect of a tenure. This tenure originally belonged to a man of the name of Ram Saran Bachaspati, and the persons sued for rent were two persons of the names of Jagat Chandra Talukdar and Nritya Sundari Dassi who were his heirs.

It appears, in the first place, that in this suit the plaintiffs sued both the persons entitled to the tenure. When the case came on for hearing an objection was taken that, as stated in the pleadings, the interest of the first defendant had ceased in the tenure, for in 1305 he sold it to two persons of the names of Syam Sundar Sarkar and Nritya Sundari Dasi, and the former sold it again to Dwarka Lal Sarkar and the latter to one Anath Bandhu Guha. One of these persons applied to be made a party to the suit. It appears that as regards the transfer there is no question of the right of transferability—the landlord's fee was paid and the name of the transferee was recorded in the *khatian*. On that and on the registration of the transfers the liability of the 1st defendant ceased and such liability as was upon him devolved upon his transferees. The plaintiff, however, was unwilling to make the transferees parties to the suit. As he did not do so, both the Courts below held that the suit was not well founded and that it could not proceed without the addition of the transferees as defendants and both the Courts thereupon dismissed the suit.

The question, therefore, before us is narrowed down to a single point, namely, whether in the circumstances of this case the plaintiff could sue the 2nd defend-

ant alone. This question again was dependent on a consideration of that which has been argued before us, namely, whether or not the liability of defendants Nos. 1 and 2, who were admittedly heirs of Ram Saran Bachaspati, was a joint liability or a joint and several liability. The question then is whether the plaintiff could proceed against one of the heirs without joining the other. This turns upon the question of the applicability in the present case of the provisions of section 43 of the Contract Act. In my opinion it has not been shown that that section has applicability in the present case, which is one as I have said of heirs and transferees from such heirs. This is not a case of a contract which is referred to in that section nor, as has been suggested, has an implied contract by reason of the transferees taking possession of the land or having gone to the landlord to have their names recorded and so forth been made out. Of that we have no evidence before us in this case. A number of decisions have been referred to, but in none of them are the facts on all fours with the present case. I think the judgments of both the Courts below are right. The appeal is, therefore, dismissed with costs.

SMITHER, J.—I agree.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

SPECIAL SECOND CIVIL APPEAL No. 190 OF 1916.

December 3, 1917.

Present:—Mr. Justice Rigg.

SAN HLA BAW—PLAINTIFF—APPELLANT

versus

MI KHOROW NISSA AND OTHERS—DEFENDANTS—RESPONDENTS.

Judge's knowledge of character of parties or witnesses, whether can be relied upon in deciding case—Procedure—Jurisdiction.

A Judge is justified in using his knowledge about the character of the parties to a suit to come to a decision upon the credit to be attached to their evidence on the case set up by them. [p. 735, col. 1.]

Where a District Judge declined to believe in the *bona fides* of a suit brought by the plaintiff, unless it was supported by evidence that left no doubt in the mind of the Judge about its credibility, on the ground that many of the suits launched by the plaintiff in his Court had been found to be false:

Held, that the Judge was justified in alluding to his experience of the plaintiff's litigation in his Court. [p. 735, col. 2.]

Mr. *S. M. Bose*, for the Appellant.

Mr. *J. E. Lambert*, for the Respondents.

JUDGMENT.—San Hla Baw sued Mi Khorow Nissa, wife of Kalathan deceased, Mi Shora Bi, Kalathan's daughter, and three minor children of the 1st defendant for recovery of Rs. 120 said to be the balance rent due on a lease executed by Kalathan on the 9th May 1913. The suit was filed in the Township Court of Rathedaung on the 25th November 1915. Neither party was assisted in the Township Court by an Advocate in the trial in which, as the District Judge has remarked, the evidence was recorded in a somewhat perfunctory way without any attempt being made to test the credibility of the witnesses. The Township Judge decreed the claim. The decision was reversed on appeal to the District Court, Akyab. On second appeal to this Court exception has been taken to the nature of the judgment written by the learned District Judge. He commences his judgment by saying: "This is a typical 'San Hla Baw' case. He wants really to get a decree for certain land standing in some one else's name; so he brings a suit, something like two years after it is due, for rent against the heirs of the late owner. . . His ways of business are, I know, very slipshod, and usually sail very close to the wind. . . . San Hla Baw, of course, is a convicted perjurer and a man who by his own admission is prepared to swear to anything to gain time when he is pressed." The Judge also refers to the evidence of Tha Kaing who, he states, is a man who to his own knowledge is accustomed to give evidence on behalf of San Hla Baw. He describes Tha Kaing as San Hla Baw's creature. It is urged in the appeal to this Court that the Judge was not justified in making remarks about the characters of the witnesses, when such characters were not established by any evidence on the record but were matters of personal knowledge of the Judge. In *Ramundoss Mookerjea* v. *Musammat Tarinee* (1) their Lordships of the Privy Council

(1) 7 M. I. A. 169 at p. 203; 1 Sar. P. C. J. 616; 19 E. R. 273.

observe as follows: "An observation, however, is made by the Sudder Dewanny Court, that the Zillah Judge, with respect to two of the attesting witnesses, has spoken of them from his own knowledge, as being what he calls 'professional witnesses,' persons of no character, and, therefore, entitled to no credit whatever. He does not say that, as we understand him, from his own personal knowledge of the parties, as being in the habit of coming before his Court. Now, the Judges in the Sudder Dewanny Court have passed a severe censure upon the Zillah Judge, for making that observation. Their Lordships think it right to say that in that censure they do not at all concur. It is of great importance that the Judge should know the character of the parties, and it is of great advantage to the decision of the case, that it is heard by a Judge acquainted with the character of the parties produced as witnesses, who is capable, therefore, of forming an opinion upon the credit due to them." Again in *Mahomed Buksh Khan* v. *Hosseini Bibi* (2) their Lordships say that they thought the Subordinate Judge was right in relying on the evidence of the Sub-Registrar and of the Mukhtar, with whose character the Subordinate Judge seemed to have been acquainted. "The Subordinate Judge says he holds a diploma, and is a respectable person in his community, and the Court has never seen any act of his by which it can suspect him." These cases are sufficient authority for justifying a Judge in using his knowledge about the character of the parties to come to a decision upon the credit to be attached to their evidence or the case set up by them. On the other hand, it has been laid down by their Lordships in *Hurpurshad* v. *Sheo Dyal* (3) that a Judge cannot, without giving evidence as a witness, import into a case his own knowledge of particular facts. Their Lordships appear to draw the distinction between the conclusion drawn from the knowledge of a Judge about the general character and position of the parties and their witnesses and his knowledge regarding any particular facts connected with the facts in issue in the case. I am of opinion, therefore, that the District Judge was justified in alluding to his experience of San Hla Baw's litigation in his Court and in declining to believe in the *bona fides* of the class of the cases launched by him, many or others of which had been found to be false, unless the case was supported by evidence that left no doubt in the mind of the Judge about its credibility.

(2) 15 I. A. 81 at p. 91; 15 C. 684; 12 Ind. Jur. 291; 5 Sar. P. C. J. 175; 7 Ind. Dec. (N. S.) 1040 (P. C.)

(3) 3 I. A. 259 at p. 286; 26 W. R. 55; 3 Sar. P. C. J. 611; Bald. 25; 3 Suth. P. C. J. 304; Rafique & Jackson's P. C. No. 41 (P. C.).

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 714 OF 1915.

February 8, 1918.

Present:—Mr. Justice Richardson and Mr. Justice Beachcroft.

JAMILA KHATUN CHOWDHURY AND OTHERS—APPELLANTS

versus

Srimati MAHAMUD KHATUN CHOWDHURY—RESPONDENTS.

Mortgage of taluk—*Mortgagee undertaking to pay land revenue—Default—Sale, collusive, for arrears, effect of—Redemption.*

Defendant, who was the mortgagee in possession of a share in a *taluk* and had undertaken to pay the Government revenue, made default in payment of the revenue, so that the *taluk* was sold for arrears of revenue and was purchased by *A*. *A* sold it to *B*. who shortly afterwards sold it to the defendant. Plaintiff, who was a purchaser from the mortgagor, sued to recover possession of the *taluk* from the defendant on redemption. It was found that the sale for arrears of revenue and the subsequent sales to *B* and the defendant were collusive transactions engineered by the defendant for the purpose of obtaining possession of the *taluk* as owner:

Held, that the sales did not affect the rights of the mortgagor or of the plaintiff, who was a transferee from the mortgagor, and that the plaintiff was, therefore, entitled to redeem. [p. 737, col. 1.]

Appeal against the decree of the District Judge, Chittagong, dated the 22nd of December 1914, affirming that of the Munsif, 2nd Court at that place, dated the 9th of May 1913.

FACTS appear from the judgment.

Babu *Probodh Kumar Das* (with him Babus *Ram Charan Mitra* and *Chandra Sekhar Sen*), for the Appellants.—The plaintiff's purchase was no purchase at all so as to

affect the interest of the defendant, for he purchased after 14 years after the mortgage. The auction sale of the 5th June 1897, by which the property was purchased by Abdul Bari for arrears of revenue, had wiped out previous encumbrances. This property has again come back to my client, defendant No. 1, by private purchase in July 1900. Hence plaintiff acquired no interest in it so as to affect the title of defendant No. 1.

[RICHARDSON, J.—Finding is that the purchase by Abdul Bari was *benami* on behalf of defendant No. 1 and if it is so, the original sale did not affect the position of the mortgagor. The purchase was a collusive one and hence your position as the mortgagee of defendant No. 5, from whom plaintiff purchased, remains unchanged.]

(2) My submission is that the amendment of issues at a late stage, *viz.*, after the hearing of the original issues, prejudiced my client.

(3) The sale of the 8-annas share for arrears of Government revenue was not due to any neglect on my part. My 8 annas was also sold along with the mortgaged 8 annas. The principal question is whether I contributed at all to the negligence for which the property was sold for arrears of revenue. This point was not at all decided by the lower Court. I was not given an opportunity to prove that there was no wilful default on my part to pay the Government revenue, which I undertook to pay. Section 53 of the Revenue Sale Law (Act XI of 1859) has no application to the present case. Having undertaken to pay the Government revenue if by some contingency there was default on my part, the mortgagor cannot escape liability for such default. He might have paid the arrears on my default.

Babu *Dwarka Nath Chackerbutty* (with him Maulvi *Nur-ul-din Ahmed* and Babu *Khitis Chandra Sen*), for the Respondents, was not called upon.

JUDGMENT.

RICHARDSON, J.—The defendant No. 1 in the suit out of which this appeal arises was the owner in her own right of a moiety share of the *taluk* to which the suit relates. As to the other moiety share she was the mortgagee in possession under a mortgage by way of conditional sale. As mortgagee, she had undertaken to pay the Government revenue due in respect of the share mortgaged. The *taluk*, however, fell into arrears and was sold on the 6th June 1897 at a revenue sale and purchased by one Abdul Bari. Abdul Bari sold the *taluk* in May 1899 to Basirulla and in November 1900 the defendant No. 1 purchased it from Basirulla. In November 1911 the plaintiff in the suit purchased a 4-annas share of the *taluk* from defendant No. 5, the mortgagor of defendant No. 1. The suit was brought by the plaintiff to redeem the mortgage of defendant No. 1 and both the Courts below have concurred in making a decree in favour of the plaintiff.

In this appeal it is contended in the first place that defendant No. 1 was prejudiced at the trial by an amendment which was made in one of the issues. In our opinion, there is no substance in this contention. The amended issue and the original issue if properly understood raise the same questions of fact, the very questions to which evidence was directed. On that point we agree with what is said on the subject by the learned District Judge in the course of his judgment.

The two remaining contentions may be dealt with together. One of them is that the plaintiff purchased nothing under his conveyance from defendant No. 5, and the second is that the learned District Judge has not found expressly that defendant No. 1 was guilty of wilful neglect in not paying the Government revenue. What the Court below appears to have found is this, that the purchase of the *taluk* by Abdul Bari and the purchase by Basirulla were collusive transactions engineered by the defendant No. 1 for the purpose of getting the estate into her own hands. If that is the meaning of the learned Judge's judgment, then there is an end of the case. Such collusive transaction could have no effect on the title of defendant No. 5 or on the title acquired by the plaintiff from that defendant. The findings of the District Judge appear to me sufficiently clear. In the first place, referring to the sequence of transactions he says this: "The rapidity of these transactions is very suggestive. It has been argued for the respondent that the appellant being already the owner of

half the *taluk*, wished to make sure of getting the other half and doing away with the rights of the mortgagors, and accordingly arranged a collusive set of transactions and was obliged to purchase herself from Basirullah when her estate was taken over by the Court of Wards, since the Court of Wards would not manage a *benami* property. These contentions are supported by the prices paid." Then later on he sums up as follows:—"These facts alone, in my opinion, suffice to show that the transactions are not genuine." As to wilful default on the part of the defendant in connection with the payment of Government revenue the learned Judge says, "there is no evidence at all to show that the tenants were seriously in arrears over paying their rents." The suggestion made to-day that if the defendant No. 1 had had an opportunity she might have shown that the inability to pay the revenue was due to a cyclone or something of that kind, cannot be accepted in face of the findings to which we have referred.

The result is that this appeal is dismissed. The plaintiff-respondent is entitled to his costs of this appeal from the appellant.

We are now informed that pending the hearing of the appeal to this Court the appellant has died. Her two daughters have been substituted in her place. Her son claims no interest through her and appears to have been added as a party respondent. He now asks for costs. We see no reason why he should receive costs.

BEACHCROFT, J.—I agree.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

CIVIL MISCELLANEOUS APPEAL No. 166 OF 1916.

December 11, 1917.

Present:—Sir Daniel Twomey, KT., Chief Judge, and Mr. Justice Ormond.

AUNG MA KHAING—APPELLANT

versus

MI AH BON—RESPONDENT.

Probate and Administration Act (V of 1881), s. 23—Letters of administration, grant of—Sister and adopted daughter, contest between—Procedure—Buddhist Law, Burmese—Adoption—Divorced woman, whether can adopt.

Where the full sister and an alleged adopted daughter of the deceased whose adoption was disputed applied for Letters of Administration to the estate of the deceased:

Held, that inasmuch as in the event of the adoption being established the sister would not under the Buddhist Law be entitled to any share in the estate, the Court would be justified in going into the question of adoption. [p. 737, col. 2.]

Under the Buddhist Law as regards the power to adopt, a woman who is divorced from her husband and has divided the joint property with him is in the same position as a single woman. [p. 738, col. 1.]

An adoption is to a great extent a matter of intention and where an attempted adoption by a married woman causes a divorce between her and her husband but the intention to adopt continues after the divorce and full effect is given to it, there is a good adoption without any formal declaration. [p. 738, col. 1.]

Mr. *Ba Dun*, for the Appellant.

Mr. *J. E. Lambert*, for the Respondent.

JUDGMENT.—The present respondent Mi Ah Bon applied for Letters of Administration to the estate of Chi Ma Pru, who died in May 1916. The present appellant Aung Ma Khaing opposed the application, alleging that she was an adopted daughter of the deceased. She is also the natural half niece of the deceased. Mi Ah Bon is the full sister of the deceased. Ma Khaing appeals from the order of the District Judge granting Letters of Administation to Mi Ah Bon.

Mr. Lambert for Mi Ah Bon contends upon the authority of *Ma Tok* v. *Ma Thi* (1) that Mi Ah Bon was entitled to Letters of Administration inasmuch as she was an admitted relation and the adoption of Ma Khaing was in dispute; but that decision refers to the case of an admitted heir and if the adoption of Ma Khaing in this case is proved, Mi Ah Bon would not be an heir. She would not be a person entitled to Letters of Administration under section 23 of the Probate and Administration Act, because she would not be entitled to any share in the estate. The District Judge has taken, we consider, a correct view of the case cited. He took the evidence in support of the adoption which lasted a whole day, and then decided that it would be waste of time to take the evidence against the adoption, because it was shown that the deceased Chi Ma Pru adopted Ma

(1) 3 Ind. Cas. 719; 5 L. B. R. 78.

Khaing against the wish of her husband. In consequence of this adoption by Chi Ma Pru there was a divorce between her and her husband by mutual consent and a division of their property was made. The learned Judge was of opinion that a sole woman can adopt but that a married woman cannot adopt without the consent of her husband and that the adoption of Ma Khaing, at its inception being invalid, could not become valid after the divorce without some formal adoption or re-adoption in order to place her in the position of a child who had been adopted with a view to inherit. No authorities have been cited to show that a single woman cannot adopt. In the case of *Ma Bu Lone* v. *Ma Mya Sin* (2) it was taken for granted that a spinster could adopt. Mr. May Oung in his work on Buddhist Law remarks that it is quite usual for widows to adopt. There is no reason in principle why a woman who is divorced from her husband and has divided the joint property with him should be in a different position as regards the power to adopt. It seems probable, as held by the District Judge in this case, that a married woman living with her husband cannot adopt without his consent. But an adoption is to a great extent a matter of intention and if Chi Ma Pru's intention to adopt Ma Khaing continued after the divorce and full effect was then given to that intention, there would be a good adoption without any formal declaration. From the evidence, so far as it has been taken, it would appear that Chi Ma Pru's intention was to adopt Ma Khaing; that such attempted adoption was the cause of the divorce and that Chi Ma Pru's intention continued after the divorce and that she gave effect to it.

The case is remanded in order that Mi Ah Bon may be allowed an opportunity of adducing evidence to show that Ma Khaing was not adopted; and the District Court will dispose of the application in accordance with the above remarks. The costs of this appeal will abide the final result.

Case remanded.

(2) 14 Bur. L. R. 9.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 52 OF 1916.

January 16, 1917.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Justice Sir Asutosh Mookerjee, KT.

THE BENGAL STONE COMPANY, LD.—DEFENDANTS—APPELLANTS

versus

JOSEPH ISAAC JOSEPH HYAM AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Contract Act (IX of 1872), s. 15—Coercion—Refusal to convey equity of redemption except on certain terms—Costs—Discretion, exercise of—Solicitor acting on his own behalf, costs of.

A mortgagee, who refuses to reconvey the mortgaged property to the mortgagor except on certain terms, cannot be said to be unlawfully detaining or threatening to detain any property within the meaning of section 15 of the Contract Act. [p. 740, col. 2; p. 741, col. 1.]

The High Court is averse to interfere with the discretion of a Judge on the question of costs, but the discretion must be exercised judicially. The ordinary rule is that a party who succeeds upon a particular issue gets the costs of that issue, unless there is a good cause for depriving him of the costs of that issue and unless the issues in the case are so closely connected that they cannot be separated one from the other. [p. 741, col. 2.]

A solicitor, who is a party to a suit and acts on his own behalf, is entitled to the same costs as if he had employed a solicitor, except in respect of items which the fact of his acting directly renders unnecessary. [p. 742, col. 2.]

Appeal against the decree of Mr. Justice Imam, sitting on the Original Side.

Messrs. *Buckland* and *Surita*, for the Appellants.

Messrs. *Hyam* and *S. N. Ghose*, for the Respondents.

JUDGMENT.

SANDERSON, C. J.—This was an action brought by the plaintiffs for an account in respect of certain building transactions which were undertaken by the defendants for the plaintiffs, Mr. Hyam and Mr. Jones. Those building transactions were undertaken in pursuance of an agreement dated the 21st of January 1909. It is not necessary for me for the purpose of this case to deal in any detail with the terms of that agreement. It is sufficient for me to state that the defendants, the Bengal Stone Company, Ld., were to erect two sets of premises, one in Park Street, and the other in Bow Bazar Street, and that they were not to be liable to spend on all accounts more than a specified sum of

money, and the method of payment was that "the owners (the plaintiffs in this case) should pay the Stone Company (the defendants) for all materials the actual cost price thereof *plus* all charges and expenses actually paid or incurred by the Stone Company in collecting and placing the same on site and also the actual cost of all labour employed by the contractors in or about the erections of the buildings and of completing and equipping the same in terms of the agreement." There were provisions for the remuneration of their services in respect of supervision and other matters, and then the payment of a sum equal to ten per cent. on the aggregate amount of all the items specified in the said clause of the agreement was provided for. The buildings were completed, although not within the specified time. There was also a provision in the agreement that a mortgage should be given by the owners of one of the premises to secure a sum of money which was eventually agreed upon Rs. 2,50,000.

Now, this action was brought, as I have said, primarily for an account. When it came on for trial, there were really two main questions, *first*, the point raised by the defendants, that there had been an account stated between the plaintiffs and the defendants, and that consequently the plaintiffs were not entitled to an account; and, *secondly*, the point raised by the plaintiffs that a certain letter which was dated the 22nd of August 1911 was obtained from the plaintiffs by the coercion of the defendants. That was a letter in these terms:

"In consideration of the Bengal Stone Co., Ltd., this day reconveying and releasing the premises Nos. 294 and 295, Bow Bazar Street, mortgaged by us to the Bengal Stone Co., Ltd., we hereby admit and acknowledge that the said reconveyance and release only relates to the said premises Nos. 294 and 295, Bow Bazar Street, and we hereby undertake to pay the said Bengal Stone Co., Ltd., not later than the 31st December 1911 any sum which may hereafter be found to be due from us to the said Bengal Stone Co., Ltd., under or in connection with the agreement dated the 21st January 1909 and made between the said Bengal Stone Co., Ltd., of the one part and ourselves of the other part. We hereby also agree to forego any and all claims that we may have had or have against you in respect of delays in completion of the buildings at Park Street and Bow Bazar Street and will only make such corrections in your bills and accounts as we may find to be erroneously or excessively charged. All other items of the contract agreement dated 21st January 1909 to be considered as in force."

Now, those were the two main issues that were to be tried by the learned Judge, and I must say I am distressed to think that this action took no less than sixteen days in trial. In my view, it should have been obvious, unless the learned Judge was satisfied that there had been an account stated between the parties, that there must be a reference for the purpose of an account to be taken between the parties, and how the case which (with the exception of one or two subsidiary matters the facts relating to which lay in a small compass) was limited to these two questions, *first*, whether there had been an account stated, and *secondly*, whether the letter of the 22nd of August 1911 had been obtained by coercion, could have taken sixteen days for trial, is certainly beyond my comprehension.

Now, with regard to the first point, the learned Judge has found that there was not an account stated. We have heard the arguments on the one side as well as on the other, we have read the learned Judge's judgment, and the facts to which he referred, and have heard the facts put forward by the learned Counsel for the defendants and I think, even assuming the facts which he has stated, that there was not an account stated between the parties: and, for this reason we did not think it necessary for him to go through the evidence as he had offered to do.

With regard to the other point, we agree with the learned Judge that the letter of the 22nd of August 1911 was not obtained by coercion. The section upon which this matter depends is section 15 of the Indian Contract Act. In order to understand that section, it is necessary to refer to sections 13 and 14. Section 13 says: 'Two or more persons are said to consent when they agree upon the same thing in the same sense." Section 14 says: "Consent is said to be free when it is not caused by—(1) coercion

as defined in section 15, or (2) undue influence, as defined in section 16, or (3) fraud, as defined in section 17, or (4) misrepresentation, as defined in section 18, or (5) mistake, subject to the provisions of sections 20, 21 and 22." The only sub-section of section 14 which can be said to apply to this case is sub-section (1), namely: "Coercion, as defined in section 15." Section 15 says: "*Coercion* is the committing, or threatening, to commit, any act forbidden by the Indian Penal Code, or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement." It is admitted that the present case does not come within the meaning of the first part of that section, namely, "the committing, or threatening to commit, any act forbidden by the Indian Penal Code." But it is said that what happened in this case, to which I will refer more in detail directly, brings the matter within the words 'unlawfully detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement." What happened in this case was this; shortly stated, Mr. Hyam and Mr. Jones had mortgaged this property at Bow Bazar Street to the defendants for Rs. 2,50,000. Mr. Hyam was anxious—Mr. Jones was away and Mr. Hyam was acting on behalf of Mr. Jones—to sell the premises, and apparently he got a purchaser, but he was not a very willing purchaser, and it was necessary for him to get the equity of redemption conveyed to him by the mortgagees. There was a discussion first of all as to whether Mr. Hyam would give a promissory note—I ought to have said that the defendants were alleging that the total of their bills would amount to a considerable sum above Rs. 2,50,000. He was unwilling to give the promissory note. Then an arrangement was come to whereby Mr. Hyam agreed to pay over the balance of the purchase-money, after deducting the amount which would be required for the first mortgage of the property, and also a sum of Rs. 4,000 as brokerage. It would leave about Rs. 2,80,000 and he agreed to pay over that. Now, he alleges that that discussion amounted to "a threatening to detain any *property* to the prejudice of any person with the intention of causing any person to enter into an agreement." The *property* which Mr. Hyam, the learned Counsel who argued the case on behalf of the respondents, relied upon was the equity of redemption; and, he said that the defendants threatened to detain the equity of redemption and there was an "unlawful detaining or threatening to detain," inasmuch as the defendants were refusing to convey the equity of redemption unless they were paid more than the sum secured by the mortgage. In my judgment, that was not unlawfully detaining or threatening to detain any property, within the meaning of section 15.

With regard to the law of duress in England, it is well known that that was limited, and no doubt for very good reasons limited, to the duress of person, and I may quote the following passage which I find stated in a convenient form at page 351 of the Third Edition of Leake on Contract, "Duress may also consist of threats of personal violence. But the fear must concern the safety of the person of a man; and not his house or goods, because he may recover the same, or damages to the value, without any corporal hurt. Again, if the fear do concern the person, yet it must not be a vain fear, but such as may befall a constant man. Fear of imprisonment is sufficient, for the law has special regard to the safety and liberty of a man," (that is a quotation from Co. Lit. 253b). Apparently, when the Legislature was considering this matter for the purpose of applying the law to India, they thought it right to extend it and not to limit the law of coercion to a coercion of a man's person but extended it beyond the law of England to unlawfully detaining or threatening to detain any property. I ask myself, can it ever have been intended to apply it to such a transaction as has occurred in this case? Can it be said that when a person who has refused to convey the equity of redemption except on certain terms has unlawfully detained or threatened to detain any property within the meaning of section 15 of the Indian Contract Act. Having regard to the ordinary meaning of the English language, I have no hesitation in saying that the refusal to convey the equity

of redemption, except on certain terms, did not come within the meaning of section 15. I think that the learned Judge was right in saying that what took place in this case did not amount to *coercion*. Therefore, I think that the plaintiffs' cross-objection upon the question of coercion fails.

Then Mr. Hyam for the plaintiffs raised two other points which I may describe as less important points. The first one was that the learned Judge was wrong in finding that the defendants were not bound to charge the rates of labour which were specified by the letter of the 22nd of December 1908. I think that the learned Judge was right. That letter, as I have said, was written on the 22nd December 1908, and the contract was not made until the 21st of January 1909. I have read the clause which relates to the rate of labour. I read it again to make my meaning clear. "The owners should pay also the actual cost of all labour employed by the contractors in or about the erections of the buildings and of completing and equipping the same in terms of this agreement." In my judgment that is a clause which governs this matter, inasmuch as it was made subsequently to the 22nd of December 1903; I do not think it is possible for us to say that it was implied that the rates of labour specified in the letter of the 22nd of December were to be incorporated in the contract. If it had been so intended, one would have expected the contract to contain some such words as these "that the owners should pay also the actual cost of all labour, having regard to the rates of labour which had been agreed upon between the parties on the 22nd of December 1903."

The other point was that the learned Judge misunderstood the evidence with regard to the steam-plant. What he says is this: "In respect of the steam-plants I accept the version put forward by the defendant Company, and I hold that they are entitled to charge the plaintiffs Rs. 150 per plant per month for the actual period during which the steam-plants were working on the sites." We have been referred to the evidence. In my judgment there was sufficient evidence on which the learned Judge could arrive at that conclusion, and I see no reason for interfering with his decision upon a question of fact in that respect. That disposes of the main points that were raised in this appeal. As I have already said, it must have been obvious from the beginning of the case, as it was obvious from the beginning of the appeal, that the matter must ultimately go to reference: and, the result is that the matter must now go to the Official Referee, unless the parties agree upon some other person who can take an account quicker and more expeditiously: and, after considering the arguments on both sides, I think that the learned Judge was right in the form of the order by which he directed it. It has been read by Mr. Buckland at my request, and I do not propose to read it again. I do not think that the form of the order as to the account ought to be interfered with at all.

Then comes the question of costs. The learned Judge made an order as to the costs in these terms: "It is further ordered and decreed the defendant Company do pay to the plaintiffs their costs of this suit upto and including this decree to be taxed by the Taxing Officer of this Court under the heading 'Class 2 ordinary causes.'" In my judgment that was not a correct direction as regards the costs. There was a clear and distinct issue raised by the plaintiffs that the letter of the 22nd of December 1911 had been obtained by the coercion of the defendants. The learned Judge has not given any direction as to the costs of that issue: and, although the plaintiffs failed upon that issue, he has given the plaintiffs the costs of the whole trial of the action. Now, it is quite true that this Court is most averse to interfere with the discretion of a learned Judge upon the question of costs. But the discretion of the learned Judge upon the question of costs has to be exercised judicially, and the ordinary rule is that a party who succeeds upon a particular issue gets the costs of that issue, unless there is a good cause for depriving him of the costs of that issue and unless the issues in the case are so closely connected that they cannot be separated one from the other. That is not the case here: It was a quite clear and distinct issue in this case, quite apart from the rest of the case. I have

asked myself what good cause there was for depriving the defendants of the costs of that issue. I find none. Therefore, I think the learned Judge was not right in the exercise of his discretion in depriving the defendants of the costs of that issue without a good cause. In my judgment, the defendants ought to have the costs of the issue relating to the question whether the letter of the 22nd of August 1911 was obtained by coercion. But it would be difficult in view of the protracted nature of the trial, as pointed out by Mr. Hyam, the learned Counsel for the plaintiffs, for the Taxing Officer at this stage, without going into the matter at length and putting the parties to a considerable expense, to come to a satisfactory conclusion as to what costs should be allocated to the issue of coercion, and I think we shall be doing substantial justice if we direct that one-third of the costs of this suit ought to be allocated to the issue of coercion and two-thirds of the costs ought to be allocated to the other issues.

Therefore, as regards the costs of the suit, I think the plaintiff ought to have two-thirds of the costs of the suit and the defendants ought to have one-third; and, the costs ought to be taxed upon that basis, for the reason that the defendants have succeeded on the issue of coercion and the plaintiffs have succeeded upon the issue whether there was an account stated.

As regards the costs of this appeal, I think that each party ought to bear his own costs, for the reason that the plaintiffs have failed in part and the defendants have also failed in part and both the defendants and the plaintiffs have succeeded to some extent.

As regards the costs of the reference, those costs will be in the discretion of the Official Referee or the person who takes the reference.

As regards the last point taken by Mr. Buckland on behalf of the defendants, mainly that there ought to be a special direction as regards the costs of Mr. Jones, the point is this:—It appears that Mr. Jones is a solicitor, and that at one time he was in partnership with Mr. Mitter, carrying on business under the name of Jones & Co.; Mr. Mitter died early in these proceedings, it is said before the affidavit of documents was put in. Therefore, substantially, we may say that Mr. Jones was acting as solicitor in this case on behalf of the plaintiffs. The question is whether we ought to give a direction to the Taxing Officer to tax the costs upon the principle of the rule which is laid down in the case of *London Scottish Benefit Society* v. *Chorley* (1). That was an action brought against the solicitors for money not accounted for. The learned Judge, Sir William Brett, Master of the Rolls, said this: "It is true, however, to say that the costs of a solicitor appearing in person must be taxed differently from those of an ordinary litigant appearing by a solicitor. The unsuccessful adversary of a solicitor appearing in person cannot be charged for what does not exist, he cannot be charged for the solicitor consulting himself or instructing himself or attending upon himself. The true rule seems to be that when a solicitor brings or defends an action in person, he is entitled to the same costs as an ordinary litigant appearing in person, subject to this restriction, that no costs which are really unnecessary can be recovered. Of this kind are the costs of instructions and attendances." The report says "an ordinary litigant appearing in person", which is a mistake as appears from the title of *errata* and should read by an ordinary litigant appearing by a solicitor. The rule laid down by this case and affirmed in *Tolputt* v. *Mole* (2) is that the solicitor is entitled to the same costs as if he had employed a solicitor, except in respect of items which the fact of his acting directly rendered unnecessary. We propose to give a direction to the Taxing Officer that he should tax the costs of Mr. Jones upon the principle laid down in that case.

We think that the costs of the paper-book in the appeal should be equally divided between the parties in this case.

MOOKERJEE, J.—I agree.

Decree varied.

(1) (1884) 13 Q. B. D. 872; 53 L. J. Q. B. 551; 51 L. T. 100; 32 W. R. 781.

(2) (1911) 1 K. B. 836; 80 L. J. K. B. 686; 104 L. T. 148; 55 S. J. 293.

KOMALUKUTTI *v.* PULIKALAKATH MUHAMAD.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 686 OF 1917.

December 5, 1917.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

AVARAN MARAKARAKATH KIZHEK-KEKATH KOMALUKUTTI AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

PULIKALAKATH PUTHIAKATH MUHAMAD *alias* AHAMMAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 111 (g)—Landlord and tenant—Agricultural lease—Disclaimer of landlord's title, what amounts to—Forfeiture of tenancy—Lease for life or for term, whether determined by disclaimer—Relief against forfeiture—Power of Court—'Renounce', meaning of.

The principles of section 111 (*g*) of the Transfer of Property Act apply to agricultural leases, though they are not covered by the enactment [p. 743, col. 2.]

A mere allegation of title by a tenant which does not amount to repudiation of the landlord's title, cannot work forfeiture of the tenancy. [p. 746, col. 1.]

Where the defendant, who was plaintiff's tenant for life, in a document whereunder he assigned certain properties which belonged to him in *jenm*, described certain other properties as his *jenm*, and the landlord sought to recover these latter properties which were comprised in his lease on the ground that his title was repudiated:

Held, that as the assertion was not addressed to the landlord or followed up by a transfer of that particular property to a third party, but was only an incidental reference in a document intended to convey some other property, it was not enough to constitute a disclaimer of title. [p. 744, col. 2.]

Per *Seshagiri Aiyar, J.*—Where there is a disclaimer of the landlord's title by the tenant, it will work a forfeiture of the tenancy even though the lease is for life or for a term. [p. 744, col. 1.]

Abbakka Shetthi v. *Seshamma*, 25 Ind. Cas. 944; (1914) M. W. N. 915; 16 M. L. T. 442, doubted.

If there is a denial of title, Courts have no power to relieve against forfeiture. In such a case, the tenant must prove, in order to obtain relief from Court, that the denial was occasioned by the fraud, mistake or accident of the landlord and that the tenant himself was neither careless nor negligent. [p. 744, col. 2.]

The expression 'renounce' connotes that some act is done to the knowledge of the landlord which is calculated to convey to him the impression that the tenant repudiates his title. [p. 744, col. 2.]

Per *Napier, J.*—Where there is no statutory provision determining particular relations between landlords and tenants in India, resort may be had to the principles of the English Law of Real Property, bearing in mind the difference in the origin of tenures and the conditions peculiar to land tenures in India. [p. 745, col. 2.]

The words 'repudiation' and 'renunciation' require something a great deal stronger than a mere assertion not communicated to the landlord. Though a hard and fast rule cannot be laid down, a very good test to apply would be, whether the assertion would operate as a starting point for adverse possession against the landlord. [p. 746, col. 2; p. 747, col. 1.]

Second appeal against the decree of the Court of the Subordinate Judge, South Malabar at Calicut, in Appeal Suit No. 130 of 1916, preferred against the decree of the Court of the District Munsif, Parpanangadi, in Original Suit No. 3 of 1915.

Mr. *T. Kuttikrishna Menon*, for the Appellants.

Mr. *K. P. Govinda Menon*, for the Respondents.

JUDGMENT.

SESHAGIRI AIYAR, J.—This is a suit for ejectment by a landlord, on the ground that the tenant has forfeited his right by his denying the title of the plaintiff. The District Munsif held that the act complained of did amount to a disclaimer of the landlord's title and decreed possession. On appeal the Subordinate Judge agreed with the District Munsif that there was a disclaimer but held that as the lease was granted for the lifetime of the lessee, the disclaimer had not the effect of putting an end to the tenancy and that the suit was premature. He dismissed the suit upon that ground.

There are two questions for consideration in this second appeal. The *first* is, was there a disclaimer of title, *secondly*, whether the tenant has not forfeited the tenancy, as the lease was for the lifetime of the tenant although he did deny the landlord's title. I shall dispose of the second point first.

The cases quoted by the Subordinate Judge have not much bearing upon this second question. I fail to see why the denial of title during the continuance of the period of tenancy should not work a forfeiture of the right. The Transfer of Property Act no doubt has no application in terms to this tenancy, which is an agricultural one. But the principle of section 111, clause (*g*), is applicable to this case. Under the second sub-section of that clause it is enacted that the lessee renounces his character as such by setting up the title of a third person or by claiming title for himself. Mr. Justice Sadasive Aiyar in *Abbakka Shetthi* v. *Seshamma* (1) points out that under the Common Law of India, a favourable construction should be placed upon the conduct of the

(1) 25 Ind. Cas. 944; (1914) M. W. N. 915; 16 M. L. T. 442.

tenant before he is adjudged to have forfeited his tenancy. I am prepared to accept this view in dealing with agricultural leases, but I can see no justification for the view taken by the Subordinate Judge that leases for a term will enure for the full length of it notwithstanding the denial of title by the tenant. Therefore, if I come to the conclusion that there has been a disclaimer of title by the tenant, I would take a different view of the case. I suggested in the course of the argument that even if there was a disclaimer, Courts may have power to relieve tenants from forfeiture. Many authorities were not cited on the question at the bar, but, on considering the matter fully, I am not satisfied that, if there is a denial of title, there is power in the Courts to relieve against forfeiture. Under the English Law there are at present still classes of cases which can be relieved against (*a*) for non-payment of rent ; the Common Law Procedure Acts of '52 and '60 and section 4 of the Conveyancing Act of '92 provide for relief, (*b*) in cases of breaches of other conditions and covenants the Conveyancing Acts of '91 and '92 declare principles on which relief can be granted. No doubt it is pointed out in *Barrow* v. *Isaacs* (2) that these various enactmants have not exhausted the equitable jurisdiction of the High Court to relieve a defaulting tenant from forfeiture. Lord Esher in that case says that in cases which are not provided for by the Legislature, equity will come to the aid of the party only in three cases, *viz.*, fraud, accident or mistake. Then he proceeds to say that even if any of these elements are found, there will be no relief if the tenant had acted with great carelessness or negligently. The learned Master of the Rolls does not refer to the case of denial of title as one of the relieveable cases, and I have not been able to find any authority in which relief was granted by Courts where the tenant had denied the landlord's title. Mr. Justice Sadasiva Aiyar, in the case to which I already referred, seems inclined to the view that all cases of forfeiture can be relieved against. Even accepting this broad proposition as being especially applicable to Indian conditions, I would require that, where there has been a denial of title, the tenant must prove, in the language of Lord Esher, that that denial was occasioned by the fraud, mistake or accident of the landlord and that the tenant himself was neither careless nor negligent. In the present case no attempt has been made to prove that the tenant has been misled. Therefore, I am driven to the conclusion that, if there had been a disclaimer of title, I would have decreed possession.

But I am not satisfied that the Courts below are right in holding that there is a disclaimer of title. The disclaimer is said to be contained in Exhibit J. That is an assignment of *jenm* right by the defendant to a third party in respect of properties which undoubtedly belong in *jenm* to the defendant. In the course of describing the properties assigned and in excluding certain properties from the deed of assignment, the defendant says that the excluded property belongs to him in *jenm*. It is true there is in this case an assertion of *jenm* right in respect of property now sought to be recovered, but the assertion is not addressed to the landlord, nor is that assertion followed up by transferring the particular property to a third party. There is no surrender of possession to a person claiming adversely to the *jenm*. It is only an incidental statement in a document which was intended to convey some other property. The question now is whether this incidental reference can amount to a denial of title. In the Transfer of Property Act the language is, 'in case the lessee renounces his character as such by setting up title of a third person or by claiming title in himself.' In this case he did not set up the title of a third person nor did he renounce his character as tenant. In ordinary parlance the expression 'renounce' would connote that some act is done to the knowledge of the landlord which was calculated to convey to him the impression that the tenant repudiated his title. The English authorities to which I shall presently refer seem to bear out the view that a casual reference like the present one will not have the effect of renunciation of title. As was pointed out in *Prag Narain* v. *Kadir Baksh* (3), the denial

(2) (1891) 1 Q. B. 417; 60 L. J. Q. B. 179; 64 L. T. 686; 39 W. R. 348; 55 J. P. 517.

(3) 18 Ind. Cas. 728; 35 A. 145; 11 A. L. J. 115.

must be unequivocal and some act tending to the giving up of the relationship of tenant must have been committed. The authorities in England are to the same effect. In *Doe d. Graves* v. *Wells* (4) Lord Denman, C. J., seems to suggest that there must be a betrayal of the landlord's interest and that the landlord should be placed in a worse condition, before he can insist upon forfeiting the tenant's lease. In *Doe d. Dillon* v. *Parker* (5) it was held that a payment to a third person was not sufficient to put an end to the tenant's lease. *Doe d. Gray* v. *Stanion* (6), *Doe d. Pittman* v. *Sutton* (7), *Doe d. Williams* v. *Cooper* (8) may be quoted in support of the same view. In Mr. Williams' Book on Ejectment (2nd Edition), page 56, the law is thus stated: 'In order to constitute a disclaimer something must be done by the tenant which amounts to a direct repudiation of the relationship of landlord and is necessarily inconsistent with that relationship.' In Woodfall on Landlord and Tenant, the statement is: "In order to make either a verbal or written disclaimer sufficient it must amount to a direct repudiation of the relationship of landlord and tenant, or to a distinct claim to hold possession of the estate upon a ground wholly inconsistent with that relation, which by necessary implication is a repudiation of it." The same proposition is stated in Cole on Ejectment also, page 41. In my opinion, the collateral reference in a document intended to convey some other property is not enough to constitute a disclaimer of title. The principle is well settled that a tenant cannot acquire title by prescription against his landlord so long as he does not, to the knowledge of the landlord, repudiate the tenancy under which he held possession. Consequently the statement in a document executed to a third party cannot ordinarily have the effect of starting adverse possession in favour of the tenant. The landlord, therefore, is not put in a worse position than he was when he let the property to the defendant. I, therefore, hold that there has been no denial of title. I would dismiss the second appeal. But having regard to the conduct of the defendant I do not think he is entitled to any costs in this Court.

NAPIER, J.—Two questions have been raised in this second appeal, the *first*, whether the alleged denial of title by the defendant operates to terminate his interest in the land, and the *second*, whether if there is a forfeiture, the Courts have power to relieve against it. The first question only has been considered by the lower Appellate Court, and the view taken by the learned Judge on his reading of some decisions of this Court is that no denial of title by a person in the position of the defendant could have that operation. I agree with the appellant that the learned Judge has misappreciated the effect of those decisions. But that does not dispose of the question.

It must be premised that there is no statutory law under which a denial of title by an agricultural lessee acts as a forfeiture. It is argued, and the argument is founded on several decisions of this Court, that the anology of the Transfer of Property Act should be applied, although such leases are specifically exempted. I have, speaking for myself, pointed out in another case the danger of this method and, where statutory provision is absent, have preferred to seek another basis, namely, the English law of property. In doing so, we should, in my opinion, always bear in mind the difference in the origin of tenures and also the conditions peculiar to land tenures in this country.

I entirely agree with my learned brother that the only denial which we have to consider in this case is that contained in Exhibit J, and this denial is certainly not made in any transaction dealing with the property, the subject of this suit, and is not addressed to the landlord. That is the state of facts as to the denial. The tenancy in question arises in a rather peculiar manner. Claims were made to this property and other properties by the plaintiff and the defendant and the suit ensued. Their respective rights were settled by a *razinama* decree, under which this property was "to be held by the 2nd and 3rd defendants until the death of both of them on

(4) (1839) 10 Ad. & E. 427; 2 P. & D. 396; 8 L. J. Q. B. 265; 3 Jur. 820; 113 E. R. 162; 50 R. R. 473.
(5) (1820) Gow. 180; 21 R. R. 827.
(6) (1836) 1 M. & W. 695; 1 Tyr. & Gr. 1065; 2 Gale 154; 5 L. J. Ex. 258; 46 R. R. 464; 150 E. R. 614.
(7) (1841) 9 Car. & P. 706; 62 R. R. 763.
(8) (1840) 1 Man. & G. 135; 1 Scott. N. R. 36; 9 L. J. C. P. 229; 133 E. R. 278; 56 R. R. 313.

Verumpattom right under the plaintiff without being surrendered." The defendants should pay a rental of Rs. 2 per year, and on the death of the defendants, the Paramba should be taken possession of by the plaintiff or her representatives. The result of this decree was to create the relationship of landlord and tenant between the plaintiff and the defendants, the tenancy being one for joint lives of the defendants. The defendants have certainly, in Exhibit J., declared that they held the property in *jenmi* rights, but they have not granted any lease inconsistent with their life tenure, nor have they repudiated that tenure directly to the landlord.

It appears from an examination of the English cases that forfeiture for denial of title is based on two different principles when applied to two different classes of tenancies. The first is with regard to tenancies from year to year. In *Doe d. Graves* v. *Wells* (4), Denman, C. J., points out that with regard to tenures from year to year the words 'forfeiture' and 'disclaimer' are wrongly applied and that where a landlord brings an action to recover possession from such a tentant, the evidence of a disclaimer of the landlord's title by the tenant is evidence of the determination of the will of both parties, by which the duration of the tenancy, from its particular nature, was limited; and, viewed in this light, he held that a verbal assertion that the fee was in the tenant even though made to the landlord's agent, was not a sufficient indication of the desire of the tenant to put an end to the tenancy, in that mere words could not operate to affect an interest in law.

The origin of the doctrine as applying to tenancies *not* terminable at will is to be found in 3 Bacon's Abridgment, page 196, Estate for Life and Occupancy—"another way of forfeiture in a Court of Record is, by claiming a greater estate than he had by the feudal donation, or by affirming the reversion to be in any other person than his lord. This seems to be grounded on a rule in the old feudal law, that if a vassal denied that he held the feud of his lord, and it was proved against him, such denial was a forfeiture." And then come the words explaining the limitation of this doctrine—"But, as by the feudal law, the vassal was to be convicted of this denial, so in our law those acts which plainly amount to a denial must be done in a Court of Record, to make them a forfeiture; for such act of denial appearing on record is equivalent and equally conclusive as a conviction upon solemn trial; and all other denials, that might be used by the great lords for trepanning their tenants and for a pretence to seize their estates, by our law were rejected, for such convictions might be made by such great lords where there was no just cause; but the denial of the tenure upon record could never be counterfeit, or be abused to any injustice; and, therefore, this notorious and solemn act of the tenant was retained as a just cause of forfeiture by our law." That is the origin of the doctrine of forfeiture by denial; and it is hardly necessary to point out how unequivocal and direct denial must be to come within the mischief of this doctrine.

The modern application of this doctrine is to be found stated in Woodfall's Law of Landlord and Tenant, 19th Edition, page 431: "In order to make either a verbal or written disclaimer sufficient, it must amount to a direct repudiation of the relation of landlord and tenant or to a distinct claim to hold possession of the estate upon a ground wholly inconsistent with that relation, which, by necessary implication, is a repudiation of it." This statement of the law is taken word for word from the judgment of the Court of Exchequer in *Doe d. Gray* v. *Stanion* (6) and was quoted as the basis of his judgment by a very eminent Judge Fry, J., in *Vivian* v. *Moat* (9).

It is clear, therefore, that a mere allegation of title which does not amount to repudiation cannot work forfeiture, and it is to be noted that in the Transfer of Property Act, this distinction has evidently been borne in mind, for the only disclaimers which operate under section 111, clause (*g*), are in cases where 'the lessee renounces his character as such by setting up a title in a third person or by claiming title in himself.' It seems to me that both the words repudiation and renunciation require something a great deal stronger

(9) (1881) 16 Ch. D. 730; 50 L. J. Ch. 331; 44 L. T. 210; 29 W. R. 504.

than a mere assertion not communicated to the landlord. It is impossible to lay down a hard and fast rule; but, to my mind, a very good test to apply would be, whether the assertion would operate as a starting point for adverse possession against the landlord [*vide Doe d. Foster* v. *Williams* (10), where Lord Mansfield applies this test]; and viewed in this light the assertion will not come within its mischief.

I am, therefore, of opinion that there was no denial of the title within the mischief of the doctrine. That being my conclusion on the first question, I do not think it necessary to enter into a consideration of the other point, whether a forfeiture for denial of title can be relieved against. I agree with the result of my learned brother's judgment.

Appeal dismissed.

M. C. P.

(10) (1777) 2 Cowp. 621 at p. 622; 98 E. R. 1273.

CALCUTTA HIGH COURT.

APPEALS FROM APPELLATE DECREES NOS. 2651, 2884 TO 2897 OF 1915.

March 13, 1918.

Present:—Mr. Justice Richardson and Mr. Justice Walmsley.

Rani MINA KUMARI SAHEBA—PLAINTIFF—APPELLANT

versus

ICHAMOYEE CHOWDHURANI AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Landlord and tenant—Occupancy holding, custom of transferability subject to payment of nazar *—Essentials of the custom—*Nazar, *tender of, whether necessary for validity of transfer.*

In order to establish a custom of transferability of an occupancy holding subject to the payment of a customary *nazar*, the evidence must show that the landlord is bound to recognise the transfer when *nazar* of the amount or at the rate determined by custom is tendered to him. [p. 748, col. 2; 749, col. 1.]

An alleged custom of transferability of an occupancy holding on payment of a *nazar* which leaves the amount or rate of the *nazar* indefinite is void for uncertainty, for no one knows what the tenant has to pay by way of *nazar* and the landlord can demand what he pleases and refuse his consent unless he is satisfied. [p. 749, cols. 1 & 2.]

Where there is a custom of transferability of an occupancy holding on payment of a customary rate of *nazar*, which the landlord is bound to accept, the transferee has no title under the custom until he has paid or tendered *nazar* at that rate. [p. 749, col. 2.]

Appeals against the decrees of the District Judge, Birbhum, dated the 29th of June 1915, affirming those of the Munsif, Additional Court, Rampurhat, dated the 18th of March 1914.

FACTS appear from the judgment.

Babu *Bipin Behari Ghose* (with him Babu *Urukramdas Chakrabarty*), for the Appellant.—There are authorities to show that when transfers are recognised by the landlord on payment of *nazars*, the custom of transferability is disproved.

The finding of the learned Judge is sufficient to give a decree for ejectment, because the holding is found not to be transferable by custom without the consent of the landlord and his finding is not sufficient to show that there was a custom that the holding was transferable by custom. If the Zemindar has to be paid a *nazar* for making a transfer legal, that is enough to show that the transfer is not valid without the landlord's consent. Payment of a *nazar* to the landlord and the acceptance of it by him do not *establish* a custom of transferability of a non-transferable occupancy holding without the landlord's consent. Refered to *Maharaja Radha Kishore Manikya Bahadur* v. *Sreemutty Ananda Pria* (1), *Srimutty Sibo Sundari Ghose* v. *Raj Mahan Guho* (2), *Bhogirat Chandra Mondal* v. *Sital Chandra Sarkar* (3). Where a landlord accepts *nazar* that shows that the landlord recognises the transfer and gives his consent. Again in this case no *nazar* was paid nor even tendered, so even assuming that there was a custom of transferability on payment of a *nazar*, the transferee cannot claim any right as he did not pay or tender the customary *nazar*.

In *Edward Dalgliesh* v. *Sheikh Gozaffar Hossin* (4) it is held that transfers must be made with the knowledge of the landlord, though without his consent and wish, in order to establish the custom of transferability.

(1) 8 C. W. N. 235.
(2) 8 C. W. N. 214.
(3) 17 Ind. Cas. 15; 16 C. W. N. 955.
(4) 8 C. W. N. 21.

MINA KUMARISAHEBA v. ICHAMOYEE CHOWDHURANI.

The mere fact that a *nazar* is to be paid in order to get the consent of the landlord is not evidence to show that there was a custom of transferability without the landlord's consent on payment of the *nazar*. It must be proved that there was a customary rate of *nazar* on payment of which the landlord was bound to recognise the transfer and also that, that *nazar* at that rate was legally offered.

Babu *Ram Chandra Mojumdar* (with him Babu *Gauranga Nath Banerjee*), for the Respondents.—The present cases are concluded by the findings of fact. With reference to the contention that a new case was made by both the Courts, I sumbit my learned friend has no such grievance. By referring to the issues we find that in the written statement the words used are.....(customary *nazar*). This was not challenged and this shows there was such a custom. This point was not at all raised in the lower Courts, so it is now too late to put forward this objection. Secondly, I submit the question as to whether the customary *nazar* was paid does not arise in the present case, which depends on the pleadings in which the whole question was whether there was any custom of transferability by payment of a *nazar* and the whole case depends on the solution of this question. The finding is that *jotes* were so transferable and this concluded the suit. The following distinctions are to be made with regard to the reported cases:—

(1) It is one thing to say that the landlord recognises a transfer on receipt of a *nazar*. Here the landlord has discretion, he may or may not accept the *nazar*.

(2) It is another thing to say that when a customary *nazar* is paid, the Zemindar is bound to recognise; and here the landlord has no discretion.

In *Maharaja Radha Kishore Manikya Bahadur* v. *Sreemutty Ananda Pria* (1) these points are discussed. In the other case in *Srimutty Sibo Sundari Ghose* v. *Raj Mohun Guho* (2) the same thing is found. Hence 8 Calcutta Weekly Notes cases do not touch the present case, which falls within the second class of cases. In the latter class of cases custom or local usage is the main thing. In the case in *Bhogirath Chandra Mandal* v. *Sital Chandra Sarkar* (3), cited by my learned friend, the question is put in a very significant form, see page 957.* Referred to *Buzlul Karim* v. *Satish Chandra Giri* (5).

Babu *Bipin Behari Ghose*, in reply.—The question of custom is beyond the scope of this suit. Pleadings do not allege that there was a custom as to the fixity of *nazar*. The defendant has not at all a valid title to resist ejectment because he has not made out a title by payment of *nazar* previous to the suit for ejectment, nor even up to this time any *nazar* has been tendered.

JUDGMENT.—The appellant is the plaintiff in a suit brought to recover actual possession of an occupancy holding in the village of Basanta of which he is the proprietor. His case is that the holding is non-transferable and that the defendants, who are in possession as purchasers from the original tenant, are mere trespassers. Of the defences raised we are now concerned only with the defence that occupancy holdings in the village are transferable by custom without the landlord's consent. The written statement says nothing about the payment of *nazar*, customary or otherwise. There is no plea that *nazar* has in fact been paid. Nor is there any reference to *nazar* in the issue framed upon this question. The issue is merely: "Are the disputed holdings transferable by local custom or usage?" At the trial, however, evidence relating to the payment of *nazar* has been given and both the Courts below have found in favour of a custom of transferability involving in some way, which is not clearly defined, the payment of *nazar*. The question is whether the finding can be supported in law.

The cases on the subject of customary *nazar* will be found collected in Mr. Sen's work on the Bengal Tenancy Act (3rd Edition, pages 136, 137). The principle of the cases is clearly this, that in order to establish a custom of transferability subject to the payment of a customary *nazar* the evidence must show that the landlord is bound to recognize the transfer when *nazar* of the amount or at the rate

(5) 10 Ind. Cas. 325; 13 C. L. J. 418; 15 C. W. N. 752.

*Page of 16 C. W. N.—*Ed.*

determined by custom is tendered to him. There is all the difference between a fixed *nazar*, which the landlord is obliged to accept whether he likes it or not, and a *nazar* which is bargained for and paid as the price of a consent which he may give or withhold as he pleases. A practice or course of business in a Zemindary office, according to which a transferee is recognized provided that the amount of the *nazar* is satisfactory to the landlord, is not sufficient.

Tried by this standard the finding of the learned Munsif is not a good finding of a custom. It is not enough to say "that there are constant transfers and the transferees pay *nazar* to the landlord to be recognized." The two statements that "occupancy *jotes* are transferable" and that "landlords recognize such on payment of *nazar*" are as they stand inconsistent. The payment of *nazar* without more is an indication that the *jotes* are not transferable without the landlord's consent, given on receipt of the *nazar*.

The finding of the learned District Judge is more artificial, but as it rests on the same materials it is perhaps not surprising to find that it is also open to objection. He holds "that a custom or usage existed in the plaintiffs' estate at Basanta by which occupancy holdings are transferred with the knowledge but without the consent of the landlord and are recognized by the landlord upon payment of a *nazar* fixed by custom." It may be presumed that the Judge means that the transfers are or must be recognized by the landlord. Apart, however, from any question of grammar, the substantial objection to the finding is that it does not state the amount of the customary *nazar*. As to that there is no definite conclusion arrived at in the judgment. The Judge says that "the landlords recognize all transfers of occupancy holdings, provided a fixed *nazar*, generally four annas in the rupee on the purchase of the property, is paid." But though he adds that "the *nazar* varies in different estates" he does not determine the rate payable in Basanta.

Now obviously a custom which leaves the amount or rate of *nazar* indefinite must be void for uncertainly. The position is no whit better than when the *nazar* is determined by agreement. No one knows what he has to pay and the landlord can demand what he pleases and refuse his consent unless he is satisfied.

Further there is another vice in the judgment. It is not found that the defendants paid or tendered any *nazar*. As I have said the written statement contains no such plea, and even if it be assumed that there is a customary rate of *nazar* which the landlord is obliged to accept, the defendants have no title under the custom until they have paid or tendered *nazar* at that rate. [*Maharaja Radha Kishore Manikya* v. *Srimutty Ananda Pria* (1), *Sreemutty Sibo Sundari Ghose* v. *Raj Mohun Guho* (2)].

For these reasons the judgments and decrees of the Courts below should, in my opinion, be set aside and a decree made in favour of the plaintiff awarding her *khas* possession in accordance with the first prayer of the plaint with costs throughout. There will be a remand of the suit to the Court of first instance in order that the claim for mesne profits may be tried.

This judgment governs the consolidated appeals other than Appeals Nos. 2892, 2893, 2894, 2895 and 2896, which fail on other grounds and are dismissed with costs.

I may add that we allowed the parties, at their request, time to settle the matter, but they have not found it possible to arrive at an agreement.

Decrees set aside.

PATNA HIGH COURT.
FULL BENCH.

APPEAL FROM ORIGINAL DECREE No. 123 OF 1914.

March 1, 1918.

Present:—Mr. Justice Chapman, Mr. Justice Atkinson and Justice Sir Ali Imam, KT.

RAM BAHADUR AND OTHERS—DEFENDANTS 1ST PARTY—APPELLANTS

versus

JAGERNATH PRASAD AND OTHERS—PLAINTIFFS, KUNJA LAL AND OTHERS—DEFENDANTS 2ND PARTY—RESPONDENTS.

Hindu Law—Will, construction of—Woman, estate taken by—Life-estate, whether can be created by Will—Contingent remainder after estate granted to woman,

RAM BAHADUR *v.* JAGERNATH PRASAD.

effect of—Adverse possession under Will—Alienation—Necessity—Recitals, value of.

The Will of a childless Hindu provided that his moveable and immoveable property should remain in the possession of his wife until her death, and that after her death it should pass into the possession of his niece, but that if on the death of his wife and niece there were living a son and a daughter born of the womb of the niece, then two-thirds of the moveable property should belong to the said son and one-third to the daughter. But as regards the immoveable property none shall have the least right of alienation:

Held, (1) that the Will purported to convey an absolute estate ultimately to the son and daughter of the niece and that the fact that the *corpus* was not expressly mentioned was not sufficient to justify the interpretation that the *corpus* did not pass; [p. 751, col. 2; p. 752, col. 1.]

(2) that the recital in the Will that there should be no right of alienation made no difference, so far at any rate as the niece's son and daughter were concerned, nor did it make any difference that the bequest in favour of the niece's son and daughter failed on the ground that they were unborn at the date of the testator's death; [p. 752, col. 1.]

(3) that the disposition in favour of the niece's son and daughter was intended as a gift of the remainder, and not merely a statement of what the testator believed to be the rule of succession in case of his niece's intestacy; [p. 753, col. 2.]

(4) that the Will was not intended to and did not vest an absolute estate of inheritance in the niece, and that, therefore, she did not in that capacity have an unfettered right of alienation; [p. 754, col. 1.]

(5) that the estate created in favour of the niece was an estate such as a woman ordinarily acquires by inheritance under the Hindu Law, which she holds in a completely representative character but is unable to alienate except in case of legal necessity; [p. 756, col. 1.]

(6) that the words restricting alienation in respect of the niece's estate were of the nature of surplusage, that is to say, the testator had in his mind the ordinary recognized restriction upon alienation which would apply independently of any provision in the Will, and that he had not in his mind the eventuality of an alienation becoming necessary either for the purposes of providing maintenance for the niece or for the preservation of his estate. [p. 756, col. 1.]

An estate of the kind that a Hindu widow inherits in the case of intestacy can be created by Will. [p. 754, col. 1.]

Where a mere contingent remainder is created after a woman's estate and not a vested remainder, this is an indication in favour of the view that the estate created was a woman's estate in the technical sense and not merely a life-estate. [p. 755, col. 2.]

In construing a Will made by a Hindu testator, it is not permissible to take into consideration what the effect of such a Will would be under the English Law. It is not permissible for instance to import the idea that where an estate is devised to enure only for life, the result is that an estate in fee in remainder, whether vested or contingent, must exist in some one. [p. 754, col. 2.]

The English classification under which estates are projected along the plane of time and are measured by time alone, is foreign to the Hindu Law which measures estates not by duration but by use. [p. 755, col. 1.]

A Hindu can by Will create an estate for life in the English sense, but his intention to do so must be made clear by the terms of the Will itself without any importation of English ideas. [p. 757, col. 1.]

Actual proof of necessity which justifies an alienation under Hindu Law is not essential to establish its validity. It is only necessary that a representation should have been made to the purchaser that such necessity existed, and that he should have acted honestly and made proper enquiry to satisfy himself of its truth. [p. 757, col. 2.]

A recital in the deed is clear evidence of the representation, and, if the circumstances are such as to justify a reasonable belief that an enquiry would have confirmed its truth, then when proof of actual enquiry has become impossible, the recital, coupled with such circumstances, would be sufficient evidence to support the deed. [p. 757, col. 2.]

Quære.—Whether where a person enters under a Will of uncertain construction, an absolute title can be acquired by adverse possession in the absence of an express claim to hold an absolute title. [p. 751 col. 2.]

Appeal from a decision of the Sub-Judge, Muzfferpur, dated the 31st July 1912.

Messrs. *Sushil Madhav Mullick* and *Sivnarain Bose*, for the Appellant.

Mr. *Pugh* (with him Messrs. *Purnendu Narain Sinha*, *Murari Prasad* and *Chandra Shekhar Bancrji*), for the Respondents.

JUDGMENT.

CHAPMAN, J.—This appeal arises out of a suit for a declaration that the title conveyed by one Sahodra Bibi to Ganpat Bhagat in a house and garden had ceased at her death, and for possession. The suit was instituted by Jagernath Prasad, the son of Sahodra Bibi, and by two other persons who had purchased a 7-annas interest from Jagernath Prasad. The deed of conveyance, which is dated the 10th January 1885 and is referred to as Exhibit C, purported to convey an absolute interest in the property. The plaintiffs' case, however, was that Sahodra Bibi had no power to convey a title to enure beyond her lifetime. The suit has been decreed and the defendants, who are purchasers from the assignees of Sahodra Bibi, have appealed to this Court.

Sahodra Bibi had held under a Will executed by Fateh Chand, who died possessed of considerable immoveable property, more particularly specified in the schedule to his Will in addition to a banking business which was carried on in the town of Muzafferpur under the style and

title of Fateh Chand Sakhi Chand. He died in 1848 or 1849, leaving a widow Sheudai Koer and Sahodra Bibi his brother's daughter. On the 13th of April 1848 he executed a Will whereby he devised and bequeathed all his property in the first place to Sheudai Koer and after her death to Sahodra Bibi. The widow Sheudai died in 1853. In 1884 the banking business failed and on the 5th of August 1884 Sahodra Bibi executed three conveyances of the immoveable property left by Fateh Chand to satisfy debts due by the banking business referred to as Exhibits B, B-1, B-2. On the 10th January 1885 she executed two further conveyances of the immoveable property of the testator referred to as Exhibits O and C. All these conveyances recited that they were executed in order to enable Sahodra to discharge debts due by the banking business which descended to her as assets of Fateh Chand deceased. The property, which is the subject of the present suit, was sold under one of the conveyances of the 10th January 1885 to Ganpat Bhagat, *viz.*, Exhibit C. Ganpat sold the property to a Hindu joint family, the head of which was named Kunj Lal, on the 29th May 1888. Thereafter this particular property fell by partition to the share of one Isri Prasad, whose successors are the principal defendants in this suit.

Sahodra Bibi died on the 8th November 1899. The plaintiffs' case is that by the conveyance of 1885 Sahodra Bibi could and did only convey a title to enure until her death; and that on her death in November 1899 the title to the property in suit together with all the other property of the testator, whether moveable or immoveable, vested in her son Jagernath who was the sole heir to Fateh Chand's estate by reason of an intestacy as to the residue of his property. Jagernath and the other plaintiffs who have purchased an interest from him accordingly sued for possession.

The decision of the case depends upon the interpretation of the Will of Fateh Chand and as to the nature and character of the estate or interest which Sahodra acquired thereby.

The first contention in appeal is that this Will is void so far as the immoveable property is concerned, as it did not convey any beneficial interest in the *corpus* of the testator's estate either to Sheudai and Sahodra or to those designated to succeed on the death of Sahodra, and that in effect the gifts or bequests contained in the Will were thereby bequests not of the *corpus* of the immoveable property but of the right to receive only the rents and profits accruing therefrom; that Sahodra, when she entered in 1853, therefore, entered as a trespasser; and that by reason thereof she has acquired an absolute estate by adverse possession, and that she acquired an absolute title which she could and did convey to Ganpat Bhagat. It may be doubted whether in such a case where a person enters under a Will of doubtful construction, an absolute title can be acquired by adverse possession in the absence of an express claim to hold an absolute title. The contention however, in my opinion, fails *ab initio*. It is clear that the Will did contain a devise of a beneficial interest in the *corpus* of the immoveable property of the testator and that the limitations in respect thereof, so far as Sheudai and Sahodra are concerned, are not invalid. The Will recites that if any daughter or son be born to the testator during his lifetime, such son or daughter will be the owner of all his property but if there be no son or daughter, his niece Sahodra is to take a bequest of a lakh of rupees and the rest of the moveable and immoveable property has to remain in the possession of his wife until her death. After her death it was to pass into the possession of his niece. But if on the death of his wife and niece there be living a son and a daughter born of the womb of the niece, then two-thirds of the cash and the furniture should belong to the son and one-third to the daughter absolutely and that as to the immoveable property "they", meaning all these persons including the son and daughter, were to enjoy the balance left after the payment of rent and the expenses incurred in discharge of certain religious and charitable obligations charged upon the income of the testator's immoveable property. This Will clearly purported to convey an absolute

estate ultimately to the son and daughter of his niece. The fact that the *corpus* is not expressly mentioned is not sufficient to justify the interpretation that the *corpus* did not pass; and the recitals from time to time in the Will that there should be no right of alienation would make no difference, so far at any rate as the niece's son and daughter are concerned, nor does it make any difference that the bequest in favour of the niece's son and daughter failed on the ground that they were unborn at the date of the testator's death. The failure of the gift of the remainder to them would not make the Will itself invalid. The appellant's Vakil has relied upon the case of *Shookmoy Chandra Das* v. *Monoharri Dassi* (1), where it was held that the Will which was the subject-matter of that case was invalid upon the ground that it was not the testator's intention to pass the *corpus* of the estate but merely the rents and profits, and that thus the Will offended against the rule of perpetuity and was void. This intention or absence of intention was inferred by their Lordships of the Privy Council from certain recitals and provisions in the Will, none of which occur in the Will which we have to construe. In the Will in the case cited the testator began by saying that his estate was to remain intact; and that his heirs were to be entitled to enjoy the profits thereof. Their Lordships said that this created an impression that the intention of the Will was to create a perpetuity as regards the estate and to limit the enjoyment of the profits for an indefinite period. This impression was confirmed by the subsequent clauses in the Will, under which a 6-annas portion of the property was dedicated to the family worship and the maintenance of the family, leaving a 10-annas share which was not to be expended at all so long as the family remained joint and which was not disposed of in any way. There was a further provision as to how the profits should be enjoyed in the event of disagreement. From the judgment of the High Court against which there was an appeal to the Privy Council, it appears that the Will provided for a succession of trustees. The only provision in the present Will which resembles the provisions in the Will in that case is the prohibition against alienation; but as was pointed out by the Privy Council in the subsequent case of *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy* (2), the interpretation given to the Will in *Shookmoy Chandra Das* v. *Monoharri Dassi* (1) was arrived at independently of the provisions against alienation. I have no doubt that the Will was not invalid upon the ground that the testator did not intend to convey the *corpus*. The first contention pressed by the appellants, therefore, fails.

The next contention is that the Will intended to create an absolute estate in Sahodra Bibi. This same Will was so interpreted in the case of *Jagarnath Prasad* v. *Jaikishun Prasad* (3). The point, therefore, requires careful consideration, and it would only be with great hesitation that we would adopt the view that was not accepted by the learned Judges who decided that case. It will be remembered that the Will created an estate in the first instance in the testator's widow Sheudai Koer. The estate in the widow is described in two passages of the Will. In the first it is said that the moveable property and the shops will remain in the possession of his wife until her death; and in other passage it is said that the immoveable property will remain in the possession of his wife during her lifetime without power to transfer them, and that his wife, after meeting certain charges recited in detail, shall bring the remainder to her own necessary expenses. The Will then proceeds to say that after the death of his wife the properties will remain in the possession of his niece Sahodra Bibi without right of transfer, and that, after defraying certain charitable charges, she will bring the balance to her necessary expenses. It then goes on to say that if on the death of his wife and his niece there be living a son and daughter born of the womb of his niece, the son and daughter are to enjoy the properties. Now there are no words in the description in the Will of the

(1) 11 C. 684; 12 I. A. 103; 4 Sar. P. C. J. 639; 9 Ind. Jur. 234; 5 Ind. Dec. (N. S.) 1214 (P. C.).

(2) 24 C. 834; 24 I. A. 76; 1 C. W. N. 387; 7 Sar. P. C. J. 155; 12 Ind. Dec. (N. S.) 1224 (P. C.).

(3) 34 Ind. Cas. 375; 1 P. L. J. 16; 3 P. L. W. 164.

estate given to Sahodra, to suggest that the intention was that she should have an absolute estate. The expression "remain in possession", as contrasted with the expression "will be the owner" used in the earlier part of the Will with reference to his own son and daughter if there should be one, militates against the idea of an absolute estate. The condition against alienation also points in the same direction. It is, however, contended that the provision for the ultimate benefit of Sahodra's son and daughter was a provision that they were eventually to succeed as heirs of Sahodra, and that this indicates that the intention was to create an estate of inheritance in Sahodra. The point, therefore, for our determination reduces itself to the question, whether the words referring to the ultimate succession of the niece's son and daughter can be treated as leading to the interpretation contended for. The alternative interpretation of course is, that there was an absolute gift of the remainder to the niece's son and daughter and that there was no idea of an estate of inheritance in the niece at all. Shortly the question is, do the words referring to the ultimate succession of the son and daughter indicate a gift of the remainder in their favour, or do these words mean a mere description of an estate of inheritance in Sahodra. It may be premised that if the words can be interpreted as a description of an estate of inheritance, it does not matter if the description is incorrect, although no doubt the incorrectness of the description is a point to be considered in adopting one or other of the two alternative constructions.

The disposing words are:—"If on the death of my wife and my niece there be living a son and a daughter born of the womb of my said brother's daughter, then two-thirds *of the moveable property will belong* to the said son and one-third to the daughter. But as regards the *immoveable property* none shall have the least right of alienation. They will, of course, be entitled to enjoy the balance left after payment of rent, etc."

Now I am aware of no case in which where a son and daughter have alone been mentioned, the words have been interpreted to amount to a description of the course of the inheritance. The words also obviously do not provide for the case where there is no son or daughter, and it is hardly conceivable that the testator can have thought that in the absence of a son and daughter there would be no person entitled to succeed by inheritance. Moreover under the Mitakshara Law to which the testator was subject, the son and daughter would not in any circumstances simultaneously succeed. It is true that under the Bengal Law there are cases in which a son and daughter may succeed jointly to a mother. But there are no circumstances in which a son and daughter would succeed, one to two-thirds and the other to one-third. The whole wording of the disposition appears to me to be also more favourable to the interpretation of a gift of the remainder than to a description of the course of succession. It is true that later on in the Will, there is reference in one sentence to the niece's heirs born of her womb, and in the other to "the heirs of my niece." These references appear to relate back to the son and daughter in favour of whom there had been an express disposition. They do not occur in the disposing portion of the Will but merely in sentences which are precatory in character, and the expression "heirs born of the womb" relied on by Sharfuddin and Mullick, JJ., would, in any event, be descriptive only of an estate tail, which is unknown to Hindu Law. They could not be held to be descriptive of an estate of ordinary inheritance. I am unable to infer from the use of these words that the testator meant to describe an estate of ordinary inheritance as having vested in his niece. The expression "her heirs born of her womb" excluded her husband who was then living; and it is impossible to conceive that the testator would not know that if his niece took an estate of inheritance the husband would be one of the principal heirs. On a careful consideration of the terms of the Will, I am of opinion that the disposition in favour of the niece's son and daughter was intended as a gift of the remainder and not merely a statement of what the testator believed to be the rule of succession in case of his niece's intestacy. It is true that this gift of the remainder would contravene the rule against bequests in favour of unborn persons and would be bad, but this is not a point that can be taken into consideration

when the question is merely the interpretation of the Will [*Edwards* v. *Edwards* (4)]. We are of opinion, therefore, that the Will was not intended to, and did not, vest an absolute estate of inheritance in Sahodra Bibi, and that, therefore, she did not in that capacity have an unfettered right of alienation.

It is then contended that the estate conferred on the niece, if not an absolute estate, was an estate of the kind that a Hindu widow inherits in the case of an intestacy, that is, that the niece had the power of alienation for legal necessity and that legal necessity was established in the present case so as to justify the particular alienation assailed in this suit.

In the course of the argument a doubt was at one time suggested whether such an estate can be created by act of parties. It was expressly held in the case of *Meda Vengamma* v. *Mitta Chelamiah* (5) that such an estate can be created by act of parties. Their Lordships of the Privy Council assumed that it could be so created so far back as 1875 in the case of *Bhagbutty Devi* v. *Bholanath Thakoor* (6), and there has been a long series of cases in the Privy Council which have proceeded upon this assumption. We are of opinion that such an estate can be created by Will.

The question we have to determine in the first place is, whether the estate created in Sahodra Bibi was a mere estate for life in the English sense of the term, or a woman's estate as known to Hindu Law. The authorities which might assist in the determination of this question are somewhat perplexing, inasmuch as the term "estate for life" has been frequently used in Indian cases as synonymous with a widow's or a woman's estate. Thus in the case of *Lallu* v. *Jagmohan* (7) Farran, C. J., described an estate in which he held that the widow had wider powers of alienation than an ordinary Hindu widow as a an life estate. And in the case of *Radha Prasad Mullick* v. *Ranee Mani Dassee* (8) their Lordships of the Privy Council described the estate in one sentence as a woman's estate in the property, and in another as an estate for life. Again in the case of *Gooroo Das Mustafi* v. *Sarat Chunder Mustafi* (9), Mr. Justice Geidt, while concurring in the view that the estate was merely an estate for life, went on to remark that the estate resembled that of a Hindu widow; and in *Mahim Chandra* v. *Hara Kumari* (10) the expression "the life-estate of a Hindu widow" occurs. The only case in which it is possible to say that it was held that a pure estate for life in the English sense as distinguished from a woman's estate was created, is the case of *Bhagabutti Devi* v. *Bholanath Thakoor* (6) decided by their Lordships of the Privy Council so far back as the year 1875 [*Bhagbutti Devi* v. *Bholanath Thakoor* (6)]. That, however, was a case of settlement made *inter vivos*.

The question, therefore, we have to determine is practically *res integra*, but this at any rate can be laid down with certainty that in construing the Will it is not permissible to take into consideration what the effect of such a Will as this would have been under the English Law. It is not permissible for instance to import the idea that where an estate is devised to enure only for life, the result is that an estate in fee in remainder, whether vested or contingent, must exist in some one. In the case of *Bhagabati Barmanya* v *Kali Charan Singh* (11) their Lordships of the Privy Council desired emphatically to call attention to a passage in the judgment of the Chief Justice of the Calcutta High Court with which their Lordships were in entire concurrence. The passage is this (page 474 of the Report):—

"English rules of construction have grown up side by side with a very special law of property and a very artificial system of conveyancing, and the success of those rules in giving effect to the real intention of those whose language they are used to interpret, depends not more upon their original fitness

(4) (1909) A. C. 275 at p. 277; 78 L. J. Ch. 504; 100 L. T. 54.

(5) 15 Ind. Cas. 17; 36 M. 484; 23 M. L. J. 168; 12 M. L. T. 293.

(6) 2 I. A. 256; 1 C. 104; 24 W. R. 168; 3 Sar. P. C. J. 528; 3 Suth. P. C. J. 186; 1 Ind. Dec. (N. S.) 65.

(7) 22 B. 409 at p. 413; 11 Ind. Dec. (N. S.) 855.

(8) 35 I. A. 115; 35 C. 896; 12 C. W. N. 729; 8 C. L. J. 48; 10 Bom. L. R. 604; 5 A. L. J. 460; 18 M. L. J. 287; 4 M. L. T. 23 (P. C.).

(9) 29 C. 699; 6 C. W. N. 721.

(10) 30 Ind. Cas. 793; 42 C. 561 at p. 580.

(11) 10 Ind. Cas. 641; 38 C. 468; 15 C. W. N. 393; 9 M. L. T. 411; 13 C. L. J. 434; 21 M. L. J. 387; 8 A. L. J. 433; 13 Bom. L. R. 375; (1911) 2 M. W. N. 295 (P. C.).

for that purpose than upon the fact that English documents of a formal kind are ordinarily framed with a knowlege of the very rules of construction which are afterwards applied to them. It is a very serious thing to use such rules in interpreting the instruments of Hindus who view most transactions from a different point, think differently, and speak differently from Englishmen, and who have never heard of the rules in question."

Again in the case of *Richard Ross Skinner* v. *Naunihal Singh* (12) their Lordships say that English rules of interpretation must not be allowed to govern the case but the matter must be determined by the principles of natural justice. It is clear, therefore, that in construing the Will we must banish from our minds for the time being the very artificial legal notions connected with the English idea of an estate for life, and substitute therefor a notion familiar to Hindu Law under which a person holding a restricted estate for life is yet regarded as representing the entire estate. The English classification under which estates are, as has been said, projected along the plane of time and are measured by time alone is foreign to the Hindu Law which measures estates not by duration but by use (Mayne's Hindu Law, 8th Edition, page 847). Now the Will contemplates that the estate should be held first by the widow and then by the niece, and that if a son and daughter born of the womb of the niece are living at the death of the niece, then by the son and daughter. The Will, therefore, does not contemplate the existence of any interest in the estate contemporaneously in the first place with the widow and thereafter with the niece. The bequest of the remainder to the niece's son and daughter was a bequest of a contingent and not a vested remainder. The condition is "if the son and daughter be living on the death of my wife and my niece" [*Denn* v. *Bagshaw* (13), Jarman on Wills, 6th Edition, page 1385]; that is to say, under the Will there was no interest vested in any person other than the widow in the first place and after her the niece. The Will, therefore, contemplated that the estate should be completely represented first by the testators's widow and thereafter by his niece; and it is not permissible to import the English artificial idea that an estate in fee was outstanding anywhere else.

In the case of *Bhagabutti Devi* v. *Bholanath Thakoor* (6) their Lordships mentioned as one of the circumstances in favour of the view that a mere estate for life was intended, and not a widow's estate, that it would follow that if the estate was a widow's estate, the gift of the remainder would not in any sense be a gift of a vested remainder but merely a contingent one. It follows that where a mere contingent remainder is created after a woman's estate and not a vested remainder, this is an indication in favour of the view that the estate created was a woman's estate in the technical sense and not merely a life-estate. The Hindu Law is, as I have said, familiar with estates which though restricted are fully representative. It is true that in describing the estate created in favour of the niece the words "without power of alienation" occur. It does not appear to us to be possible to read those words as more indicative of an estate for life in the English sense than of a widow or woman's estate. Read literally, the words would be as foreign to an estate for life as to a woman's estate. We must not forget that the testator was a Hindu and it is no easier to read into the words the power to convey a title for the remainder of the niece's life than it is to read into the words the power to alienate in the case of legal necessity. The fact is that in cases of this kind it is very easy to use the words "without power of alienation" in a loose sense, that is to say, to use them in the sense without power of alienation except in the case of recognized legal necessity. Thus the Officiating Chief Justice of Madras in the case of *Carlapatti Chinna Cunniah* v. *Cota Wammalivariah* (14) says: "We are inclined, therefore, to think he did not intend that his widow should have the power to alienate the estate", when manifestly the meaning was "to alienate otherwise than in the case of necessity". We are of opinion that a reasonable interpretation of the description

(12) 19 Ind. Cas. 267; 35 A. 211 at p. 224; (1913) M. W. N. 500; 13 M. L. T. 488; 11 A. L. J. 494; 17 C. L. J. 555; 15 Bom. L. R. 502; 17 C. W. N. 853; 25 M. L. J. 111; 40 I. A. 105 (P. C.).

(13) (1796) 6 T. R. 512; 101 E. R. 675; 3 R. R. 242.

(14) 3 Ind. Cas. 475; 33 M. 91.

of the estate created in favour of the niece is an estate such as a woman ordinarily acquires by inheritance under the Hindu Law which she holds in a completely representative character but is unable to alienate except in case of legal necessity.

In the case of *Lala Ramjewan Lal* v. *Dal Koer* (15), where the terms of the Will resembled the terms of the Will with which we are dealing in the present case, with this exception that the word *malik* was used to describe the estate conferred upon the woman in that case, the Judges had to consider the effect of an emphatic condition against alienation. The Judges held that an absolute estate had been conferred, and that on that ground the condition against alienation was void. It is instructive, however, to notice that the Judges say that, if a life-estate had been given, there was no reason why there should be any provision restricting the beneficiary from selling or alienating. Thus in the present case the words " without power to alienate " in respect of the niece's estate were of the nature of surplusage ; that is to say, the testator had in his mind the ordinary recognized restriction upon alienation which would apply independently of any provision in the Will, and that he had not in his mind the eventuality of an alienation becoming necessary, either for the purposes of providing maintenance for the niece or for the preservation of his estate.

At a later stage in the Will there is a general expression to the effect that " none shall have the least right of alienation, " but in the first place it is not certain that the testator meant by the word " none " in this sentence to refer to any person other than the son and daughter of the niece who had been mentioned in the immediately preceding sentence. So far as they are concerned, the gift in their favour being obviously an absolute gift, the condition was void. We are also not disposed to attach too much importance to the use of the word " least " in this sentence. We are of opinion that the Will must be read as a whole, and if so read, it is quite clear that the testator intended that his estate should be entirely represented in the first instance by his widow, next by his niece, and after the death of his niece, by the niece's son and daughter. It is inconceivable that he should really have intended to have prevented any of these persons from alienating portions of the estate in the event of an occasion arising such as is described by the term " legal necessity." The principle of repugnancy has been applied in a large series of precedents which deal with the more simple cases in which an absolute estate had been created : but where a completely representative estate has been created the principle, in our opinion, should be applied. In the case of *Jatindra Mohan Tagore* v. *Ganendra Mohan Tagore* (16) the Privy Council said that where a gift is in terms of an inheritable estate with superadded words restricting the power of transfer, the restriction would be rejected as being an attempt to take away that which the law attaches to the estate which the giver has sufficiently shown his intention to create, though he adds a qualification which the law does not recognize. Adopting the expressive words of the Court of Exchequer Chamber in a judgment which is the foundation of the rule of repugnancy [*Ferrin* v. *Blake* (17)] the indelible landmarks of property, irrevocably established by the well weighted policy of the law, cannot be exceeded or transgressed by any intention of the testator, be it ever so clear and manifest. Where a testator is found to have intended to create a woman's estate, an estate, that is to say, which is entirely representative, though restricted, an absolute prohibition of alienation even for the purposes of the preservation of the estate should be regarded as coming within the principle above laid down and rejected as being an attempt to take away that which the law attaches to the estate which the giver has sufficiently shown his intention to create. It is however, the fact that to so construe the Will would *not* be to defeat the real intention of the testator, which clearly was to provide simultaneously for the maintenance of his niece and for the perpetuation of his name. It is precisely with this in view that the power to alienate

(15) 24 C. 406; 12 Ind. Dec. (N. S.) 938.

(16) 9 B. L. R. 377; 18 W. R. 359; I. A. Sup. Vol. 47; 2 Suth. P. C. J. 692; 3 Sar. P. C. J. 82 (P. C.).

(17) (1770) 1 W. Bl. 672; 4 Burr. 2579; 1 Dougl 329 *n*; 96 E. R. 392.

in the case of necessity has been grafted by judicial decision upon women's estates treated in the texts as inalienable except for religious purposes. The power has been grafted with a view either to secure the maintenance and other objects desired or to preserve the estate and the name of the last male holder.

In the case of *Brandon* v. *Robinson* (18) Lord Eldon said: "It is clear, generally speaking, that if property is given to a man for his life, the donor cannot take away the incidents to a life-estate". There is, therefore, nothing in the bare fact that the estate is to last only for life to bar the application of the rule of repugnancy.

We hold that the estate created in favour of the niece was a woman's estate with power to alienate in the case of legal necessity.

We do not doubt that a Hindu can by Will create an estate for life in the English sense, but his intention to do so must be made clear by the terms of the Will itself without any importation of English ideas.

We proceed to consider whether this particular alienation was justified upon the ground of legal necessity. The difficulty in the way of finding in favour of legal necessity is that Ganpat Bhagat, the vendee of the conveyance of 1885, though alive at the time of the suit, was not examined as a witness to testify as to whether he made enquiry or not. On the other hand, there is nothing to indicate that Ganpat would have proved anything more than that he made enquiry. The plaintiff Jagernath in his application for insolvency, made in September 1884, stated that the money lending business was insolvent and that the two debts which were discharged by the conveyances made by Sahodra Bibi in the following year were debts due by the money lending business. We have regard also to the fact that Jagernath's father signed this conveyance of 1885 for Sahodra Bibi as well as three other conveyances in August in the previous year and another conveyance on the same date as the conveyance which is the subject of the suit; and in all these conveyances the urgent necessity for alienation is recited. Jagernath himself is a witness to the three conveyances made in August 1884, in each of which the urgent necessity is recited. We would not be disposed to give undue weight to the fact that the business appears to have declined from the prosperous condition in which Fateh Chand left it in 1848, for the evidence is, and this evidence is not denied, that the plaintiff's father, and after him the plaintiff himself, managed the business; and if any blame is attached to the management for the insolvency the blame was theirs. The alienation was made at a time when Jagernath's application in insolvency was about to fail. Twenty-five years had passed since the conveyance of 1885 when the suit was instituted. It is permissible, therefore, to apply the principles laid down in the case of *Nanda Lal* v. *Jagat Kishore Acharjya* (19) on the subject of the weight which may, in such a case as the present, be given to recitals made at or about the time of the conveyance. Their Lordships say (page 229 of the report): "If the deeds were challenged at the time or near the date of their execution, so that independent evidence would be available, the recitals would deserve but slight consideration, and certainly should not be accepted as proof of the facts. But, as time goes by, and all the original parties to the transaction and all those who could have given evidence on the relevant points have grown old or passed away, a recital consistent with the probability and circumstances of the case assumes greater importance, and cannot lightly be set aside; for it should be remembered that the actual proof of the necessity which justified the deed is not essential to establish its validity. It is only necessary that a representation should have been made to the purchaser that such necessity existed, and that he should have acted honestly and made proper enquiry to satisfy himself of its truth. The recital is clear evidence of the representation, and, if the circumstances are such as to justify a reasonable belief that an enquiry would have confirmed its truth, then when proof of actual enquiry has become impossible, the recital, coupled with such circumstances, would be sufficient evidence

(18) (1811) 18 Ves. Jun. 429; 34 E. R. 379; 11 R. R. 226.

(19) 36 Ind. Cas. 420; 20 C. W. N. 225; 20 M. L. T. 335; 31 M. L. J. 568; (1916) 2 M. W. N. 336; 4 L. W. 458; 18 Bom. L. R. 868; 14 A. L. J. 1103; 24 C. L. J. 487; 1. P. L. W. 1; 44 C. 186; 43 I. A. 249; 10 Bur. L. T. 177 (P. C.).

to support the deed. To hold otherwise would result in deciding that a title becomes weaker as it grows older, so that a transaction—perfectly honest and legitimate when it took place—would ultimately be incapable of justification merely owing to the passage of time". We find that the alienation was justified by necessity.

A point was taken, which we have not hitherto mentioned, that the plaintiffs failed to prove that Jagernath was the heir to the estate. He is the son of Fateh Chand's niece and would, therefore, be a *bandhu* and would not probably inherit until after many other relations. His evidence, however, is to the effect that except himself there is no other heir to Fateh Chand. This is supported by the recitals in Fateh Chand's Will that he had at that time no other heir. There is no evidence to the contrary and no suggestion that there is any heir other than Jagernath. In these circumstances we are of opinion that the plaintiffs made out sufficiently that Jagernath was the heir of the estate and that the suit cannot be defeated upon the ground of any failure of proof in that connection.

We would accordingly allow the appeal and dismiss the suit with costs in both Courts.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 149 OF 1916.

October 3, 1917.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Seshagiri Aiyar.

KALLIANI AMMAL AND OTHERS —PLAINTIFFS—APPELLANTS

versus

P. NARAYANA MENON AND OTHERS— —DEFENDANTS—RESPONDENTS.

Will—Conditional ratification of partition by testator, effect of—Suit by legatees impeaching partition, validity of.

A testator, by his Will, declared that the share allotted to him in a partition previously effected as between himself and his co-parceners was to be taken by his heirs on his death, if he did not question the partition during his lifetime. In a suit by the legatees under the Will to set aside the partition:

Held, that the conditional ratification of the partition by the testator was valid and that the suit was, therefore, not maintainable. [p. 760, col. 1.]

Arayalprath Kunhi Pocker v. *Kanthilath Ahmad Kuti Haji*, 29 M. 62, followed.

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Palghat at Calicut, in Appeal Suit No. 120 of 1915, preferred against the decree of the Court of the District Munsif, Ponnani, in Original Suit No. 285 of 1913.

FACTS of the case are clear from the following judgment of the lower Appellate Court:—

The plaintiffs, the wife and children of one Sankunni Menon, deceased, brought the suit to recover possession of the plaint properties with mesne profits from the 1st defendant as *karnavan* and manager of his family. The other defendants in the suit are the remaining members of the *tavazhi* (branch) of which the 1st defendant is the *karnavan* and manager. Plaintiffs' suit was decreed and the 1st defendant appeals.

The respondents are the plaintiffs. The facts of the case are not in dispute. The 1st plaintiff's husband, Sankunni Menon, the defendants and some other persons formed members of Parutholli Tarwad. The defendants and other members of the Tarwad effected a partition of the Tarwad properties under a deed dated 29th *Dhanu* 1086 (13th January 1911). The deceased Sankunni Menon was not a party to the partition, but the properties which under the partition were set apart for the share of Sankunni Menon were put in the possession of 1st defendant by the other parties to the partition deed and it was provided that if Sankunni Menon did not take possession of the items set apart to him, during his lifetime, the defendant's *tavazhi* was to enjoy the same. Sankunni Menon, so long as he was alive, was not for treating the partition as valid and for accepting the properties allotted by the partition deed for his share as his own. He, however, executed a Will (Exhibit B) in favour of the plaintiffs (his wife and sons), whereby he bequeathed the property reserved for his share under the partition deed to his wife and children contingent upon the event of his not setting aside the

partition-deed in his lifetime. The plaintiffs claim the properties as the devisees under the Will.

The 1st defendant resisted the claim and contended that the plaintiffs have acquired no title to the properties and that the late Sankunni Menon had no right to execute a Will in respect of his properties. He denied that he was a trustee for the suit properties and also disputed his liability to render accounts as claimed by the plaintiffs and to pay mesne profits.

The points for decision are:—

(1) Whether the plaintiffs have become the owners of the suit properties on the death of Sankunni Menon by virtue of the Will left by him in favour of the plaintiffs and of the fact of Sankunni Menon's marriage by the 1st plaintiff having been registered under the Malabar Marriage Act, and

(2) whether Sankunni Menon had a valid disposing interest in the suit properties on the date of the Will?

Exhibit A is a copy of the partition-deed entered into among the members of the defendants' Parutholi Tarwad, dated 27th *Dhanu* 1086 (13th January 1911). As already observed, Sankunni Menon was not a consenting party to the partition and he was not one of the executants thereof. In fact, he objected by Exhibit I, a letter (22nd December 1910) sent by him to the Sub-Registrar of Ponnani, to the partition-deed being registered. Till his death he was not for approving the arrangement evidenced by the partition-deed Exhibit A, and Exhibits II and III show his attitude of mind in respect of the partition, Exhibit A. Even from the very instrument of Will, which he left in favour of the plaintiffs (Exhibit B dated 28th June 1911), two months prior to his death, it is clear that Sankunni Menon had not given up the idea of setting aside the partition arrangement evidenced by Exhibit A, either through Court or otherwise. He bequeathed the properties in favour of the plaintiffs only contingent upon the event of his not setting aside the partition-deed during his lifetime.

It is not alleged in the plaint that Sankunni Menon ratified the arrangement made in the partition-deed. As a matter of fact, it could not be in the nature of things, as we find that even when he drew up the Will (Exhibit B), he had the intention of setting aside, if possible, the partition arrangement.

It is unquestionable that a partition of property belonging to the members governed by Marumakkathayam Law, to be valid, requires the consent of each and every one of the persons interested in the property [*Arayalprath Kunhi Pocker* v. *Kanthilath Ahmad Kuti Haji* (1)]. It admits of no doubt that an adult member of a family is entitled to be consulted and his consent secured before a valid partition could be effected. It does not appear that Sankunni Menon was consulted in the matter of the partition. It is, however, beyond doubt that Sankunni Menon was not for effecting a partition and did not consent to the partition. Nor did he, at any time before his death, ratify the arrangement, so far at any rate as it related to his share of the properties mentioned in the partition-deed. If he had ratified the arrangement and signified his assent to the other members of the Tarwad to take possession of the properties set apart for his share before his death, the plaintiffs would be entitled to succeed. It is not correct to say that it was unnecessary for Sankunni Menon to accept the partition-deed before any title passed to him, because the other members have renounced their rights to the suit items in his favour in consideration of their getting some properties for their shares. To effect a valid partition in a Marumakkathayam Tarwad, the consent of each and every one of the adult members of the family, and if they are minors, the beneficial nature of the arrangement to the family as a whole, including the minor members, are essential. If one adult member of the Tarwad stands against the partition, the partition, as a whole, is invalid and it cannot be said to be invalid only in respect of his share.

It is, no doubt, true that the other members of the Tarwad have given effect to the partition and were in possession and management of the respective shares in the properties as per the partition-deed. This fact, by itself, cannot render a partition valid when its validity is impeach-

(1) 29 M. 62 at p. 63.

ed, as it could certainly be impeached. With this matter, however, we are not here concerned.

Sankunni Menon had the personal right of election either to avoid the partition or to ratify the partition during his lifetime. He did neither before his death. And failing to do so, he had no disposing interest in the properties (at the time of his death) either at the time of the Will or at the time of his death. The Will takes effect only after his death. Plaintiffs acquired no right to the properties, under the Will or by the marriage.

My findings on the two points are in the negative.

As regards the mesne profits, I am not prepared to disturb the finding of the lower Court. The account books Exhibits VII and VIII are unreliable as the 1st defendant, admittedly, has no personal knoweldge of the entries contained therein.

Grounds Nos. 2 and 3 attack the position assigned to 1st defendant as the trustee for Sankunni Menon so far as the plaint properties are concerned. I think that on a reading of the partition-deed, the 1st defendant is, more or less, an implied agent for Sankunni Menon in respect of suit properties.

In the result I allow the appeal with costs throughout."

Mr. *C. V. Ananthakrishna Aiyar*, for the Appellants.

Mr. *K. P. M. Menon*, for the Respondents.

JUDGMENT.—We think the Will amounted to a conditional ratification of the partition, to take effect if he died without setting it aside, and that the ratification completes the partition. *Arayalprath Kunhi Pocker* v. *Kanthilath Ahmad Kuti Haji* (1). The properties claimed were assigned to the deceased as his share, and we do not think his right to them could be made conditional on his taking possession of them during his lifetime.

We reverse the decree of the Subordinate Judge and restore that of the District Munsif with costs here and in the lower Appellate Court.

Appeal allowed.

M. C. P.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 159 OF 1916.

December 3, 1917.

Present:—Mr. Justice N. R. Chatterjea and Mr. Justice Walmsley.

DRAUPADI DASYA—PETITIONER—APPELLANT

versus

RAJKUMARI DASYA AND ANOTHER—OBJECTORS—RESPONDENTS.

Probate, revocation of—Legatee under earlier Will, locus standi of.

A legatee, whose interest under a Will has been considerably cut down by an alleged Will said to have been subsequently executed by the testator revoking the earlier one, has *locus standi* to apply for the revocation of the Probate of the later Will on the ground of non-service of citation, even before he has obtained Probate of the earlier Will. [p. 761, col. 1.]

Appeal against the decree of the Officiating Subordinate Judge, 1st Court, Mymensingh, dated the 15th April 1916.

Babu *Gopal Chandra Das*, for the Appellant.

Babu *Kali Kinkar Chuckerbutty*, for the Respondents.

JUDGMENT.

CHATTERJEA, J.—This appeal is against an order refusing an application for revocation of Letters of Administration with a copy of the Will annexed, which had been granted to the respondent Raj Kumari Dasi in 1914.

It appears that one Broja Kishore died leaving his widow Kunja Mani, a daughter Raj Kumari, a daughter's son Sarat, a widowed daughter-in-law Draupadi and two granddaughters Sarala and Khiroda. Brojo Kishore executed a Will on the 3rd November 1896 by which he bequeathed, subject to the life interest to be enjoyed by his widow Kunja Mani and with the exception of some properties and legacies, an 8-annas share of his estate to his widowed daughter-in-law Draupadi and the other half to his daughter Raj Kumari. In 1907 Kunja Mani applied for and obtained Probate of a later unregistered Will said to have been executed by Brojo Kishore on the 8th June 1906. By this Will the right of the daughter-in law in the estate was considerably cut down. Kunja Mani died in 1914 and her daughter Raj Kumari and her son Sarat obtained Letters of Administration] with a copy of

the Will annexed. On the 20th November 1914 an application for revocation was made by Draupadi on the ground that no citation had been served upon her at the time when Letters of Administration were granted to Raj Kumari. Raj Kumari and her son pleaded that citation had been served upon Draupadi. A large number of witnesses were examined on the point as to whether citation had really been served or not. After the evidence on both sides had been taken, at the time of argument it was contended on behalf of Raj Kumari that Draupadi had no *locus standi* to apply for revocation of the Will, and the learned Judge has thrown out the application on that ground.

We are of opinion that this case ought not to have been disposed of in this way. The fact that there was an earlier Will is admitted and in the later Will itself it is stated that the earlier Will is thereby revoked. There are many references in the evidence on both sides to the earlier Will. Now, if the later Will stands, Draupadi cannot claim any rights under the first Will under which she has a substantial interest. She had, therefore, sufficient interest to oppose the grant of the later Will and to apply for revocation of the later Will.

It is contended that she cannot apply for revocation of the later Will unless and until she obtains Probate of the earlier Will. We think that it is not necessary that Draupadi should obtain Probate of the earlier Will for the purpose of enabling her to apply for revocation of the Letters of Administration. If she succeeds in showing that there was no later Will, it will be open to her to prove the earlier Will and to apply for Letters of Administration with a copy of the Will annexed. We think therefore that she has *locus standi* to make the application.

In this view, it is unnecessary to consider how far the right of Draupadi for maintenance is affected by the later Will and whether she is entitled to apply for revocation of the later Will on that ground.

The order of the lower Court is set aside and the case sent back to that Court for decision on the question whether Draupadi had been served with citation in the proceedings for grant of Probate in 1907 and for Letters of Administration with a copy of the Will annexed in 1914 to Raj Kumari upon the evidence on the record.

Costs will abide the result. We assess the hearing-fee at two gold *mohurs*.

WALMSLEY, J.—I agree.

Appeal allowed.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 196 OF 1917.

April 22, 1918.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

DHARA SINGH—DEFENDANT—APPLICANT

versus

GAYAN CHAND—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 115—Revision—Jurisdiction—Mistake of law, whether ground for revision—Promissory note, liability of minor on.

Where a Court has jurisdiction to determine a matter and in the exercise of its jurisdiction it makes a mistake in law, that does not entitle the party against whom the decision is given to come to the High Court in revision. [p. 762, col. 1.]

Plaintiff brought a suit on a promissory note executed by the defendant. Defendant pleaded infancy, whereupon the Court of first instance dismissed the suit. On appeal the Subordinate Judge found that the plaintiff was a minor but that he had fraudulently misrepresented his age, so that he was estopped from setting up his minority as a defence. It, therefore, decreed the suit. The suit being of small cause nature, the defendant applied in revision to the High Court:

Held, that the lower Appellate Court was wrong in holding the minor liable on the finding of fact arrived at by it, but that the mistake being a mere mistake of law the High Court could not interfere in revision. [p. 762, col. 1.]

Civil revision from a decree of the Subordinate Judge, Meerut.

Mr. *Kailas Nath Katju* (for Dr. *Tej Bahadur Sapru*), for the Defendant-Applicant.

Mr. *Radha Kant Malaviya* (for Mr. *Baldev Ram Dave*), for the Plaintiff-Respondent.

JUDGMENT.—A preliminary objection has been taken to the hearing of this application. The suit was brought upon a promissory note. The defendant pleaded that he was a minor at the date of the note. The Munsif held that he was a minor and dismissed the suit. In appeal the Subordinate Judge found that the defendant was a

minor but that he had fraudulently misrepresented his age to the plaintiff, and on this ground reversed the decision of the Munsif and decreed the suit. The preliminary objection is that the suit being of the nature cognizable by a Small Cause Court, the Code does not provide for a second appeal and that the defendant is not entitled to apply in revision under the provisions of section 115. It is quite clear that the Court had jurisdiction to determine the matter and in exercise of its jurisdiction, if it made a mistake in law, this does not entitle the party against whom the decision is to come here in revision. We may mention that the Court was clearly wrong in holding the minor liable on the promissory note on the finding of fact arrived at by it. We reject the application but under the circumstances we make no order as to costs.

Application rejected.

CALCUTTA HIGH COURT.

APPEAL FROM ORDER No. 91 OF 1917 AND RULE No. 343 OF 1917.

January 21, 1918.

Present:—Mr. Justice Teunon and Mr. Justice Newbould.

ALOK CHAND PAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

JALURAM NAMASUT AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Landlord and Tenant Procedure Act (VIII of 1869), ss. 59, 64, 65—Non-transferable holding, whether can be sold in execution of decree for rent in District of Sylhet.

In execution of a decree for rent in a case in the District of Sylhet governed by the provisions of Bengal Act VIII of 1869, whether the decree is a decree for the co-sharer landlord's share of rent or a decree for the whole rent due on the holding which is non-transferable, the holding cannot be sold under the provisions of section 59 or section 64 or 65 of the Act.

Appeal against the order of the District Judge, Sylhet, dated the 12th December 1916, affirming that of the Munsif, 4th Court at Habiganj, dated the 5th August 1916.

Babu *Birendra Chandra Das*, for the Appellants.

Babu *Birendra Kumar Dey*, for the Respondents.

JUDGMENT.—This appeal arises out of an application for execution of a rent decree by attachment and sale of the holding. In the Courts below the case was treated practically as one falling under the provisions of the Bengal Tenancy Act, and the learned District Judge held that the holding not being transferable and the decree in his view being one not for rent but for money, neither the whole of the holding nor the 8-annas share therein, that is to say, the share corresponding with the share of the executing decree-holder could be sold. But the case comes from the District of Sylhet and is, therefore, governed by the provisions of Bengal Act VIII of 1869. Whether it is, as the District Judge supposed, a decree merely for the co-sharer landlord's share of the rent, or a decree for the whole rent due on the holding, it must be dealt with under the provisions of the Act which we have just cited. In the suit brought by the co-sharer landlord to which all his co-sharers, it appears, were parties there was no prayer and therefore, no order for ejectment. The holding is admittedly not transferable and it would, therefore, seem that it cannot be sold under the provisions of either section 59 or section 64 of the Act. Section 65 of the Act requires that in the first instance execution should be taken out against the person or moveable property of the debtor and thereafter against his immoveable property, if any. If satisfaction cannot be obtained in the manner indicated in section 65 the unexecuted decree may, it appears, become the basis of a suit for ejectment under the provisions of section 52. Whatever may be the proper course open to the decree-holder landlord, it is clear that he cannot in the present proceeding at least obtain satisfaction of his decree by attachment and sale of this non-transferable holding.

For these reasons we dismiss this appeal with costs. We assess the hearing fee at one gold *mohur*.

The connected Rule No. 343 of 1917 is discharged. We make no order as to costs in the Rule.

Appeal dismissed;
Rule discharged.

MADRAS HIGH COURT.

APPEALS AGAINST ORDERS No. 357 OF 1916 AND No. 9 OF 1917.

October 1, 1917.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Oldfield.

LAKSHMINARAYANA TANTRI—DEFENDANT No. 1—APPELLANT

versus

RAMACHANDRA TANTRI—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), Sch. II, paras. 14, 15, 21—Arbitration, reference to, out of Court—Revocation of submission by guardian of minor—Award binding minor, validity of—Absence of guardian in proceedings before arbitrators, effect of—Arbitrators, duty of—Misconduct.

The principles of Order XXXII, rule 11, Civil Procedure Code, apply to references to arbitration made out of Court. [p. 764, col. 2; p. 767, col. 1.]

Where the guardian of a minor, on whose behalf a reference was made to arbitration, has been grossly negligent or has acted fraudulently in conducting the proceedings before the arbitrators, it is open to the minor to impeach the award by a suit instituted through a guardian or when he attains majority. [p. 764, col. 1.]

Hoghton, In re, Hoghton v. *Fiddey*, (1874) 18 Eq. 573 at p. 576; 43 L. J. Ch. 758; 22 W. R. 854, applied.

The Court may also refuse to file the award on objection taken on behalf of the minor. [p. 765, col. 2; p. 767, col. 1.]

Where a reference on behalf of the minor is revoked by the guardian and the arbitrators nevertheless proceed with the reference, it is the duty of the guardian to watch the proceedings on the minor's behalf, and any award passed binding the minor without his being duly represented is liable to be vacated at his instance. It is the duty of the arbitrators to see that the minor is properly represented. [p. 766, col. 2; p 767, col. 1.]

Per *Abdur Rahim, J.*—An award cannot be said to be *ipso facto* invalid because it is not shown to be advantageous or beneficial to the minor. [p. 764, col. 2.]

Ramji Ram v. *Salig Ram*, 11 Ind. Cas. 481; 14 C. L. J. 188, approved.

Romon Kissen Sett v. *Hurrololl Sett*, 19 C. 334; 9 Ind. Dec. (N. S.) 667, not approved.

An award that is invalid under the law governing minors, as where it is passed on a reference out of Court without the minor being duly represented, comes within the expression 'or otherwise invalid' in paragraph 15 (*c*) of Schedule II, Civil Procedure Code, and the Court can, for that reason, set aside the award. [p. 765, col. 1.]

There is no distinction between void and voidable awards so far as paragraph 15 of Schedule II, Civil Procedure Code, is concerned. The rule itself states the circumstances under which an award becomes void in cases dealt with in paragraph 14, suggesting that awards which can be set aside under rule 15 are not to be treated as void awards. [p. 764, col. 1.]

The words 'or otherwise invalid' in paragraph 15 (*c*) of Schedule II, Civil Procedure Code, are not *ejusdem generis* with the other cases mentioned in the clause, but are meant to include all cases of invalidity on grounds other than those mentioned. [p. 765, col. 1.]

Per *Oldfield, J.*—Under paragraph 21 (1), Schedule II, Civil Procedure Code, the Court must be satisfied that the matter has been referred to arbitration and must, therefore, enquire into the validity of the reference. In such enquiry the question of benefit to the minor can be raised [p. 766, col. 1.]

An award passed on a reference out of Court binding a minor who was not in fact represented in proceedings before the arbitrators, should be set aside under paragraph 15 (1) of the Schedule as for the arbitrator's misconduct. [p. 767, col. 1.]

An arbitrator fails in his duty and is guilty of misconduct if he does not secure for each party an opportunity to present his case, and he should even go beyond strict legal requirements to do so. [p. 767, col. 1.]

An arbitrator should refrain from passing an award, so long as he is deprived of the power to pass a just one, and should either adjourn the proceedings in case a change in the representation of the minor is probable, or, if one is not probable either generally or within the time, if any, fixed for the award, he should refuse to act. [p. 767, col. 1.]

Appeals against the decrees of the District Court, South Canara, dated the 13th September 1916, in Original Suit No. 3 of 1916.

Messrs. *K. Y. Adiga* and *K. P. Lakshmana Rao*, for the Appellant.

Mr. *B. Sitarama Rao*, for the Respondent.

JUDGMENT.

ABDUR RAHIM, J.—This appeal arises in a suit to file an award and is preferred by the 2nd defendant, who is a minor represented by his mother, the other parties being the 1st defendant his father, and the plaintiff, the brother of the 1st defendant and uncle of the 2nd defendant. All these three persons were members of an undivided Hindu family, and the arbitration was sought for the purpose of partitioning the properties between the plaintiff on the one hand and the first and second defendants on the other. The very next day after the submission the 1st defendant, who was acting as the guardian of the 2nd defendant, gave notice to the arbitrator revoking the submission; thereafter he did not appear at all in the proceedings and the arbitrator proceeded to make the partition, no one being there to watch the proceedings on behalf of the 2nd defendant and to protect his interests. It has been held that the revocation by the 1st defendant was not justified and the question for decision, therefore, is whether the failure

of the 1st defendant as guardian to conduct the case of the 2nd defendant before the arbitrator, which in my opinion amounted to gross neglect of his duty, is sufficient to vitiate the award. I am clearly of opinion that the contention of the learned Vakil for the appellant that an award is *ipso facto* invalid if it cannot be shown to be beneficial or advantageous to the minor is not sustainable. I am not clear that the learned Judge in the decision in *In the matter of Romon Kissen Sett* v. *Hurrololl Sett* (1) has laid down any such proposition. At any rate, I agree with the view of the law as propounded in *Ramji Ram* v. *Salig Ram* (2) on this point. Nor am I able to accept the contention of the appellant that the 1st defendant's interest in the arbitration proceedings was adverse to that of the minor and the submission was bad on that ground. No doubt one of the questions which the arbitrator had to deal with was whether certain debts incurred by the 1st defendant were binding, but that question was not raised between the 2nd defendant and the 1st defendant but only between the plaintiff on the one side and the 1st and 2nd defendants on the other and the decision of the arbitrator has in no way concluded that matter between the 1st defendant and the 2nd defendant.

On the main question there can be little doubt that it would be open to the minor, by a suit instituted either through a guardian or when he attains majority, to impeach the award if he can prove that his guardian has been grossly negligent or has acted fraudulently in conducting the proceedings before the arbitrator. There can be no doubt that a decree may be impeached where there has been negligence on the part of the next friend in the conduct of the plaintiff's case, and it is stated by Vice-Chancellor Malins in *Hoghton, In re*; *Hoghton* v. *Fiddey* (3): "The question which I have to decide is, whether this infant, on whose behalf a decree was taken by consent in 1867, is to suffer by any negligence or want of knowledge on the part of her then next friend. I am clearly of opinion she cannot be called upon to endure that inconvenience. The proposition that an infant of tender years may have her whole fortune wrecked by the neglect of her next friend is so monstrous that I cannot pay attention to it. She is entitled to have a next friend who is diligent and who will protect her interests." See also *Lalla Sheo Churn Lal* v. *Ramnandan Dobey* (4). It is unfortunate that there is no provision in the Civil Procedure Code which makes it incumbent on the arbitrator, where a reference has been made out of Court, to see that the case of the minor is in the hands of a proper guardian, similar to that laid down by Order XXXII, rule 11, with respect to the Court. I think the proposition laid down by Vice-Chancellor Malins is equally applicable to the proceedings before an arbitrator. This has hardly been disputed before us. The argument which is used to uphold the award is that the Court can refuse to file an award only on the grounds mentioned in the Second Schedule of the Code, rules 15, 14, etc., and that, though a separate suit may lie, the same objections to an award which would justify a suit are not available to the minor when the award is filed and sought to be made a decree of Court under the special procedure provided by the Second Schedule. If this argument were accepted, it would follow that where an award which affects a minor is invalid because of the fraud or neglect of the guardian in the conduct of the arbitration proceedings, the Court is bound to pass a decree in the terms of the award although the next day it would be set aside by a suit on the very same allegations. Unless one is compelled by clear words of the Statute one would not countenance such an interpretation of the law.

Rule 15 says: "No award shall be set aside except on one of the following grounds" be it noted that this does not seem to be confined merely to objections to filing an award but is wide enough to cover suits to set aside an award, including those mentioned in clause (*c*) which runs as follows, "the award having been made after the issue of an order by the Court superseding the arbitration and proceeding with the suit or after the expiration of the period allowed by the Court, or being otherwise invalid."

(1) 19 C. 334; 9 Ind. Dec. (N. S.) 667.
(2) 11 Ind. Cas. 481; 14 C. L. J. 188.
(3) (1874) 18 Eq. 573 at p. 576; 43 L. J. Ch. 758; 22 W. R. 854.
(4) 22 C. 8; 11 Ind. Dec. (N. S.) 7.

The phrase "or being otherwise invalid" was for the first time introduced into the new Code and it seems to me that it is wide enough to cover such a case as this. If an award is invalid under the law governing minors, I see no difficulty why such invalidity is not included in these words. It was suggested that "invalid" means "void" and an award which an infant could get set aside would only be voidable, but I do not think that there is any substance in this distinction. If a party does not choose to get rid of an award even in cases falling under clause (*c*) it would be binding on him, and there seems to be no sense in the distinction between void and voidable awards so far as rule 15 is concerned. In fact, that rule itself states the circumstances under which an award becomes "void" in cases dealt with in rule 14, suggesting that awards which can be set aside under rule 15 are not to be treated as void awards.

Then it was suggested that we must read the words "or being otherwise invalid" as *ejusdem generis* with the other cases mentioned in clause (*c*), that is to say, it would only apply to cases where an award is bad on grounds like want of jurisdiction. It seems to me that those words do not call for an *ejusdem generis* interpretation, but are meant to include all cases of invalidity on grounds other than those mentioned. This view seems to have the support of a Full Bench decision of the Allahabad High Court in *Lutawan* v. *Lachiya* (5), where Richards, C. J., says: "It seems to me that it was the clear intention of the Legislature by this amendment of the Code that objections to the award on the ground of invalidity from any cause whatever would be decided by that Court and by no other Court." This passage might also suggest that the only remedy of the 2nd defendant to the suit would be under rule 15 of the Second Schedule, and not by a separate suit. But it is not necessary in this case to consider whether that general proposition is correct.

It is argued by Mr. Sitarama Rao in support of the lower Court's order that it has not been shown that the 1st defendant as the guardian of the 2nd defendant was, in fact, negligent in the conduct of the case of the 2nd defendant before the arbitrator. But he was not justified in rescinding the submission and when he found that the arbitrator proceeded with the arbitration, it was his duty to appear and watch the proceedings and put forward the case of the minor before him. This is not one of those cases in which there may be a question whether the minor had a good defence or not, if a minor has not a good defence to a suit it is undoubtedly not the duty of the guardian to incur unnecessary costs in defending the suit. The very nature of the arbitration proceeding is ordinarily such that every person having a claim would be interested in seeing that the partition made by the arbitrator is just and fair. In this case the minor alleges that by the partition he has been prejudiced. I am of opinion that the appellant has a valid objection to any decree being passed on the award.

Having regard to the nature of the award which is one for partition, the proper order to be passed is that the suit must be totally dismissed. As regards costs, since it was the conduct of the 1st defendant that led to the award being treated as invalid, I would make him pay the costs of the 2nd defendant in this Court and in the lower Court. The plaintiff-respondent will bear his own costs throughout.

OLDFIELD, J.—This is an appeal against an order of the District Judge, South Canara, under section 21, Schedule II, Civil Procedure Code, filing an award, and against the decree passed in its terms. We have to deal only with the order, since no independent objection has been made to the decree. The arbitrators were asked to make a partition of family property between plaintiff and 1st defendant, brothers, and 2nd defendant, minor son of the last mentioned, the present appellant.

The first objection to the award is that on 2nd defendants's behalf there was no valid submission to arbitration, first defendant, who acted for him, having an interest adverse to his in the proceedings, because an important question in them was whether 1st defendant had incurred certain debts as manager of the family and whether he or its members, including 2nd defendant, were liable for them. But the

(5) 21 Ind. Cas. 989; 36 A. 69 at p. 74; 12 A. L. J. 57.

partition, it was not disputed before us, was of the family properties between the plaintiff on one side and the 1st and 2nd defendants on the other and the interest of the two last mentioned was identical in it, to establish the liability of the family and make a portion of the debts recoverable from the plaintiff instead of the whole being recoverable from the 1st defendant primarily and 2nd defendant secondarily in virtue of his sonship.

It is urged next that the lower Court should, before filing the award, have considered whether the submission to arbitration under the award itself were advantageous to 2nd defendant. As regards the latter there is, so far as we have been shown, only one authority in support of 2nd defendant's claim, *Roman Kissen Sett* v. *Hurrololl* (1), and its weight is small, since it is the decision of a single Judge in an uncontested case. It is in fact impossible to consider whether the award, as distinguished from the submission, is advantageous to the minor concerned, without a discussion of the merits of the questions referred, which would be inconsistent with the principles of arbitration procedure; and it was held in *Balaji* v. *Nana* (6), following *Jagan Nath* v. *Mannu Lal* (7), that where the reference was not impugned, the Court was bound to pass a decree in terms of the award, if there were none of the objections specified in the Code to doing so. I accordingly turn to the objection that the reference itself was disadvantageous and, therefore, invalid. Under section 21 (1), Schedule II, Civil Procedure Code, the Court must be satisfied that the matter has been referred and, no doubt, must, therefore, enquire into the validity of the reference. There is then authority in the first of the two last mentioned cases, which I should be inclined (if necessary) to follow, for the view that the question of benefit to any minor concerned can be raised in such enquiry. See also *Ramji Ram* v. *Salig Ram* (2). But it is unnecessary to pursue the matter further, because the objection to the reference, as distinguished from the award, on the ground of disadvantage to the minor 2nd defendant has not been taken in the grounds of appeal here and was not, so far as appears, taken in the lower Court; and I am not prepared to condone the omission and dispose of the point on the materials on record, because it is eminently one which should be stated explicitly with a clear specification of the matters in respect of which disadvantage to the minor was to be feared. It may be added that no attempt at such specification was made in the argument before us.

The next objection is more important. The 1st defendant the day after he consented to the reference revoked his consent and no suggestion has been made that this revocation was legally effective. Subsequently he did not attend the arbitration proceedings, although as regards him personally the arbitrators fully complied with their duty because they did not proceed or place him *ex parte* until they had given him notices of their intention to do both. But as throughout 1st defendant appears to have acted also as the guardian of the 2nd defendant, the decision to proceed *ex parte* affected both ; and the proceedings took place and the award was passed without any person attending to protect the latter's interest. It is contended that in these circumstances the award should be set aside either under section 15 (1) on account of the arbitrator's misconduct or under section 15 (3) as " otherwise invalid. "

As I shall accept the first of these contentions, I need not consider whether the general words " otherwise invalid " cover all conceivable grounds, other than those already specified, on which an award might in proceedings of any description be set aside or only grounds *ejusdem generis* with those specified in section 15 (3). Turning to section 15 (1), I observe first with reference to *Lalla Sheo Churn Lal* v. *Ramnandan Dobey* (4), a decision which has been followed in various unreported cases, that, if first defendant's conduct had occurred in proceedings before a regularly constituted tribunal, it would have justified the subsequent vacation of any decision passed adversely to the minor he represented, since there is no suggestion that he absented himself on consideration of the merits of the case or because he could have had no contention worth advancing with reference to them; and next, with reference to

(6) 27 B. 287; 5 Bom. L. R. 95.
(7) 16 A. 231; A. W. N. (1894) 60; 8 Ind. Dec. (N. S.) 159.

Order XXXII, rule 11, that the Court would have been bound to be vigilant in the minor's interest and, after removing 1st defendant for his failure in his duty, to appoint another guardian in his stead. Are arbitrators acting, like those here in question, on a reference without the Court's intervention under that or any similar duty and is their failure to perform it misconduct? No authority directly in point has been shown us. But generally arbitrators will fail in their clear duty and be guilty of misconduct, if they do not secure for each party an opportunity to present his case: and according to English authority they should even go beyond strict legal requirements in order to do so. *Crompton & Co. and Mohan Lal* (8), *Gladwin* v. *Chilcote* (9), *Haigh* v. *Haigh* (10) and *Whatley* v. *Morland* (11). The principle involved is one of substance and the case of a minor, such as that before us, is not one, in which it should be relaxed. True, arbitrators cannot, like a regularly constituted Court, protect his interest by removing the defaulting guardian and appointing another in his stead. But their duty may fairly be taken to be to refrain from passing an award, so long as they are deprived of the power to pass a just one, and either to adjourn the proceedings in case a change in the representation of the minor is probable, or, if one is not probable either generally or within the time (if any) fixed for the return of the award, to refuse to act. In the present case the arbitrators' failure in this duty amounted, in my opinion, to misconduct and on this ground their award must be set aside.

This entails that the appeal should be allowed, the lower Court's decision being set aside and the petition being dismissed. I agree with the order proposed by my learned brother as to costs for the reason he gives.

Appeal allowed.

M. C. P.

(8) 25 Ind. Cas. 391; 41 C. 313.

(9) (1841) 9 Dow. P. C. 550; 5 Jur. 749; 61 R. R. 825.

(10) (1861) 31 L. J. Ch. 420; 3 De G. F. & J. 157; 5 L. T. 507; 8 Jur. (N. S.) 983; 45 E. R. 838; 130 R. R. 73.

(11) (1834) 2 Cr. & M. 347; 2 Dow. P. C. 249; 4 Tyr. 255; 3 L. J. (N. S.) Ex. 58; 39 R. R. 790; 149 E. R. 794.

CALCUTTA HIGH COURT.

CIVIL RULES NOS. 305 AND 306 OF 1917.

August 29, 1917.

Present:—Justice Sir Asutosh Mookerjee, KT., and Mr. Justice Walmsley.

Rai BAIKANTHA NATH SEN *Bahadur*—DEFENDANT—PETITIONER

versus

RAMAPATI CHATTERJEE—OPPOSITE PARTY.

Bengal Tenancy Act (*VIII B. C. of* 1885), *s.* 148 *A*, *suit under, form of—Suit by co-sharer landlord for separate share of rent, or in the alternative for total rent, nature of—Decree, form of.*

Co-sharer landlords, who by arrangement with the tenants collect their shares separately and have in previous years brought separate suits for recovery of their dues, are competent to sue jointly for the total amount due to them under the terms of the original lease, which can be enforced by all the co-sharers together without the consent of the tenants. But if a plaintiff seeks to avail himself of the special provisions of section 148A of the Bengal Tenancy Act, he must in his plaint seek to recover the entire amount due to himself and his co-sharers. [p 768, cols. 1 & 2.]

A co-sharer landlord sued for rent and alleged, in the first paragraph of the plaint, that he had separately collected his share of the rent from the tenant-defendant in previous years. In the second paragraph he stated that he had demanded his separate share of the rent from the tenant but to no avail. He added, in the third paragraph, that he was not aware whether his co-sharers (whom he joined as defendants) had separately realised their shares of the rent. In the first clause of the fourth paragraph he prayed that a decree might be made in his favour for his share of the rent; then followed a second alternative clause to the effect that if it was found that the tenant had not paid the rent due to his co-sharers, he might be granted leave to amend the plaint so as to secure a decree for the entire sum:

Held, that this was not a suit contemplated by section 148 A of the Bengal Tenancy Act. [p. 768, col. 1.]

The nature of the decree to be made in the suit depends upon its true character. If it is a suit for the share of the rent recoverable by the plaintiff separately by reason of the fact that he has on previous occasions collected that share of the rent separately from his co-sharers, the decree will be a money-decree; if, on the other hand, it is a decree in a suit properly framed under section 148A, the decree will operate as a rent-decree capable of execution under the special procedure prescribed by the Bengal Tenancy Act. [p. 768, col. 2.]

Civil Rules against a decision of the Subordinate Judge, Burdwan, dated the 19th December 1916, confirming that of the Munsif, Katwa, dated the 18th December 1915.

Babu *Hemendra Nath Sen* for the Petitioner.

Babu *Karunamoy Bose*, for the Opposite Party.

JUDGMENT.—The question for determination in this Rule is, whether the suit as framed is maintainable under section 148A of the Bengal Tenancy Act. The plaintiff alleged, in the first paragraph of the plaint, that he had separately collected his share of the rent from the tenant-defendant in previous years. In the second paragraph he stated that he had demanded his separate share of the rent from the tenant but to no avail. He added, in the third paragraph, that he was not aware whether his co-sharers (whom he joined as defendants) had separately realised their shares of the rent. In the first clause of the fourth paragraph he prayed that a decree might be made in his favour for his share of the rent; then followed a second alternative clause to the effect that if it was found that the tenant had not paid the rent due to his co-sharers, he might be granted leave to amend the plaint so as to secure a decree for the entire sum. We are of opinion that this is not a plaint in a rent suit of the character contemplated by section 148A.

Reference has been made to the decisions in *Pergash Lal* v. *Akhowri Balgobind Sahoy* (1) and *Nunda Lal Choudhury* v. *Kaia Chand Choudhury* (2) which, however, do not support the contention of the plaintiff. In each of these cases the plaintiff-landlord instituted the suit on the allegation that rent was recoverable by him jointly with his co-sharers and that he was obliged to institute a suit alone inasmuch as his co-sharers had not joined and had not disclosed how much, if any, sum was due on account of their shares. In the case before us, the plaintiff throughout the plaint proceeds on the allegation that he has previously collected his share of the rent separately and in the first prayer clause actually seeks to recover that share. No doubt, as pointed out by the Judicial Committee in the case of *Pramada Nath Roy* v. *Ramani Kanta Roy* (3) and subsequently by this Court in the case of *Bhola Nath Bose* v. *Belchambers* (4), co-sharer landlords, who by arrangement with the tenants collect their shares separately and have in previous years brought separate suits for recovery of their dues, are competent to sue jointly for the total amount due to them under the terms of the original lease, which can be enforced by all the co-sharers together without the consent of the tenants. But it is plain that if a plaintiff seeks to avail himself of the special provisions of section 148A, he must in his plaint seek to recover the entire amount due to himself and his co-sharers; this the present plaintiff has failed to do. The Courts below have concurrently found that the plaintiff never collected his share of the rent separately and that the evidence he has adduced in support of the allegation made in the plaint is untrustworthy. In our opinion, the suit as framed is not a suit under section 148A and should not have been entertained. We cannot accept the contention that there is no substance in this objection. The nature of the decree to be made in the suit depends upon its true character. If it is a suit for the share of the rent recoverable by the plaintiff separately by reason of the fact that he has on previous occasions collected that share of the rent separately from his co-sharers, the decree will be a money decree; if, on the other hand, it is a decree in a suit properly framed under section 148 A, the decree will operate as a rent-decree, capable of execution under the special procedure prescribed by the Bengal Tenancy Act. We are accordingly of opinion that this Rule must be made absolute and the suit dismissed with costs, inasmuch as the allegation of separate collection has not been established. We assess the hearing fee in this Court at one gold *mohur*.

A similar order will be drawn up in Rule No. 306 of 1917.

Rules made absolute.

(1) 19 C. 735; 9 Ind. Dec. (N. S.) 932.
(2) 8 Ind. Cas. 50; 15 C. W. N. 820.
(3) 35 C. 331; 7 C. L. J. 139; 12 C. W. N. 249; 10 Bom. L. R. 66; 35 I. A. 73; 18 M. L. J. 43; 3 M. L. T. 151 (P. C.).
(4) 10 Ind. Cas. 891; 14 C. L. J. 373.

PAPALA CHAKRAPANI *v.* LACHIMIACHI.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 2592 OF 1914.

January 9, 1918.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Napier.

PAPALA CHAKRAPANI—PLAINTIFF—APPELLANT

versus

LACHIMIACHI, LEGAL REPRESENTATIVE OF THE DECEASED 1ST RESPONDENT SUBRAMANIA CHETTIAR—DEFENDANT No. 1—RESPONDENT.

Mortgage—Sub-mortgagee, rights of—Discharge of original mortgage by substitution of other mortgages, how far affects rights of sub-mortgagee—Assignment of mortgage, absence of notice of, to mortgagor, effect of—Sale, right of, by sub-mortgagee—Transfer of Property Act (IV of 1882), s. 67.

There is no necessity to give notice of an assignment of a mortgage to the mortgagor, and such want of notice will not render the sub-mortgage invalid, save in so far as the assignee holds subject to the accounts between him and the original mortgagee. [p. 770, col. 1.]

The substitution of one mortgage by another mortgage will not affect the rights of a sub-mortgagee from the original mortgagee to bring the mortgagee's rights under the earlier mortgage to sale. [p. 770, col. 1.]

A sub-mortgagee has the right to sell the mortgagee's rights against the particular properties sub-mortgaged to him for the whole amount due to him and the mortgagor's remedy against him is just what he would have against the original mortgagee if the latter sought to enforce his debt against those particular properties, *viz.*, to redeem by paying the amount due. [p. 770, col. 2.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Tanjore, in Appeal Suit No. 40 of 1916, preferred against the decree of the Court of the District Munsif, Tanjore, in Original Suit No. 379 of 1908.

FACTS appear from the judgment.

Mr. *T. R. Ramachandra Aiyar* (with him Messrs. *T. R. Krishnaswami Aiyar* and *N. A. Krishna Aiyar*), for the Appellant, contended that the position of a sub-mortgagee was not affected by the replacement of the mortgage by subsequent mortgages. The fact that the mortgagor had no notice of the sub-mortgage was immaterial. The only circumstance that could put an end to the sub-mortgage was redemption.

Mr. *K. N. Aiyar*, for the Respondent, argued that as substitution extinguished the original mortgage, it had the same effect in regard to rights created under the earlier mortgage. It had virtually the same effect as redemption. Further, the mortgagor had no notice of the sub-mortgage and could not be called on to recognise rights created by his mortgagee who had himself been a party to the supre ssio nof his mortgages.

JUDGMENT.—This second appeal comes before us for re-hearing so far as the 12th respondent is concerned, our judgment in Second Appeal No. 2592 of 1914 and the decree being to that extent set aside. The points arising have now been re argued on behalf of that respondent. With regard to the question of proof of the sub-mortgage sued on we do not think it necessary to say more than that we consider the proof sufficient. The point most strongly pressed on us was that the plaintiff's sub-mortgage does not now legally affect the property covered by the original mortgage which it purported to charge, that mortgage having been discharged by the substitution of two mortgages, Exhibits C and D, covering distinct portions of the property and executed by two different branches of the family, both documents being executed in ignorance of the existence of the sub-mortgage in favour of the plaintiff's predecessor-in-title. We have asked the learned Vakil for authority for the proposition that a sub-mortgage executed without notice to the mortgagor was invalid or that such a sub-mortgage could be rendered inoperative except by redemption of the mortgaged property, and he has been unable to give us any such authority. He has contended, however, that substitution must have the same operation as redemption, the interest affected having been destroyed. This proposition is clearly unsound in principle and has been negatived by authority of that Court. It was laid down in *Jones* v. *Gibbons* (1) that there is no necessity to give notice of an assignment to the mortgagor. *Vide* Fisher on Mortgages, page 631, and White and Tudor's Leading Cases in Equity, 7th Edition, Volume 2, page 38*, where the cases are collected. In *Matthews* v. *Wallwyn* (2) it was held that the only rights of a mortgagor without notice of the assignment are that the assignee holds subject to the account between him and the original mortgagee. This latter proposition was re-affirmed

(1) (1804) 9 Ves. (Jun.) 407; 32 E. R. 659; 7 R. R. 247.

(2) (1798) 4 Ves. (Jun.) 118; 31 E. R. 62.

*Eighth Edition page 43.—*Ed.*

in *Chambers* v. *Goldwin* (3). This principle applies both to payments made prior to the assignment and to those subsequent to it. *Vide* Halsbury's Laws of England, Volume 21, page 179, and *Dixon* v. *Winch* (4), where the limits of the doctrine were considered. As pointed out in our previous judgment the case in *Narayana Mudali* v. *Raghavammal* (5) is a direct authority on the point argued before us. It was there held that a subsequent mortgage, in consideration of further advances to the mortgagor although it might operate as a merger of the earlier mortgage as between the original mortgagor and the mortgagee, "could not prejudice the rights of the sub-mortgagee, or affect his rights to bring the mortgagee's rights under the earlier mortgage, to sale." The right to the state of account between the original parties was also recognised, but in that case as in this it was found that the mortgagor had paid nothing.

The next point taken was that the sub-mortgagee could not bring a suit for sale of some of the items covered by the original mortgage which items alone were sub-mortgaged to him by Exhibit B. There is nothing in this objection. The rights of a sub-mortgagee are stated in a decision of a Full Bench of the Allahabad High Court, *Ram Shankar Lal* v. *Ganesh Prasad* (6), as follows: — "A sub-mortgagee is entitled to a decree for sale of the mortgagee rights of his mortgagor subject to the right of redemption by the original mortgagor." In this case the right of the original mortgagee was to bring any one of the properties to sale for the amount of his debt. His right with regard to some of those properties he has assigned by way of sub-mortgage for a sum less than the amount covered by the original mortgage and it is now vested in the plaintiff. The plaintiff has, therefore, the right to sell the mortgagee's rights against those particular properties for the whole amount due to him, and the mortgagor's remedy against him is just what he would have against the original mortgagee if the latter sought to enforce his debt against those particular properties, namely, to redeem by paying the amount due and sued for. We must, therefore, set aside the decree of the lower Appellate Court with costs payable by the 12th respondent both here and in the lower Appellate Court, and restore the decree of the District Munsif. Time for redemption is extended for three months from this date.

Appeal allowed.

M. C. P.

(3) (1804) 9 Ves. Jur. 254; 32 E. R. 609; 7 R R. 181.

(4) (1900) 1 Ch. 736; 69 L. J. Ch. 465; 82 L. T. 437; 48 W. R. 612; 16 T. L. R. 276.

(5) 18 M. L. J. 462.

(6) 29 A. 385; 4 A. L. J. 273; A. W. N. (1907) 97; 2 M. L. T. 248.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

March 18, 1918.

Present:—Viscount Haldane, Lord Dunedin, Lord Sumner, Sir John Edge and Mr. Ameer Ali.

Rajkumar JAGANNATH PRASHA SINGH—DEFENDANT—APPELLANT

versus

Syed ABDULLAH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Evidence Act (*I of* 1872), *s.* 115—*Estoppel by representation or action causing another to change position —Conveyance by person entitled by estoppel, whether transfers good title against those bound by estoppel.*

The doctrine of estoppel is based upon the change of position brought about by the representations or actings of the persons bound by the estoppel. [p. 772, col 2.]

Estoppel applies not only in favour of the person induced to change his or her position, but of a transferee from such person, and it binds not only the person whose representations or actings have created it, but all claiming under him by gratuitous title. [p. 772, col. 2.]

The estates of *B.*, a Raja, were taken under Government management under the Encumbered Estates Act. The manager appointed, who had a power of sale under the Act, put up a village to sale. *B.* bought it *benami* in the name of *K*, but the manager never executed any conveyance to *K.* Thereafter the management was removed and *B.* was restored to his estates *K.* having died, *B.* procured *K.'s* heir *L.* to convey the village to *B's* illegitimate daughter *R.* After *B's* death *R.* conveyed it to *A.* who sued *B.'s* heir *J.* for possession:

Held, that *J.* was estopped from denying *R.'s* title. [p. 773 col. 1.]

Appeal from a decree of the Calcutta High Court, dated June 10, 1913, reversing that of the Subordinate Judge, Gaya.

JAGANNATH PRASHAD SINGH *v.* ABDULLAH.

FACTS of the case are sufficiently set out in their Lordships' judgment.

Syed Abdullah's suit was dismissed by the first Court, but decreed by the High Court (Chatterjea and Newbould, JJ.). Defendant appealed.

Mr. Dunne, K. C., with him Mr. *Ramsay*, for the Appellant.—The estoppel relied on by the High Court is that the Raja's conduct prevented us from alleging that the ostensible title was not the real title. But Rajeshwari here was not even ostensible owner. Her transferor never got a conveyance such as would have given him title. Section 54 of the Transfer of Property Act lays down that to affect immoveable property there must be a registered instrument. The Board has held that until registered a contract has no effect: and that if registration is not effected all equitable rights under the contract are extinguished.

[LORD DUNEDIN referred to Lord Shand's judgment in *Sarat Chunder Dey* v. *Gopal Chunder Laha* (1).]

That was a clear case of a representation being acted on: it was not so here. Rajeshwari did not act on any misrepresentation: it has been found she paid no consideration. If the Raja wished to make a gift of the village to her, section 123 of the Transfer of Property Act requires a registered instrument signed by him or on his behalf. Syed Abdullah cannot avail himself of section 41 of that Act, for he neither made reasonable enquiries nor acted *bona fide*: there are recitals in the deed, but the smallest enquiry would have shown him that they were untrue, and indeed the deed itself recites that he relied on Rajeshwari's representations as to her title.

Sir *W. Garth*, for Respondents, was not called on.

JUDGMENT.

LORD DUNEDIN.—In this suit Syed Abdullah sues the Raja of Deo for possession of a village called Badam. The plaintiff is purchaser from a dancing girl, Rajeshwari Koer, who is the natural daughter of the late Raja Bhikham of Deo, father of the present Raja, defendant.

The history of the matter is this: Raja Bhikham having got into involved circumstances, his estate was put under management under the provisions of the Chota Nagpur Encumbered Estates Act, which had been made to apply to Deo by a special Act. The manager appointed under the Act one Bhuan Lal, who had in terms of the Act powers of sale, put up to public action the village of Badam. It was bought by Kashi Nath Singh for the sum of Rs. 2,000. As a matter of fact, Kashi Nath had been put forward by the Raja himself, who provided him with the money. No conveyance was executed by Bhuan Lal in favour of Kashi Nath. The management came to an end in 1896, and the Raja was restored to his estate. In 1897, the Raja, who had expressed his desire to benefit Munni Bibi, the mother of Rajeshwari, and his infant daughter by her, caused Lajjadhari, the adopted son of Kashi Nath who had by this time died, to execute a conveyance of Badam in favour of Rajeshwari. The deed of conveyance bore to be in respect of a consideration of Rs. 5,000 but in reality no money passed—Lajjadhari merely acted on the command of the Raja. On the 22nd April 1898 Rajeshwari, being a minor, applied through her mother as guardian for registration and mutation of names in respect of the village of Badam. On the same day the Raja presented a petition in which he narrated the fact of Badam having been sold by Bhuan Lal, the manager, set forth that Kashi Nath had died without having obtained a conveyance and that Lajjadhari his son had sold the property to Rajeshwari, and prayed that Rajeshwari's petition should be granted and her name inserted in the register, "to which your petitioner has no objection whatever." Rajeshwari's name was accordingly entered in the Government register as proprietrix of the village of Badam.

In October 1898 Raja Bhikham died and the present Raja being a minor the estate came under the management of the Court of Wards. Sometime in 1899 Mr. Wright, the manager, turned out Rajeshwari who was in possession, *via facti* and without process. In 1901 Mr. Wright conveyed Badam to Ranee Chandra Koer, the surviving widow of Raja Bhikham, on the idea that it was *gur* property descending from Ranee to Ranee. In 1902 the Ranee applied for mutation of names. Her application was opposed by Rajeshwari and was refused. In 1904 the Ranee raised a civil suit for a declaration that the property was hers. To this suit she called as defendants

(1) 19 I. A. 203; 201 C. 296; 6 Sar. P. C. J. 224; 10 Ind. Dec. (N. S.) 20 (P. C.).

Rajeshwari and the young Raja, the present defendant. The whole facts were gone into. The Ranee had based her case on an allegation that Kashi Nath was a *benamidar* for her. The Subordinate Judge held that Kashi Nath was the *benamidar* of Raja Bhikham, and not of the Ranee, and dismissed the suit, adding an opinion that Raja Bhikham himself would have been estopped from denying that the property belonged to Rajeshwari. On appeal the District Court affirmed the judgment, but did not repeat the dictum as to estoppel. In 1908 Rajeshwari executed a conveyance in favour of the present plaintiff, who in the same year raised the present suit.

The defence to the suit was, after discounting irrelevant pleas, based on two grounds, first, a denial of Rajeshwari's title to convey anything to the plaintiff; second, a denial that Rajeshwari had conveyed to the plaintiff on the allegation that she was a minor at the time of the conveyance. The learned Subordiate Judge upheld both defences and dismissed the suit. The Appeal Court reversed and gave judgment in favour of the plaintiff.

It will be convenient to dispose of the second ground of defence first, as it depends on a pure question of fact. The Subordinate Judge, while commenting on the unreliability of the witnesses, three in number, adduced by the defendant to prove the minority, gave judgment on the ground that the rebutting evidence was not what it might have been. The High Court, agreeing with the criticism on the defendant's witnesses, came to the conclusion that the defendant had not made out his allegation. Their Lordships agree with the High Court. The onus to prove minority is on the defendant who asserts it. He brings no reliable evidence to prove this assertion. This defect in his proof cannot, their Lordships think, be cured by a mere criticism of the evidence brought by the plaintiff. It would further seem to their Lordships that the evidence tendered by the brother is not open to any obvious objection. But it is enough to say that the matter being left in doubt the defendant fails to prove his assertion.

The sole question then is whether there was a title in Rajeshwari. Formal title by progress there was not. Both Courts find that the sale by auction, though it gave a right to the purchaser to get a title, did not give him an actual title. Admittedly Kashi Nath never got the acual title, to which as purchaser he was entitled. The plaintiff in the Court below attempted to prove that Kashi Nath was a true purchaser for value. In this he failed, and both Courts are agreed as to this. He was only trustee for the Raja Bhikham. The argument in the lower Court then turned mostly on the effect of the judgments of 1905 and 1906 in the suit by the Ranee. The plaintiff urged that as between Raja Bhikham and the defendant, who were both co-defendants to the Ranee's suit, these judgments formed a *res judicata* to the effect that the property belonged to Rajeshwari. In deciding rightly that this was not so, the learned Subordinate Judge overlooked the fact that, though the dictum of the Subordinate Judge in the Ranee's suit that Raja Bhikham was in a question with Rajeshwari estopped from denying that the property was hers was an *obiter dictum*, yet on the emergence of the same facts as were found in that suit, the question arose to be decided in this suit, it being obvious that if Raja Bhikham was estopped, the present Raja, his son, taking by gratuitous title from him, was equally estopped. But the High Court took up that point and decided it in favour of the plaintiff. The question before their Lordships is whether that view was right.

Their Lordships think that it was. In the first place, they are satisfied that the facts are as have been stated above. When, therefore, Lajjadhari executed the conveyance in favour of Rajeshwari at the instance of Raja Bhikham, he (Raja Bhikham) was the true owner. Kashi Nath was a trustee for Raja Bhikham, and Lajjadhari could only succeed to his father's trusteeship. Further, Raja Bhikham was the proprietor of the estate of which Badam was a part. So that if by renunciation or limitation the right of Kashi Nath to get a conveyance became extinct, the full right as well as the title was in him. In this position of affairs not only did Raja Bhikham cause Lajjadhari to execute the conveyance, but when Rajeshwari proceeded to give effect to that conveyance by applying for registration he actively assisted her. By so doing he caused her to change her position, for by registration she became bound for all

the State liabilities which attach to the registered holders of immoveable property. If then Raja Bhikham had lived and attempted to regain the property these actings of his would, in their Lordships' view, have estopped him from making the claim. He did not do so. The present defendant is his son, and succeeded by gratuitous title, and he, therefore, cannot do what his father would have been unable to do.

Their Lordships will humbly advise His Majesty to dismiss the appeal with costs.

Appeal dismissed.

Solicitors for Appellant:—Messrs. *T. L. Wilson & Co.*

Solicitor for the Respondents, Mr. *E. Dalgado.*

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 190 OF 1917.

March 5, 1918.

Present:—Sir Henry Richards, KT., Chief Justice, and Justice Sir P. C. Banerji, KT.

FAZAL RAB—APPLICANT

versus

MANZUR AHMAD AND OTHERS—OPPOSITE PARTIES.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 89, 92—Sale in execution, setting aside of—Deposit by judgment-debtor in treasury, whether deposit in Court—'Court', meaning of—Revision—High Court, power of interference of.

The deposit under Order XXI, rule 89, of the Civil Procedure Code of the purchase-money *plus* 5 per cent. compensation to the auction-purchaser, is an indulgence to the judgment-debtor. The auction-purchaser isentitled to the benefit of his purchase, unless the rule is strictly and completely complied with. Whether or not the section has been completely complied with, is a question which the Court has jurisdiction to decide and if in the exercise of such jurisdiction, it comes to an erroneous conclusion, the High Court is not entitled to interfere with its order in revision [p. 774, col. 2.]

A judgment-debtor deposited the sum necessary for getting a sale set aside under Order XXI, rule 89, in the treasury owing to the Civil Court being closed on that day. On the re-opening of the Court he applied under the above rule, stating that he had already deposited the money in the treasury. The Court refused to set aside the sale on the ground that the deposit had not been made in the Civil Court:

Held, that as the word 'Court' in Order XXI, rule 89, means Civil Court, the Court had jurisdiction to decide whether the deposit had been made in Court and that the order of the Court, even if it was erroneous, could not be interfered with in revision. [p. 774, cols. 1 & 2.]

The Code gives a right of appeal to an auction-purchaser against an order setting aside a sale, as he is the party mainly affected by the order. [p. 774, col. 2.]

The High Court is not entitled to create what are really appeals put forward in the shape of revisions. [p. 774, col. 1.]

Civil revision from an order of the Subordinate Judge, Allahabad.

Mr. *Kailas Nath Katju* (with him Mr. *Peary Lal Banerji*), for the Applicant.

Mr. *S. M. Sulaiman* (with him Mr. *T. N. Chaddha*), for the Auction-purchaser.

JUDGMENT.—The facts connected with this application may be stated very shortly. There was a decree for about Rs. 1,000. Certain property of the judgmet debtor was directed to be sold. The sale was held by the Collector on behalf of the Civil Court. The sale took place on the 20th September 1916. The property was put up to sale and fetched Rs. 850. On the 15th October the judgment-debtor came to the Collector and stated that he was anxious to have the sale set aside and to save the property; that he could not deposit the decretal amount *plus* 5 per cent. compensation to the auction-purchaser as the Civil Court was closed but he was anxious to lodge the money in the Treasury. The money was accepted by the Collector. On the 11th November, which was the day on which the Civil Court opened, the judgment-debtor applied to have the sale set aside and stated how the money had been already deposited in the Treasury. There was a Rubkar from the Treasury to the effect that the money had been deposited. In December following the Civil Court directed that the money should be transferred to the account of the Civil Court. The Court of first instance, thereupon, set aside the sale, holding that the money had been deposited within thirty days. The auction-purchaser appealed and the lower Appellate Court held that the money had not been deposited within thirty days or on the 11th November, which was the day on which the Civil Court opened, and accordingly the rule had not been complied with and the auction-purchaser was entitled to the benefit of his purchase. The judgment-debtor has applied in revision. There is no appeal from the order of the lower Appellate Court refusing to set aside the sale.

It is contended in the first place that the money was in fact deposited within the meaning of the rule and that consequently the lower Appellate Court had no jurisdiction to refuse to set aside the sale, and in the second place that the Court of first instance having set aside the sale no appeal by the auction-purchaser lay to the lower Appellate Court.

Rule 89 provides: "Where immoveable property has been sold in execution of a decree, any person, either owning such property or holding an interest therein by virtue of a title acquired before such sale, may apply to have the sale set aside on his depositing in Court (*a*) for payment to the purchaser a sum equal to 5 per cent. of the purchase money, and (*b*) for payment to the decree-holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder."

Rule 92, clause 2, provides "that where in an application under rule 89 the deposit required by that rule is made within thirty days from the date of the sale, the Court shall make an order setting aside the sale."

The question which the Court below had to decide was whether or not the money had been deposited in Court. It is quite clear that Court means the Civil Court. This was a question which admittedly the lower Appellate Court had not only jurisdiction but was bound to decide. It is somewhat difficult to say whether the Court was not technically right in holding, unfortunate though the judgment debtor may have been, in strictness that the money was not deposited in Court within thirty days or on the 11th November, which was the first day the Court opened. It was not until December following that the money was accepted in the Civil Court by ordering the transfer of the deposit to the Civil Court account. It has been decided by their Lordships of the Privy Council that the High Court is not entitled to create what are really appeals put forward in the shape of revisions and accordingly even if we thought that under the exceptional circumstances of this case the lower Appellate Court might very well have upheld the Court of first instance, this would not justify us in interefering with the decision of the lower Appellate Court in revision.

In this connection it must be remembered that the deposit of the purchase-money *plus* 5 per cent. compensation of the purchase-money to the auction-purchaser is an indulgence to the judgment-debtor. The auction-purchaser is entitled to the benefit of his purchase unless the section has been strictly and completely complied with. We think that the question whether or not the section has been complied with completely was clearly a question which the Court below had jurisdiction to decide, that it exercised its jurisdiction and that even if we thought it had come to an erroneous conclusion, we would not have been entitled to interfere in revision.

As to the second contention, namely, that an auction-purchaser has no right to appeal, the Code undoubtedly gives a right of appeal against an order setting aside the sale. The party mainly affected by the setting aside of the sale is the auction-purchaser and the Code provides that the sale should not be set aside without notice to him. We think it would be most unreasonable to hold that the Code restricts the right of appeal to the decree-holder or judgment-debtor. We think the application fails and we accordingly dismiss it with costs.

Revision dismissed.

MADRAS HIGH COURT.

FULL BENCH.

CITY CIVIL COURT APPEAL No. 7 OF 1917.

April 9, 1918.

Present:- Sir John Wallis, KT, Chief Justice, Mr. Justice Sadasiva Aiyar and Mr. Justice Spencer.

KADIRVELU NAINAR—PLAINTIFF—APPELLANT

versus

KUPPUSWAMI NAICKER—DEFENDANT—RESPONDENT.

Fraud—Decree obtained by perjured evidence, suit to set aside, maintainability of.

No suit can be instituted to set aside a decree on the ground that it was obtained by perjured evidence. [p. 778, col. 1.]

KADIRVELU NAINAR *v.* KUPPUSWAMI NAICKER.

Venkatappa Naick v. *Subba Naick*, 29 M. 179; 16 M. L. J 59, overruled.

Logadapatti Chinnayya v. *Kotla Ramanna*, 19 Ind. Cas 579; 38 M. 203; (1913) M. W. N. 387; 13 M. L. T. 421; 25 M L. J. 228; *Moruful Huq* v. *Surendra Nath Roy*, 15 Ind Cas 893; 16 C. W. N. 1002 and *Janki Kuar* v. *Lachmi Narain*, 30 Ind. Cas. 789; 37 A. 535; 13 A. L J. 753, followed.

Appeal against the decree of the City Civil Court, Madras, in Original Suit No. 498 of 1916.

This appeal coming on for hearing on the 10th of December 1917, upon perusing the grounds of appeal, the judgment and decree of the lower Court and the material papers in the suit and upon hearing the arguments of Mr. *K. S. Ganapathi Aiyar*, for the Appellant, and of Mr. *K. Venkataraghavachari*, for the Respondent, and the case having stood over for consideration till the 8th January 1918, the Court (Wallis, C. J , and Sadasiva Aiyar, J.) made the following

ORDER OF REFERENCE TO A FULL BENCH.

SADASIVA AIYAR, J.—The plaintiff is the appellant. The present defendant had brought a suit against the present plaintiff in the Presidency Small Cause Court for money due by the plaintiff to a Chit fund, of which the defendant was the stake-holder and in which the plaintiff had four shares, the plaintiff having executed a promissory note in favour of the defendant. The defendant obtained a decree for Rs. 117-2-0 in the suit filed in the Presidency Court of Small Causes against the plaintiff notwithstanding certain defences raised by the plaintiff. The decree is dated the 5th February 1914. The present suit was brought on the 14th December 1916 in the City Civil Court (*a*) for a declaration that the decree in Small Cause Suit No. 1432 of 1914 is null and void, and (*b*) for a decree directing the defendant to pay the plaintiff Rs. 399-12-0 (the damages incurred by the plaintiff through the defendant's fraud in obtaining the unjust decree) with interest thereon and costs of suit. The grounds alleged as the foundation of this claim are found in paragraphs 8 to 10 of the plaint as follows: "The defendant falsely swore in that suit that he paid only ten monthly instalments" (to the Chit) and that certain receipts were passed only for instalments paid in respect of the Chit fund transaction, and not for independent loans advanced by the plaintiff to the defendant, "that the defendant also dishonestly suppressed the fact that he was bound to give credit for Rs. 68 due to the plaintiff as premia in the Chit and that the decree of the Small Cause Court which was obtained by the plaintiff's wilful perjury and suppression of material facts was obtained in fraud of the Court."

The plaintiff's suit was dismissed by the learned City Civil Judge, on the ground that his Court cannot be converted into a Court of Appeal on a question of fact from the decision of the Small Cause Court. In *Venkatappa Naick* v. *Subba Naick* (1) Boddam and Moore, JJ., purported to follow the English cases in *Abouloff* v. *Oppenheimer* (2) and in *Vadala* v. *Lawes* (3) and held that a judgment obtained by perjury is a judgment obtained by fraud committed upon the Court and could be set aside in a separate suit. The learned Judges evidently thought that the decision in the well-known case of *Flower* v. *Lloyd* (4) was overruled by the two later English decisions referred to by them. The decision in *Venkatappa Naick* v. *Subba Naick* (1) has been afterwards considered in at least two cases in this Court. In *Kumarasawmy Chetty* v. *Kamakshi Ammal* (5), which came before Sundara Aiyar, J. and myself, I said: "I also wish to add that I should not be understood as admitting that a plaintiff can maintain a suit to set aside a decree on the ground of fraud simply because the decree had been obtained on perjured testimony. I know it has been so held in *Venkatappa Naick* v. *Subba Naick* (1), but I have grave doubts as to the correctness of that decision." Sundara Aiyar, J., agreed with my above observations. Then there is a reported case in *Logadapatti Chinnayya* v. *Kotla Ramanna* (6) in which Benson and Sundara Aiyar, JJ., dealt elaborately with the same point. At

(1) 29 M. 179; 16 M. L. J. 59.

(2) (1883) 10 Q. B. D. 295; 52 L. J. Q. B. 1; 47 L. T. 3 5; 31 W. R. 67.

(3) (1890) 25 Q. B. D. 310; 63 L. T. 128; 38 W. R. 594.

(4) (1879 10 Ch. D. 327; 39 L. T. 613; 27 W. R. 496.

(5) 16 Ind. Cas. 843; 23 M. L. J. 187; 12 M. L. T. 186; (1912) M. W. N. 805.

(6) 19 Ind. Cas. 579; 38 M. 203; (1913) M. W. N. 387; 13 M. L. T. 421; 25 M. L. J. 228.

page 206* it is said: "It is indisputable that the decree may be vacated on the ground that it was obtained by the successful party by fraud. The question is what would amount to fraud which would entitle an unsuccessful litigant to get the decree vacated. He cannot, it is clear, be allowed to get round the rule of *res judicata* and to prove that the judgment given by the Court was wrong because it came to a wrong conclusion on the evidence before it. It follows from this that the Court's conclusion, both on the construction to be put on the evidence placed before it and on the inference to be drawn from such evidence as well as on the trustworthiness of the evidence, should be regarded as final. If the Court acts erroneously in forming its judgment on any of these matters, the proper remedy is to invoke the help of the appellate tribunal where an appeal is allowed by law. Another mode of rectifying an erroneous judgment is to apply for review of judgment. The unsuccessful party has, in such an application, an opportunity to adduce any evidence which he failed to adduce at the hearing and which he could not, with all proper diligence, have then adduced. It cannot be doubted that, in such cases, he cannot institute a fresh suit to get the judgment vacated." "The test to be applied is, is the fraud complained of not something that was included in what has already been adjudged by the Court, but extraneous to it? If, for instance, a party be prevented by his opponent *from conducting his case properly by tricks or misrepresentation*, that would amount to fraud. There may also be fraud upon the Court if, in a proceeding in which a party is entitled to get an order without notice to the other side, he procures it by suppressing facts which the law makes it his duty to disclose to the Court. But where two parties fight at arm's length, it is the duty of each to question the allegations made by the other and to adduce all available evidence regarding the truth or falsehood of it. Neither of them can neglect his duty and afterwards claim to show that the allegation of his opponent was false." Then the learned Judge refers to Black on Judgments in 23, Cyclopædia of American Law and Procedure, as regards the acts which can be relied on as constituting the fraud which would vacate a judgment, namely, things which are collateral to the matters which have been adjudged by the Court. Then the passages from the judgment of the Lord Justice James in *Flower* v. *Lloyd* (4) are quoted: "Assuming all the alleged falsehood and fraud to have been substantiated, is such a suit as the present sustainable? That question would require very great consideration indeed, before it is answered in the affirmative. Where is litigation to end if a judgment obtained in an action fought out adversely between two litigants *sui juris* and at arm's length could be set aside by a fresh action on the ground that perjury had been committed in the first action, or that false answers had been given to interrogatories or a misleading production of documents or of a machine, or of a process had been given? There are hundreds of actions tried every year in which the evidence is irreconcilably conflicting, and must be on one side or other wilfully and corruptly perjured. In this case, if the plaintiffs had sustained on this appeal the judgment in their favour, the present defendants, in their turn might bring a fresh action to set that judgment aside on the ground of perjury of the principal witness and subornation of perjury and so the parties might go on alternately *ad infinitum*. There is no distinction in principle between the old Common Law action and the old Chancery suit and the Court ought to pause long before it establishes a precedent which would or might make, in numberless cases, judgments, supposed to be final only the commencement of a new series of actions. Perjuries, falsehoods, frauds, when detected, must be punished and punished severely, but in their desire to prevent parties litigant from obtaining any benefit from such foul means, the Court must not forget the evils which may arise from opening such new sources of litigation, amongst such evils not the least being that it would be certain to multiply indefinitely the mass of those very perjuries, falsehoods and frauds." The learned Judge declined, therefore, to follow *Venkatappa Naick* v. *Subba Naick* (1). As regards the two English cases *Abouloff* v. *Oppenheimer* (2) and *Vadala* v. *Lawes* (3), they were cases of suits brought upon foreign judgments. In the case in *Nanda*

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Kumar Howladar v. *Ram Jiban Howladar* (7) Jenkins, C. J., says at page 998* that the jurisdiction to set aside a decree for fraud "is to be exercised with care and reserve, for it would be highly detrimental to encourage the idea in litigants that the final judgment in a suit is to be merely a prelude to further litigation." In *Ramratan Lol* v. *Bhuri Begam* (8) Richards, C. J., quotes with approval passages from *Flower* v. *Lloyd* (4), dissents from *Lakshmi Charan Shaha* v. *Nur Ali* (9), which was disapproved of in the Calcutta High Court itself in *Moruful Huq* v. *Surendra Nath Roy* (10), and approves of Jenkins, C. J.'s observations in *Nanda Kumar Howladar* v. *Ram Jiban Howladar* (7). In *Janki Kuar* v. *Lachmi Narain* (11) also *Venkatappa Naick* v. *Subba Naick* (1) was expressly dissented from and the learned Judges say that the weight of authority is in support of the view taken in *Nanda Kumar Howladar* v. *Ram Jiban Howladar* (7) and in *Moruful Huq* v. *Surendra Nath Roy* (10), that is, in favour of the view taken in *Flower* v. *Lloyd* (4), and in the Madras case *Logadopatti Chinnayya* v. *Kotla Ramanna* (6). I think that in India the considerations mentioned by James, L. J., in *Flower* v. *Lloyd* (4) apply with very great force, as it is dangerous to allow a fresh suit to be brought by an unsuccessful litigant to set aside the decree passed against him on the ground that his opponent had imposed on the Court by letting in perjured evidence. The two cases relied on in *Venkatappa Naick* v. *Subba Naick* (1) and the later case in *Cole* v. *Langford* (12). merely follow old English precedents and do not attempt to tackle with the weighty reasons given in *Flower* v. *Lloyd* (4). The passion for litigation, wherever it exists in this country, is likely to turn into almost incurable mania and the doctrine of *res judicata* would become practically useless if *Lakshmi Charan Shaha* v. *Nur Ali* (9) is followed in Indian Courts.

Having regard, however, to the conflict of views found in the decisions in *Venkatappa Naick* v. *Subba Naick* (1) and in *Logadapatti Chinnayya* v. *Kotla Ramanna* (6), I would refer the following question to the Full Bench:—

"Was the question of law considered in *Venkatappa Naick* v. *Subba Naick* (1) rightly decided in that case ?"

WALLIS, C. J.—I concur in the order of reference.

The appeal came up for hearing before the Full Bench on 9th April 1918.

Mr. *K. S. Ganapatty Aiyar*, for the Appellant, relied on *Venkatappa Naick* v. *Subba Naick* (1), which holds that a judgment obtained by false evidence is a judgment obtained by fraud and is, therefore, liable to be vacated. *Vide* also *Abouloff* v. *Oppenheimer* (2) and *Vadala* v. *Lawes* (3).

Mr. *K. Venkataraghavachari*, for the Respondent, urged that *Venkatappa Naick* v. *Subba Naik* (1) was against the preponderating weight of judicial decisions and should not be followed. Reference was made to *Logadapatti Chinnayya* v. *Kotla Ramanna* (6), *Moruful Huq* v. *Surendra Nath Roy* (10), *Janki Kaur* v. *Lachmi Narain* (11). The effect of upholding the decision in *Venkatappa Naick* v. *Subba Naick* (1) would be to make the Court which is asked to vacate the decree of another Court virtually a Court of Appeal. The perjury committed in a proceeding must be exposed in the very action itself. The finality of a judgment should, as far as possible, be preserved and there should be no loopholes for fresh litigation.

Abouloff v. *Oppenheimer* (2) and *Vadala* v. *Lawes* (3) are actions on foreign judgments.

The English case of *Flower* v. *Lloyd* (4) was also cited.

OPINION.—In *Venkatappa Naick* v. *Subba Naick* (1) the Court decided that a suit could be instituted to set aside a decree on the ground that it had been obtained by false evidence tendered at the trial and by the suppression of evidence. On reference to the printed papers it appears that the

(7) 23 Ind. Cas. 337; 41 C. 990; 18 C. W. N. 681; 19 C. L. J. 457.
(8) 30 Ind. Cas 792; 38 A. 7; 13 A. L. J. 901.
(9) 11 Ind. Cas. 626; 38 C. 936; 15 C. W. N. 1010.
(10) 15 Ind. Cas. 893; 16 C. W. N. 1002.
(11) 30 Ind. Cas. 789; 37 A 535; 13 A. L. J. 753.
(12) (1898) 2 Q. B. 36; 67 L. J. Q. B. 698; 14 T. L. R. 427.

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alleged suppression of evidence consisted in the non-production of a promissory note the very existence of which the defendant denied when giving evidence in the case. There has been considerable difference of opinion in England as to whether an action would lie to set aside the judgment of an English Court on the ground that it had been obtained by perjured evidence. In India the weight of authority appears to be in favour of holding that such a suit will not lie for the reasons given by Sundara Aiyar, J., in *Logadapatti Chinnayya* v. *Kotla Ramanna* (6), by the Calcutta Court in *Moruful Huq* v. *Surendra Nath Roy* (10), and by the Allahabad Court in *Janki Kuar* v. *Lachmi Narain* (11). We are, therefore, of opinion that *Venkatappa Naick* v. *Subba Naick* (1) was wrongly decided and must be overruled.

M. C. P.

Answered in the negative.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 291 OF 1916.

December 18, 1917.

Present:—Mr. Justice Fletcher and Justice Sir Syed Shamsul Huda, Kt.

Chowdhury KASI NATH MITRA—DEFENDANT—APPELLANT

versus

BHIKAN CHARAN MAITY—PLAINTIFF—RESPONDENT.

Mortgage—Part of consideration kept in deposit and paid afterwards—Remedies of mortgagor—Contract Act (IX of 1872), ss. 16, 74 - Undue influence—Penalty—Interest, high rate of, whether allowable.

Where at the time of the execution of a mortgage bond for Rs. 3,000, only the sum of Rs. 1,000 was advanced to the mortgagor and the balance was kept in deposit with the mortgagee, which was subsequently paid over to the mortgagor on a registered receipt after the expiry of the due date of repayment stipulated in the mortgage bond:

Held, that in regard to the balance of Rs. 2,000 subsequently advanced the remedy of the mortgagee was not a mere personal action based on a simple contract, but he could recover the whole amount of Rs 3,000 by a suit on the mortgage security. [p. 779, col. 1.]

Without any evidence of undue influence exercised or unfair means adopted by the lender, a rate of interest agreed to by the borrower cannot be disallowed as being penal unless it is so high as to shock the conscience of the Court. [p. 779, col. 1.]

Appeal against the decree of the Subordinate Judge, 3rd Court, Midnapore, dated the 29th August 1916.

FACTS appear from the judgment.

Babu *Khitish Chunder Chuckerburtty*, for Babu *Nilkant Ghosh*, for the Appellant.—The mortgage-bond is only a bond, for Rs. 1,000 though the consideration of Rs. 3,000 was mentioned in the bond because as a matter of fact Rs. 1,000 was advanced at the time of the execution of the bond. The other sum of Rs. 2,000 remained with the mortgagee even after the due date of repayment. They were advanced subsequently on taking a registered receipt. Therefore the lending of this sum of Rs. 2,000 was the subject-matter of a separate contract and did not form part of the mortgage-bond. So with regard to this sum limitation applicable would be 3 years only, *vide Munshi Bajrangi Sahai* v. *Udit Narain Singh* (1). Then the question remains whether the money advanced on receipt can be taken as the part of the consideration money of the bond. I submit not. The case is on all fours with *Walker* v. *Carbton* (2). See also the Full Bench case of *Gokal Chand* v. *Rahman* (3). Moreover, the compound interest allowed in this case is penal.

Babu *Dwarka Nath Chuckerburtty* (with him Babu *Khirode Narain Bhuian*) for the Respondent, was not called upon.

JUDGMENT.

FLETCHER, J.—This is an appeal by the defendant from the decision of the learned Subordinate Judge of Midnapore, dated the 29th day of August 1916. The appeal is one of the most frivolous nature. I doubt whether I have ever seen an appeal with less to support it than the present one; and, if I may say so, that is saying a good deal. The suit was brought to enforce a registered mortgage bond. The suit was of the simplest description and the mortgage-bond bore interest at the rate of 9½ per cent. per annum with annual rests, which in this country certainly is not excessive. The mortgage is admitted by both sides.

The two points raised in this appeal are these: *First* of all, that a part of the claim is barred by limitation and *secondly*, that the interest contracted to be paid by the mortgage-bond is penal. Both the points

(1) 10 C. W. N. 932 at p. 933.
(2) 97 Ill. 582.
(3) 59 P. R. 1907 (F. B.).

are equally bad. The mortgage itself was dated the 7th May 1906. I give the date under the Gregorian Calendar, because I find it more convenient. The mortgage purported to secure a sum of Rs. 3,000 with interest. The mortgagor took only Rs. 1,000 at the time of the execution of the bond; the other Rs. 2,000 was what is called in this country kept in deposit with the mortgagee, that means that the money was placed in a separate account in the hands of the mortgagee, the mortgagor having the right to have the same whenever he wished. The date of the repayment was agreed to be 13th April 1908. The date of the repayment arrived and the sum of Rs. 2,000 still remained in deposit with the mortgagee. On the 1st October 1908 the Rs. 2,000 was paid over to the defendant by the plaintiff and subsequently—and wisely I expect—the mortgagee plaintiff obtained a registered receipt for the Rs. 2,000 on the 7th January 1909. The first point is that the suit to recover the sum of Rs. 2,000 is not based upon the mortgage security at all but that it is a mere personal remedy to recover the sum of Rs 2,000 due upon a simple contract and, therefore, it is barred by limitation. There is nothing in this point. It is a non-arguable point and it only requires to be stated to show how wrong it is. It is said that there are decisions of some of the Courts in India and also in America that support such a proposition. All I can say is that, if there are such decisions, I respectfully disagree with them and I expect that, if the decisions were available and could be looked at, one would find that they do not lay down the proposition that the learned Vakil for the appellant in this case says that they do.

The other point is an extremely frivolous point, namely, that the rate of interest is penal. What the non-penal rate is is not suggested. The defendant has not gone into the witness box to state that any undue influence was exercised or any unfair means were adopted. This rate, the rate of 9½ per cent. per annum, is clearly not so high on a mortgage in the district of Midnapore of a property of this nature as to shock the conscience of the Court. It is a rate which the Judges in the local Courts at Midnapore must see exceeded every day the Court sits. Certainly 9½ per cent. per annum with annual rests is usual in the Moffusil and, so far as I know, it is a rate that has not been quarrelled with in this Court. I notice that, since the intended legislation, this class of penal rate seems to have increased in this Court. When the mortgagor sees that he cannot repay the money the rate is stated to be penal and excessive. The short answer is either do not borrow money at this rate or, if you do borrow, repay the money on the date you agreed on the contract to repay. The mortgagor has only got himself to thank if on account of his failure to pay off the loan for a long period of years, the debt amounts to a considerable sum. The appeal fails and must be dismissed with costs. We assess the hearing fee at one hundred and fifty rupees.

SHMASUL HUDA, J.—I agree.

Appeal dismissed.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 102 OF 1917.

January 11, 1918.

Present:—Mr. Justice Oldfield and Mr. Justise Sadasiva Aiyar.

MANJAPPA AND ANOTHER—DEFENDANTS NOS. 3 AND 4—PETITIONERS—APPELLANTS

versus

RAJAGOPALACHARIAR AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), ss. 19, 20, 21—Contract for supply of goods—Goods not ordered sent with goods ordered—Return of goods not ordered by buyer—Claim for value of goods ordered and damages for negligent re-transmission of goods not ordered—Place of suing—Cause of action—Jurisdiction—S. 21, applicability of, to usurpation of jurisdiction of foreign Courts.

Defendants, who were residents of Sagaram in the Mysore State, contracted with the plaintiffs, residing at Kumbakonam in British India, for the supply of certain articles by the latter. The plaintiffs sent the goods ordered by the defendants along with goods not ordered. The defendants having returned *all* the goods, the plaintiffs instituted the present suit at Kumbakonam for the value of the six articles ordered and of the other articles also on the ground that they were negligently re-transmitted causing loss to the plaintiffs

MANJAPPA v. RAJAGOPALACHARIAR.

Held, (1) that the cause of action arose at, and the suit was properly filed, at Kumbakonam in respect of the goods ordered, as the proposal by defendants was impliedly accepted at that place; [p. 780, col. 2.]

(2) that the cause of action in respect of the other articles was distinct, and the defendants' liability being for damages for alleged negligence, the cause of action arose at Sagaram and it was not competent for the Kumbakonam Court to take cognizance of that portion of the claim; [p. 780, col. 2.]

(3) that section 21, Civil Procedure Code, did not apply to usurpation of the jurisdiction of a foreign Court. [p. 780, col. 2.]

Appeal, under clause 15 of the Letters Patent, against the judgment of Mr. Justice Bakewell, in Civil Revision Petition No. 1116 of 1916, preferred to the High Court to revise the decree of the Court of the Small Causes at Kumbakonam, in Small Cause Suit No. 285 of 1915.

FACTS appear from the judgment.

Mr. *Ramanath Shenai*, for the Appellants, argued that the cause of action in respect of the goods ordered was distinct from that in respect of the goods not ordered. The defendants' liability, if any, did not arise from any contract with the plaintiffs. Some of the goods were not ordered by defendants and they were returned at plaintiffs' express request. Defendants could only be held accountable for negligence in handling them or for their method of reconveyance. The negligence, if any, was committed at the place where defendants resided. The Kumbakonam Court had no jurisdiction to entertain this portion of the claim.

Mr. *T. Narasimha Iyengar*, for the Respondents, argued that the requisition to the defendants to return the goods not ordered and the latter's returning the goods in compliance therewith constituted an implied contract between the parties and the contract was entered into at Kumbakonam. The Kumbakonam Court, therefore, had jurisdiction to take cognizance of the claim.

Besides, the objection was not taken in the lower Court, and section 21, Civil Procedure Code, barred the objection at that stage.

Mr. *Ramanath Shenai* was heard in reply.

JUDGMENT.—The plaintiffs' claim is first to be paid for six articles ordered by defendants, which the latter were, therefore, bound to pay for and which they had no right to return. Part of the cause of action as regards these articles arose at Kumbakonam, where plaintiffs complied with defendants' order by despatching the articles to them, thus impliedly accepting their proposal. The lower Court, therefore, had jurisdiction as regards this part of the case. There is no answer to it on the merits.

Next, however, plaintiffs claim the value of 17 other articles, which, it is not disputed, they sent in excess of defendants' order, on the ground that they failed to use the proper amount of care in the method by which they returned them to them at their request and that they consequently did not reach them.

It is argued, first, that the cause of action for this amount arose in part at Kumbakonam, where plaintiffs were, because it is based on a contract entered into between defendants and plaintiffs to return the articles and plaintiffs entered into that contract there. It is clear, however, that there was no contract, defendants simply undertaking to return the articles at plaintiffs' request made without reference to the passing of any consideration. The liability, if any, is in fact for damages for their alleged negligence; and that negligence took place, it is not denied, at Sagaram in Mysore State. They must, therefore, be sued there.

Next section 21 of the Code of Civil Procedure is relied on. But we have been shown no authority for holding, and we do not think, that this provision is applicable to usurpation of the jurisdiction of a foreign Court.

It is then suggested that, as the part of plaintiffs' claim relating to the 6 articles was properly made at Kumbakonam, the whole could be made there. But when the causes of action in respect of the 6 and the 17 articles were distinct, there is no reason why the jurisdiction competent in the case of one should be competent in the case of the other also.

The claim as regards the 17 articles was, therefore, not made in a competent Court and it should have been disallowed. The claim as regards the 6 articles should have been decreed.

The lower Court's decision and that of the learned Judge are set aside and the

small cause suit is remanded in order that a fresh decree may be passed in the light of the foregoing. Costs in this Court will be costs in the case and will be provided for in the decree to be passed.

M. C. P.

Appeal allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 773 OF 1916.

April 20, 1918.

Present:—Mr. Justice Fletcher and Justice Sir Shamsul Huda, Kt.

MAHARAJ BAHADUR SINGH—PLAINTIFF—APPELLANT

versus

Mahant BHAGAWAN DAS *Shebait* OF ISWAR RAGHUNATH DEB THAKUR—DEFENDANT—RESPONDENT.

Bengal Tenancy Act (*VIII B. C. of* 1885), *ss.* 102 (*dd*), 106—*Suit under s.* 106—*Dispute between neighbouring proprietors—Question for determination.*

In a suit under the provisions of section 106, Bengal Tenancy Act, to amend a Record of Rights in which the dispute is between two neighbouring proprietors, and which comes within the provisions of section 102 (*dd*), the only question between those rival proprietors that can be gone into, is the question as to which of them was in possession of the land in question at the date of the final publication of the Record of Rights. [p. 782, col. 2.]

Appeal against the decree of the District Judge, Birbhum, dated the 28th January 1916, reversing that of the Subordinate Judge of that district, dated the 7th December 1914.

FACTS of the case appear from the judgment.

Babu *Bepin Behari Ghose II* (with him Babu *Urukram Das Chuckrabartty*) for the Appellant.—The suit was under section 106 of the Bengal Tenancy Act for correction of Settlement records after declaration of plaintiff's title to the disputed land. The plaintiff asked for a declaration that the disputed land entered in the finally published Record of Rights as appertaining to defendant's village really appertained to plaintiff's village and that the Settlement record should be corrected accordingly. The disputed land was mainly waste land but a portion of it was cultivated for several years. There was a local investigation by a survey-knowing Pleader Commissioner, who found that most of the disputed land belonged to the plaintiff's village. The first Court gave a decree in favour of the plaintiff, holding that in case of disputed possession title settles the dispute, and as in the present case title was with the plaintiff so possession went with it. The lower Appellate Court reversed the decision of the first Court and dismissed the suit. The lower Appellate Court held that all that the plaintiff could get, if successful in this suit between rival landlords, was (1) a declaration that the Record of Rights was wrong in showing that at the time it was published the disputed land was in defendant's possession as part of his village and not in plaintiff's possession as part of his village and (2) an order directing an entry showing plaintiff as the landlord under section 107 (2) of the Bengal Tenancy Act.

As regards the cultivated land, the lower Appellate Court says the Record of Rights raises a presumption that it was in defendant's possession at the time of publication and the plaintiff has failed to rebut that presumption. The defendant being in possession of part of the disputed land and having claimed title to the whole of the disputed land and the plaintiff having notice of the defendant's claim to the entire suit land (waste and cultivated), the Record of Rights was clearly right as to the possession of the land in suit. The lower Appellate Court dismissed the suit, holding that the first Court had misconceived the case entirely in treating the suit as one for declaration of title.

The disputed land being mainly waste land the suit comes under section 102, clause (*dd*) of the Bengal Tenancy Act. The case reported as *Mohunt Padmalav Ramanuja Das* v. *Lukmi Rani* (1) was decided before the clause (*dd*) was inserted in section 102 of the Act. By this clause a change in the law has been introduced. When the case comes under this clause, the Court cannot decide the question of possession without going into the question of title. See the

(1) 12 C. W. N. 8.

remarks of Mr. Justice Coxe in *Mohunt Padmalav Ramanuja Das* v. *Lukmi Rani* (1), last paragraph. By the insertion of clause (*dd*) the Legislature has made a change in the law and such questions of title between rival proprietors can now be gone into under the Act and in deciding such questions the Court must go into the question of title.

In the case reported as *Mohunt Padmalav Ramanuja Das* v. *Lukmi Rani* (1) there were tenants and the question was to whom the tenants must pay their rents, but in the present case there was no recorded tenant.

Babu *Gunada Charan Sen* (with him Babu *Surendro Nath Das Gupta*), for the Respondent.—All the decisions of this Court commencing from *Mohunt Padmalav Ramanuja Das* v. *Lukmi Rani* (1) are in my favour. Though the decision in *Mohunt Padmalav Ramanuja Das* v. *Lukmi Rani* (1) was before the insertion of the clause (*dd*), in section 102 of the Bengal Tenancy Act, the decisions in *Kali Sundari* v. *Girija Sankar* (2), *Ram Chandra Bhanj Deo* v *Nanda Nandanananda Deb* (3) and *Pran Krishna Saha* v. *Trailakhya Nath Chowdhury* (4) are all decisions after the insertion of the clause (*dd*) and in all these cases the decision in *Mohunt Padmalav Ramanuja Das* v. *Lukmi Rani* (1) has been followed. In the case reported as *Ramchandra Bhanj Deo* v. *Nanda Nandanananda Deb* (3) it was argued that the decision in *Mohunt Padmalav Ramanuja Das* v. *Lukmi Rani* (1) was wrong and should be referred to the Full Bench but that contention was disallowed.

Babu *Bepin Behari Ghose*, in reply.—The later decisions have blindly followed the decision in *Mohunt Padmalav Ramanuja Das* v. *Lakmi Rani* (1) which was before the insertion of the clause (*dd*), and in those decisions the significance of the clause (*dd*) has not been observed. The remarks of Mr. Justice Coxe at page 13, last paragraph, of 12 Calcutta Weekly Notes make it quite clear.

JUDGMENT.—This is an appeal by the plaintiff against the decision of the learned District Judge of Birbhum, dated the 28th January 1916, reversing the decision of the Subordinate Judge of the same place. The plaintiff brought the suit under the provisions of section 106 of the Bengal Tenancy Act to amend a Record of Rights. The dispute in this case is a dispute between two neighbouring proprietors and, therefore, the case comes within the provisions of section 102 (*dd*). The learned District Judge in this case has considered that having regard to the authorities in this Court, the only question between these rival proprietors that he can go into in a suit instituted under the provisions of sections 106 of the Bengal Tenancy Act is the question as to which of these two rival proprietors was in possession of the land in question at the date of the final publication of the Record of Rights. I think that the authorities in this Court do establish that. I have authorities beginning with the decision of Mr. Justice Woodroffe and Mr. Justice Coxe reported as *Mohunt Padmalav Ramanuja Das* v. *Lukmi Rani* (1), and that decision is followed by the cases reported as *Kali Sundari* v. *Girija Sankar* (2), *Ramchandra Bhanj Deo* v. *Nanda Nandanananda Deb* (3) and *Pran Krishna Saha* v. *Trailakhya Nath Chowdhury* (4). We are bound by these authorities and we content ourselves by simply saying that following those decisions the present appeal fails and must be dismissed with costs.

Appeal dismissed.

(2) 11 Ind Cas. 184; 15 C. W. N. 974.
(3) 20 Ind. Cas. 298; 18 C. W. N. 936; 19 C. L. J. 197.
(4) 27 Ind. Cas. 883; 19 C. W. N. 911.

MADRAS HIGH COURT.
SECOND CIVIL APPEAL No. 98 OF 1917.
December 18, 1917.
Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Kumaraswami Sastri.

GOTATAI VIGNESWARUDU—PLAINTIFF—APPELLANT

versus

TADANKI VENKATA SURYANARAYANAMURTHI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (*Act V of* 1908), *ss.* 64, 73, O.

PURNA CHANDRA PAL *v.* BARADA PRASUNNA BHATTACHARJEE.

XXI, r. 89—Sale in execution, setting aside of, effect of, on creditor claiming rateable distribution—Decree-holder, whether can use attachment for execution of another decree—Alienation before re-attachment, effect of.

Where a sale is set aside under Order XXI, rule 89, Civil Procedure Code, the result is that there are no assets realised under which other creditors of the judgment-debtor can claim rateable distribution.

Mina Kumari Bibi v. Bijoy Singh Dudhuria, 40 Ind. Cas. 242; 44 C 662; 32 M. L. J. 425; 1 P. L. W. 425; 21 C. W. N. 585; 5 L. W. 711; 21 M. L. T. 344; 15 A. L. J. 382; 25 C. L. J. 508; 19 Bom L. R. 424; (1917) M. W. N. 473; 44 I. A. 72 (P. C.), followed.

The attaching decree-holder in such a case cannot use the attachment for the satisfaction of other decrees obtained by him. He can only bring the property to sale a second time, if there has been no alienation of it by the judgment-debtor in the meantime.

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Guntur, in Appeal Suit No. 39 of 1916, preferred against the decree of the Court of the Additional District Munsif, Tenali, in Original Suit No. 231 of 1915.

Messrs. *B. Narasimha Row* and *N. Rama Row*, for the Appellant.

Mr. *V. Ramadoss*, for Respondent No. 2.

JUDGMENT.—In this case the 2nd defendant attached the suit property in execution of a decree and brought it to sale. The sale was set aside under Order XXI, rule 89 of the Civil Procedure Code. The result of setting aside the sale was that in accordance with a recent decision of the Privy Council in *Mina Kumari Bibi* v. *Bijoy Singh Dudhuria* (1) and a recent Full Bench decision which followed it. No assets had been realised under that attachment against which other creditors could claim rateable distribution under section 64 of the Code.

The 2nd defendant's claim against the suit property was satisfied by the deposit pursuant to rule 89, but the decree was not fully satisfied and a particular sum has subsequently accrued as interest.

Assuming that the 2nd defendant, the attaching creditor, had the right to bring the property to sale a second time in satisfaction of that balance, that has not been done; if it were done, that sale could again be set aside on payment of the balance and other charges provided for in the rule. No assets have been realised under this attachment against which the 2nd defendant is entitled to proceed in respect of another decree which he has obtained. If the 2nd defendant wishes to bring this property to sale, he must attach under that other decree and bring it to sale. But then he would be met by the objection that the sale to the plaintiff was prior to that attachment. The circumstances very much resemble the circumstances of the Privy Council case. In both the cases, the attaching decree-holder was seeking to make use of the attachment for the satisfaction of some other debt when there had been no sale and no realisation of the assets under the attachment. On the other hand there has been an alienation to a third party, which is good against any subsequent attachment by the 2nd defendant. In the result we allow the appeal, reverse the decrees of the lower Courts and remand the case to the District Munsif for disposal on the first issue. Costs will abide.

M. C. P.

Appeal allowed; Case remanded.

(1) 40 Ind. Cas. 242; 44 C. 662; 32 M. L. J. 425; 1 P. L. W. 425; 21 C. W. N. 585; 5 L. W. 711; 21 M. L. T. 344; 15 A. L. J. 382; 25 C. L. J. 508; 19 Bom. L. R. 424; (1917) M. W. N. 473; 44 I. A. 72 (P. C.).

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 3202 OF 1913.

March 5, 1918.

Present:—Mr. Justice Richardson and Mr. Justice Walmsley.

PURNA CHANDRA PAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

BARADA PRASUNNA BHATTACHARJEE—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 148, applicability of, to suit for redemption of charge—Transfer of Property Act (IV of 1882), s. 95—Co-mortgagor redeeming mortgage—Charge on shares of other co-mortgagors—Possession of co-mortgagor, whether adverse to others.

Article 148 of the Limitation Act does not apply to a suit to redeem a charge which one of several mortgagors redeeming the mortgaged property has

under section 95 of the Transfer of Property Act on the shares of the other co-mortgagors. [p. 785, col. 2; p. 786, col. 1.]

Vasudeo v. *Balaji*, 26 B. 500; 4 Bom. L. R. 178, followed.

Ashfaq Ahmad v. *Wazir Ali*, 14 A. 1; A. W. N. (1891) 211; 11 A. 423; 7 Ind. Dec. (N. S.) 373 and *Khiali Ram* v. *Taik Ram*, 36 Ind. Cas. 452; 38 A. 540; 14 A. L. J. 834, not followed.

Three brothers *D*, *G.* and *K.* were the joint owners of a *taluq* which they had mortgaged. *A.*, in execution of a decree against two of the brothers, *D.* and *G.*, having purchased the *taluq*, redeemed the mortgage and obtained possession of the lands through Court. Subsequently he procured from the superior landlord a settlement of the whole *taluq* in his favour. The finally published Record of Rights contained an entry showing that the *taluq* was in exclusive possession of *A.* by virtue of the sale-certificate he had obtained at the execution sale:

Held, that *A* having redeemed the mortgage obtained a charge on the share of the third brother *K.* by virtue of section 95 of the Transfer of Property Act, but that his possession of the *taluq*, having regard to what happened subsequent to his redemption of the mortgage, was not the possession of a co-sharer of *K.* but was in exclusion of *K.* and adverse to him. [p. 786, col. 2.]

Appeal against the decree of the Subordinate Judge, 1st Court, Chittagong, dated the 30th July 1913, modifying that of the Munsif, Fatickcheri, dated the 29th June 1912.

FACTS appear from the judgment.

Babu *Ram Dayal De*, for the Appellants.—If the mortgage is redeemed, it is extinguished. It must be redeemed as a whole. The lower Appellate Court by applying sections 95 and 100 of the Transfer of Property Act has made a new case for the plaintiffs. Even assuming that the lower Appellate Court is competent to do so, it ought to have considered the question of limitation.

Section 100 of the Transfer of Property Act does not make Article 148 of the Limitation Act of any application to the facts of the present case. Article 144 of the Limitation Act is applicable here. I rely on *Vasudev* v. *Balaji* (1), *Jai Kishen Joshi* v *Budhanand Joshi* (2) and *Vithal* v. *Dinkarrao* (3).

[RICHARDSON, J.—The case of *Vasudev* v. *Balaji* (1) is in your favour, the facts are similar.]

Jai Kishen Joshi v. *Budhanand Joshi* (2) is also in my favour. The facts in *Nidhiram Bandopadhya* v. *Sarbessur Biswas* (4) are not similar, there Article 132 was applied. In no case is the period of limitation more than 12 years. The question of limitation was taken in the first Court and there was an issue to that effect, but it was not pressed. If it was treated as a charge, the learned Subordinate Judge in the Court below ought to have decided the question of limitation. The plaintiff's suit is clearly barred by limitation.

Babu *Jogesh Chandra Roy* (with him Babu *Dhirendra Lal Kastgir*), for the Respondent.—The question of limitation was not pressed at the time of argument in the lower Courts. The appellant cannot take the point now. That it was not taken there might depend on many circumstances. If the point was taken, then the facts would have been gone into. The possession of the defendant might not be adverse. Whether it was adverse or not is a question of fact as well as of law. A question of law which involves consideration of facts cannot be taken for the first time in second appeal.

[RICHARDSON, J.—The Bombay case is against you.]

The Bombay case would not apply to the present case because Sir Lawrence Jenkins says at page 504*: "So it depends on many circumstances."

I rely on *Ashfaq Ahmad* v. *Wazir Ali* (5). Article 148 would apply to the present case. Why should the period of 60 years be cut down to 12 years? The recent case on the point is *Khiali Ram* v. *Taik Ram* (6). There is no Calcutta case on the point. There are earlier Bombay cases, *Ramchandra Yashvant* v. *Sadashiv Abaji* (7), *Faki Abas* v. *Faki Nuruddin* (8), and a Madras case, *Moidin* v. *Oothumanganni* (9).

[RICHARDSON, J.—The principle there laid down is different.]

However, this is a new point and a new point cannot be raised here for the first time in second appeal and there are cases on this point.

JUDGMENT.

RICHARDSON, J.—This appeal arises out of a suit to redeem and recover possession of

(1) 26 B. 500; 4 Bom. L. R. 178.
(2) 34 Ind. Cas. 244; 38 A. 138; 14 A. L. J. 41.
(3) 3 Bom. L. R. 685.
(4) 5 Ind. Cas. 877; 14 C. W. N. 439.
(5) 14 A. 1; A. W. N. (1891) 211; 11 A. 423; 7 Ind. Dec. (N. S.) 373 (F. B.).
(6) 36 Ind. Cas. 452; 38 A. 540; 14 A. L. J. 834.
(7) 11 B. 422; 6 Ind. Dec. (N. S.) 276.
(8) 16 B. 191; 8 Ind. Dec. (N. S.) 605.
(9) 11 M. 416; 4 Ind. Dec. (N. S.) 291.

* Page of 26 B.—*Ed.*

a certain Taluk. The facts are as follows: The Taluk originally belonged to three brothers Dhaniram, Gurudas and Kailash. In the year 1249 M. E. (1887) the Taluk was mortgaged by the three brothers to defendant No. 1, Abidulla. On the 7th May 1890 a person of the name of Akbar Ali purported to purchase the whole Taluk in execution of a decree against Dhaniram and Gurudas. On the 6th April 1892 Akbar Ali redeemed the mortgage of Abidulla. Having done so, on the 19th April 1892 he obtained possession of the land through Court. On the 15th September 1893 he further procured from the superior landlord a settlement of the whole Taluq in his favour. The Record of Rights, which was published in the year 1898, contains an entry showing that the Taluk was then in exclusive possession of Akbar Ali under and by virtue of the sale-certificate in his name. On the 5th January 1902 Akbar Ali's sons granted a Raiyati lease of the land to defendant No. 2 and on the 10th January 1907 they sold the superior right to defendant No. 9. On the 25th September 1907 the plaintiff purchased the right of Kailash, one of the original owners of the Taluk whose interest did not pass at the sale in execution of the decree obtained by Akbar Ali. On the 7th June 1911 the plaintiff brought the present suit claiming the right, as I have said, to redeem the defendant No. 9 and to recover possession of the land. In the Trial Court the case appears to have been discussed and decided on the footing that the plaintiff was claiming a right to redeem the mortgage in favour of Abidulla. The learned Munsif found that on that footing the plaintiff was only entitled to redeem as against the defendant No. 9 a one-third share of the Taluk on payment of a proportionate amount of the mortgage-debt. The Munsif further held that the plaintiff was not entitled to eject the defendant No. 2, being apparently of opinion that the defendant No. 2 had a right to remain in possession on the principle laid down in the case of *Binad Lal Pakrashi* v. *Kalu Pramanik* (10).

From the Munsif's decree the plaintiff preferred an appeal to the lower Appellate Court and there was also a cross-objection on behalf of the defendant No. 9. The learned Subordinate Judge dealt with the case on a somewhat different footing. He held, in my opinion, rightly that on the redemption of the original mortgage by Akbar Ali that mortgage came to an end and ceased to exist. Applying section 95 of the Transfer of Property Act, he held that Akbar Ali became entitled as against Kailash to a charge on a one-third share of the land in respect of the latter's one-third share of the mortgage-debt, and that, by paying that share of the debt, Kailash, or the plaintiff in right of Kailash, was entitled to redeem the charge. In regard, therefore, to the plaintiff's claim as against the defendant No. 9, the learned Subordinate Judge arrived by a different process at the same result at which the learned Munsif had arrived. In regard, however, to defendant No. 2, the learned Subordinate Judge took a somewhat different view of the facts and held that defendant No. 2 was not entitled to remain in possession. By his decree the Subordinate Judge varied the decree of the first Court by directing that the plaintiff should recover Khas possession of a one-third share of the Taluk by ejecting the defendant No. 2.

The defendants Nos. 2 and 9 have appealed to this Court and on their behalf it is argued that the Subordinate Judge, though he may have correctly appreciated the legal position, was not entitled to decide in favour of the plaintiff without considering the question of limitation. On that question the learned Pleader for the appellant relies on the decision of the Bombay High Court in the case of *Vasudev* v. *Balaji* (1). It was held there in circumstances somewhat similar to the present that Article 148 of the Limitation Act was inapplicable to a suit for the redemption of a mere charge and, apparently, that in default of any other Article such a suit would be governed by Article 144. For the plaintiff, on the other hand, reference has been made to the decision of a Full Bench of the Allahabad High Court in the case of *Ashfaq Ahmad* v. *Wazir Ali* (5) and to the decision of a Division Bench of the same Court in the case of *Khiali Ram* v. *Taik Ram* (6). The view expressed in these cases appears to be that a suit of this nature comes within Article 148 and may be

(10) 20 C. 708; 10 Ind. Dec. (N. s.) 477.

brought within 60 years from the date when the original mortgage became redeemable. According to that view the present suit would no doubt be in time. With great respect, however, it appears to me that the view taken in the Bombay case is more consistent with the language of sections 95 and 100 of the Transfer of Property Act and the language of Article 148 of the Schedule of the Limitation Act. The Transfer of Property Act draws a clear distinction between a charge and a mortgage, and it is difficult to interpret the word 'mortgagee' in Article 148 as including a charge. If Article 148 has no application then this suit is *prima facie* out of time. It was certainly brought more than twelve years from the date when the charge came into existence and more than twelve years from the date when Akbar Ali obtained exclusive possession.

It has been argued, however, for the plaintiff that in the Trial Court, though the question of limitation was made the subject of one of the issues framed for the purposes of the trial, the learned Munsif stated that the point had not been pressed at the time of the argument. It is suggested that as the point turns partly on a matter of fact, it cannot now be raised. The reason, however, why it was not pressed seems to be that in the Trial Court, the parties dealt with the case on the footing that the legal position was such that the relevant Article could only be Article 148. If the period of limitation be 60 years, then there is no room for argument on the point. If, however, as the Subordinate Judge held, the right to redeem must be referred to the charge instead of to the mortgage, the question of limitation assumes another aspect. The learned Pleader for the plaintiff says that the learned Subordinate Judge made a case for the plaintiff which he had not made himself. But that is not so. The Subordinate Judge merely applied the law as he understood it to the facts on which the plaintiff's claim was based. As the plaintiff's success now depends entirely on his right to redeem the charge, he cannot take the advantage of that position without also accepting its disadvantage.

The question then remains whether Akbar Ali, after he obtained possession of this Taluk in the year 1892, *i.e.*, 19 years before the present suit was brought, was in adverse possession of the land as against Kailash. The learned Pleader says that by his purchase of the interests of Dhaniram and Gurudas he became a co-sharer or partner with Kailash in the mortgaged property. That is so, in a sense. But there is no suggestion that there was any particular connection between him and Kailash. They were not co-sharers in the ordinary sense of the word and having regard to the title which the sale-certificate purported to give him and what subsequently happened to the settlement which he obtained from the superior landlord and to the entry in the Record of Rights, in my opinion there is no room for the suggestion made, *i.e.*, that the possession of Akbar Ali was as a co-sharer also the possession of Kailash. On the contrary it was a possession exclusive of Kailash.

This litigation has lasted for a number of years and as the Courts below have not found on this issue whether Akbar Ali's possession was or was not adverse as against Kailash, it is open to us under section 103 of the Code of Civil Procedure to decide the issue ourselves. Speaking for myself, I have no doubt in the circumstances as to what the finding ought to be. In my opinion the suit is barred by limitation.

I should, therefore, allow this appeal and dismiss the suit. The plaintiff must pay the costs of the defendants Nos. 2 and 9 throughout.

WALMSLEY, J.—I agree.

Appeal allowed.

MADRAS HIGH COURT.

CIVIL APPEAL No. 65 OF 1908.

November 23, 1917.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Oldfield.

Raja VISWANADHA VIJIA KUMARA BANGAROO THIRUMALAI SOURI NAICKER—DEFENDANT No. 1—APPELLANT

versus

R. G. ORR AND OTHERS—RESPONDENTS.

Contract Act (IX of 1872), s. 70, scope of—Act done

VISWANADHA VIJIA KUMARA BANGAROO v. G. R ORR.

primarily for doer's benefit incidentally benefiting another—Irrigation channel, repair of, benefiting both repairer and third party—Contribution, claim for—Refusal of defendant to pay for repairs—Charge, enforceability as—Limitation Act (IX of 1908), Sch. I, Arts. 61, 120—*Regulation XXVII of* 1802, *s.* 32—*Collection of cost of repairs by Collector, effect of.*

Section 70 of the Contract Act does not apply to cases where a person does an act for his own benefit and that act incidentally benefits his neighbour or any other person. In such cases the latter need not pay for the extent of the benefit derived by him from the act. [p 789, col. 1.]

A person claiming contribution from another under section 70 of the Contract Act must prove that he did some act for the latter. An act cannot be described as done by one person for another, unless it can be shown that, but for the existence of that other's interest, it would not have been done. [p. 792, col. 1.]

Plaintiffs, the lessees of the Sivaganga Zemindari, executed certain necessary repairs to a tank which irrigated their lands and the defendants' lands and also the lands of other persons. Before commencing the repairs they intimated to defendants their intention to do so and called upon them to bear their rateable share of the expenses. Defendants replied that they did not want the repairs and refused to pay any portion of the expenses. The plaintiffs, however, completed the repairs, and filed the present suit for contribution against the defendants, relying on section 70 of the Contract Act. They prayed also that the amount that may be decreed to them may be made a charge on the defendants' properties:

Held, (1) that as the repairs were executed by the plaintiffs mainly for their own benefit, though the defendants were also incidentally benefited by them, the latter were not liable for a proportionate share of the expenses under section 70 of the Contract Act; [p. 789, col. 1.]

(2) that, even if defendants were liable, plaintiffs were not entitled to a charge on their property; [p. 791, col. 2.]

Rajah of Vizianagram v. *Rajah Setrucherla Samasekhararaz*, 26 M. 686, distinguished.

(3) that Article 120 and not Article 61 of the Limitation Act was applicable to the case. [p. 791, col. 1.]

Per *Oldfield, J.*—Article 61 of the Limitation Act can be applied to cases under section 70 of the Contract Act where the payment made by the plaintiff produced an immediate benefit to the defendant, as in cases of payments of Government revenue or of decree amounts, but the Article will not apply when the benefit will only arise at a subsequent stage and plaintiff's cause of action will not be complete until that subsequent stage is reached. To such cases Article 120 must be applied. [p. 793, col. 2.]

Per *Abdur Rahim, J.*—The fact that the Collector has levied some portion of the expenses for repairs from defendants by coercive process under section 32 of Regulation XXVII of 1802 will not affect their non-liability under section 70 of the Contract Act. [p. 789, col. 2.]

Appeal against the decree of the Court of the Subordinate Judge, Madura (East), in Original Suit No. 53 of 1905.

Messrs. *C. S. Govindaraja Mudaliar, C. S. Vencatachariar* and *N. R. K. Thathachariar*, for the Appellant.

Messrs. *K. Srinivasa Aiyangar, T. R. Vencatrama Sastri* and *S. R. Muthuswami Aiyar*, for the Respondents.

This appeal and the memorandum of cross-objections put in by respondents Nos. 1 and 2 coming on for hearing on the 20th, 21st and 22nd November 1917, and having stood over for consideration till this day, the Court delivered the following

JUDGMENT.

ABDUR RAHIM, J.—This appeal is from a decree of the Subordinate Judge of Madura, by which he directed the defendants to pay a sum of money as compensation for the benefit enjoyed by them as a result of certain repairs executed by the plaintiffs to a tank called Marnad Tank situate in the Sivaganga Zemindari. The defendants are Inamdars of a village called Vellikurichi and, admmittedly, this tank is the source of irrigation for that village and also a number of Ayan and Devastanam villages. Vellikurichi is what is called a *jividam* Inam. It was granted prior to the Permanent Settlement to a descendant of Tirumal Naick and is held rent-free. The first ground of the claim is based on section 70 of the Contract Act. Sivaganga Zemindari is now in the possession of the plaintiffs who are lessees, and their case is to the effect that the tank which is a common source of supply to the Ayan villages as well as to Vellikurichi was badly in need of repairs, the *bund*, in more than one place, had been worn out and the sluices were not in order. It was necessary for the maintenance of the tank in proper condition that considerable repairs should be executed. The finding of the Subordinate Judge is that the tank was, as a matter of fact, in need of repairs and, as a result of the repairs, it has been restored to its proper capacity and even improved. Vellikurichi has benefited by these repairs just as much as other villages, and the Subordinate Judge also finds that, were it not for the repairs, the tank would have gradually gone into ruins. The plaintiffs sent a notice to the defendants that repairs were necessary for the maintenance of the tank in proper condition and also a copy of the estimate, claiming that the defendants were liable to contribute to the cost in

proportion to the land which was cultivated with water from the tank. The defendants, in reply, denied their liability and, in fact, said that they did not want any repairs to be done to the tank, so far as they were concerned. The plaintiffs, however, proceeded with the repairs, the cost of which has amounted to Rs. 14,000 and odd.

There can be no doubt that, as a result of the repairs, the tank has been improved. The plaintiffs have not only repaired the tank but they have improved the sluice and put in a regulator under lock and key for the purpose of regulating the discharge of water from the tank. The Subordinate Judge has held the defendants liable for a proportionate share of the expenses of the repairs, but that, so far as the repairs to the sluice are concerned, they could not be said to be for the benefit of the defendants, and he has disallowed the cost of those repairs. The memorandum of cross-objections mainly relates to the cost of repairs to the sluice.

The question we have to consider in this case has a fairly long history, going as far back as 1820 or so. On going through the entire evidence both oral and documentary, one fact seems to be clear, namely, that the Inamdars have all along been refusing to pay anything for the repair of the tank. I shall have again to refer to that matter later on. So far as the application of section 70 of the Contract Act is concerned, it must be taken to be proved that the defendants never authorized the plaintiffs to execute the repairs at their cost and never assented to payment of the expenses. I may assume for the purpose of argument, so far as this question is concerned, that the defendants did in fact enjoy the benefit of the repairs done by the plaintiffs. But that is not enough to bring the case within section 70. This section has been the subject of interpretation in a number of cases in this Court beginning from *Damodara Mudaliar* v. *Secretary of State* (1), and it could not be said that the rulings have been consistently uniform on every point. But the weight of the decisions undoubtedly preponderates in favour of the views expressed by Munro and Sankaran Nair, JJ., in *Yogambal Boyee Ammani Ammal* v. *Naina Pillai Markayar* (2) and by Sankaran Nair and Spencer, JJ., in *Rajah of Pittapur* v. *Secretary of State* (3). In those cases, the scope of the section has been fully discussed. That section says: "Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered". In this case, there can be no doubt that the act of the plaintiffs was lawful. The next element that has to be proved by them is that they did the act, the compensation for which they claim from the defendants, *for* the defendants. It has further to be proved that they did not intend to do what they have done gratuitously and this, we may take it, has been amply proved and is not disputed. The last condition that has to be satisfied is that the defendants should have enjoyed the benefit of the act. As regards this, it is laid down, in the two cases already referred to, that the person who is sought to be charged must have the option of refusing or adopting the benefit. But on this point, there seems to be some difference of opinion. Ayling and Tyabji, JJ, in *Saptharishi Reddiar* v. *Secretary of State for India* (4) appear to have doubted whether that view of the law is correct. It is not, however, necessary for us in this case to go into that question.

I think that the plaintiffs have failed to bring their case within section 70 by failing to prove that they did the repairs *for* the defendants. The irrigation of their own villages also depends as much upon the maintenance of this tank as that of Vellikurichi. The extent of land irrigated in the Ayan villages is more than three times that of the wet land of Vellikurichi. So they had undoubtedly a preponderating interest in the maintenance of the tank. The tank is situated in the plaintiffs' Zemindari and they are the owners of the soil and the tanks. There is nothing in the terms of the notice which the plaintiffs

(11) 18 M. 88; 4 M. L. J. 205; 6 Ind. Dec. (N. S.) 420.

(2) 3 Ind. Cas. 110; 33 M. 15; 6 M. L. T. 162; 19 M. L. J. 489.

(3) 25 Ind. Cas. 783; 16 M. L. T. 375.

(4) 28 Ind. Cas. 309; 28 M. L. J. 384; 17 M. L. T. 234; 2 L. W. 329; (1915) M. W. N. 256.

gave to the defendants or in any other evidence to show that the plaintiffs were executing the repairs for the benefit of the defendants. The fact that it is this tank which irrigates their own land and that land is much larger in extent than the wet lands in Vellikurichi village would suggest that when they executed the repairs, they did so for their own benefit. If they did not keep the tank in order, their lands would suffer and we have not been referred to any circumstance which would suggest the inference that they wanted to repair the tank not primarily for the benefit of their own lands but for the benefit of the defendants' lands. The natural inference is that as they had to repair the tank in order to cultivate their own lands, and did so for that purpose, no doubt the repairs would inevitably and incidentally also benefit the defendants' "lands". But that in itself would not show that the plaintiffs' intention in executing the repairs was to benefit the defendants. The law is not that, when a person does any act for his own benefit, and that act incidentally benefits his neighbour or any other person, that neighbour or other person must pay for the extent of the benefit he derives from the act. That certainly is not the scope of section 70 and we have not been referred to any authority that, apart from all question of intention of the person who seeks to charge the defendant for the benefit which he has derived from a certain act of his, the defendant would be liable, if the act happens to be beneficial to him. That, at any rate, is not the scope of section 70, and none of the cases which have been referred to at the Bar have in any way minimised the importance of the condition that the act must be done for the benefit of the defendant. This proposition has never been doubted, though in some cases the question did not really arise, for instance, where payments were made in discharge of arrears of Government revenue by a co owner of the property or by any other person interested in making the payments. To cases of that class which have been brought to our notice, section 69 would apply.

The history of the present case is this. The documents show that before 1820, the Sivaganga Zemindar used to receive a certain periodical payment from the Inamdars in the shape of Kulavettu, that is to say, annual payment in connection with the digging of, or repairs to, the tank. This appears from Exhibit III. However by 1852, the demand made by the Zemindar was not for any Kulavettu but for the defendants' share of the cost of repairs, which is something quite different from Kulavettu. There is nothing whatever to show that at any time, the Inamdars acceded to this demand. Only once in 1854, the Court of Wards, or rather, the Collector, who was in charge of the Zemindari at the time, though it does not clearly appear in what circumstances, did, under section 32 of Regulation XXVII of 1802, realise a certain sum of money in connection with the repairs to the tank. That section deals only with the payment of Tuccavy or of advances of money for repairs of tanks. The plaintiffs now seek, not to recover any advance of money made for repairs, but to enforce contribution towards the cost of repairs already executed without authority from the Inamdars. Section 32 of Regulation XXVII of 1802 would have no application to the present claim of the plaintiffs. If, therefore, the Collector attached the property of the Inamdars and under coercion of such process realised any proportion of the costs of repairs executed by the Zemindar, he clearly acted beyond the powers given to him under section 32 of the Regulation. If, on the other hand, the provisions of the Regulation were properly enforced, that is to say, in order to realise the advances made by the Zemindar or by the Government, then such enforcement can in no way support the present case of the plaintiffs. So I do not think that the plaintiffs now in any way rely on what the Collector realised in 1854 under coercive process. It is conceded that that was the only time when any money was actually realised, so far as the evidence goes, from the Inamdars in connection with any repairs to the tank. But the Inamdars have throughout been protesting against any obligation to pay anything for repairs done against their wishes or without their consent.

Then certain accounts have been produced of the year 1880 and thereabouts. In one or two instances, a small sum of money is shown as due from the Inamdars of Vellikurichi on account of repairs to this

tank. But it is not proved by any evidence that anything was paid on this account by the Inamdars. The evidence, both oral and documentary, shows clearly that there had been repairs done to this tank since 1854. There is a body of evidence to this effect of witnesses, whom I do not find any reason for disbelieving, and the accounts produced by the plaintiffs themselves corroborate that evidence. One witness says that, sometime ago, repairs which cost about Rs. 2,000 were executed. If, as a matter of fact, the Zemindar was conscious that he had a right to levy contribution for repairs or at any rate that he had not lost that right if he had it at any time, it is not conceivable that since 1884 to the date of the present suit, he would not have made any serious attempt to realize the share of the defendants' liability. In fact, the result of the entire evidence is that, at no time, the Inamdars either actually paid anything for the repairs or that their liability for such repairs was ever established or admitted. I have already pointed out that what the Collector did under section 32 of Regulation XXVII of 1802 is of no importance in the absence of clear evidence as to the circumstances in which the money was realised, and so far as it appears, his action does not seem to have been authorised by the law.

Then the plaintiffs sought to base their case on a general custom, to the effect that every village held under a Zemindar by way of Inam or similar tenure is liable to contribute to the cost of repairs done to their sources of irrigation, whether tanks or channels. The evidence that we have on record falls far short of establishing any such general custom. We have been referred especially to the accounts maintained by the Zemindar and produced by the plaintiffs, Exhibits F, G, H and M series They do not extend lower down than 1886, and it is not possible to extract from these accounts sufficient particulars upon which one could find with any amount of certainty that a custom such as that alleged prevailed in the Zemindari. We ought to know much more about the circumstances in which the payments were made by the different Inamdars or holders of Devastanam and other villages. It is not even clear that such payments as were made were not made voluntarily or under contract. It is not shown at what rate the contributions were made, or on what basis. We do not know anything about the conditions of the tenures of the villages from the proprietors of which these contributions towards the cost of repairs, either to channels or to tanks, were received. Unless these points are cleared up, it could not be said that any custom has been established. Then it is remarkable that, so far as Vellikurichi is concerned, there is only a single instance which has been already alluded to in which a small payment is shown as due from the Inamdars. I cannot, upon the evidence in the case, hold, whatever else the accounts of the Zemindar might show in this connection, that the Inamdars either agreed to make any such payment or did in fact make it. Whatever might be the case with the other villages shown in the accounts, they certainly do not make out a case against Vellikurichi. Even if it be taken to be sufficiently established that a general custom exists in the Zemindari such as is contended for by the plaintiffs, the evidence and the circumstances above alluded to indicate that, so far as Vellikurichi is concerned, the custom has lost its force for a very long time if it ever applied to it. In this connection, I may refer to what happend in the lower Court with respect to the evidence adduced by the plaintiffs to prove a general custom. It is stated in paragraph 38 of the judgment, from which it would appear that the Subordinate Judge at one stage of the trial formed an opinion that a general custom had been proved by evidence adduced by the plaintiffs, and he intimated to the plaintiffs that it was unnecessary for them to encumber the record with further documents in support of the alleged custom. Such an observation on the part of the Subordinate Judge was unjustified, as it might have had the effect of deterring the plaintiffs from adducing all the evidence they had on the point. But whether they were in fact so deterred and whether any further evidence which they were in a position to adduce would have improved their case, is not at all made clear. No application has yet been made to us to admit into evidence any documents wrong

fully rejected by the Subordinate Judge; nor is the learned Vakil for the respondents able to state what the materiality is of the evidence which the respondents might have produced. None of the documents are here. And the only inference I can draw from what has happened is that it did not strike the respondents or their Pleaders that any further evidence which they could have produced would have improved their position so far as the question of custom was concerned. I hold that the plaintiffs have failed to make out their right.

The question relating to limitation discussed at the Bar does not arise, but I may state that it is difficult to see how Article 61 of the Limitation Act has any application to the facts of the case. Under section 70 of the Contract Act, the plaintiffs would have no cause of action merely because of their having incurred expenses in executing the repairs. It has to be further made out that the benefit of those repairs was enjoyed by the defendants. Both the elements must be present in order to constitute a cause of action, that is, the incurring of cost by the plaintiffs and the enjoyment of the benefit by the defendants. Article 61 applies to cases of money payable to the plaintiff for money paid for the defendant and time runs from the date when the money is paid. But here it cannot be said that the payment made by the plaintiffs to the contractors was money paid for the defendants. Under section 70, if the case of the plaintiffs fell within it, what they would be entitled to is compensation for the benefit enjoyed from the act done by the plaintiffs for the defendants. If, for instance, defendants never derived any benefit from the plaintiffs' act, the mere payment of money by the plaintiffs to contractors who executed the repairs would not entitle them to any compensation under section 70. The only Article that would be applicable to a case like this, if the plaintiffs were able to establish their right, would be Article 120, which is the residuary Article dealing with suits for which no period of limitation is provided elsewhere in the First Schedule, and the right to sue would accrue from the date of the doing of the repairs and the enjoyment of the benefit thereof by the defendants. On that view of the matter the suit would be in time.

I may also mention that the Subordinate Judge has held that the plaintiffs are entitled to a charge on the village for the share of costs payable by the defendants. None of the cases cited at the Bar support that proposition. One case in which there are some expressions to be found which might favour the Subordinate Judge's views, *viz.*, *Rajah of Vizianagram* v. *Rajah Setrucherla Samasekhararaz* (5), has no analogy to this case. There the payment was by one co-owner for arrears of revenue due to the Government, and the charge on the property which was saved by such payment might be supported on the basis that the person making the payment should be allowed in equity to stand in the shoes of the Government, who under the Act have a lien for arrears of revenue on the lands concerned. It is difficult to see how such a charge could be sustained under section 70 of the Contract Act. Then the Subordinate Judge seems to think that the doctrine of salvage lien has some application to this case. It is rightly conceded, however, by the learned Vakil for the respondents that he could not uphold that view of the law.

I, therefore, allow the appeal and reverse the judgment of the Subordinate Judge. The suit will be dismissed with costs here and in the Court below.

The memorandum of cross-objections also fails and is dismissed with costs.

OLDFIELD, J.—The plaintiffs have sustained their claim with reference either to section 70 of the Contract Act or custom; and in either case, the burden of proving all the necessary facts is entirely upon them. As regards section 70, it is only necessary to deal with one of the requisites for its application. It requries that the plaintiff shall have done something for the defendant. In this case, the plaintiffs allege that they have made the repairs for the defendants. But it is difficult to say exactly in what sense they have done so, or that they have shown that they have done so in any sense other than the very general one, that the defendants have derived or may derive some advantage from the repairs. That does not seem to be

(5) 26 M. 686.

sufficient, and it is not the current of decisions that it is so. I refer to *Rajah of Pittapur* v. *Secretary of State* (3) as an instance of a case very similar to the present; and it is clear there that the learned Judges did not think that the work connected with an irrigation source was done for the defendant on the grounds either that the defendant derived some benefit from it or that he was asked to contribute to it. It is not desirable to attempt to formulate any general test as to whether a thing is done by one person for another; but, it is, I think, sufficient to say that what is done cannot be described as done by one person for another, unless it can be shown that, but for the existence of that other's interest, it would not have been done. Here we have evidence of demand, and it may be assumed for the present that there is evidence of benefit conferred. But there is nothing further, since the evidence of demand, does not, in any way, show that the intention was to do the work, only if the defendants wanted it done.

There was a suggestion in the course of the arguments that the plaintiffs' attitude was indicated directly by the fact that they had actually supplied other villages besides those, which have hitherto taken water from the tank, with irrigation from the increased supply, which the tank is alleged to have received in consequence of these repairs. Only two cases were, however, referred to, in two years, and the evidence is conflicting regarding them. Under that head, therefore, it does not seem to me that anything is proved. Then as regards the Ayacut, we have the fact that one portion of it is in a Devastanam village; but it is insignificant and may be neglected. Roughly, the defendants own a little over a quarter. But that fact, in the absence of anything else adduced, does not seem to be sufficient to enable us to assume that the defendants' interest in the Ayacut was the factor which determined the plaintiffs' favour of making these repairs. When the plaintiffs owned such a preponderating interest, as they did, in the property, the burden is on them to show that they did not make the repairs for themselves and that they did make them for the defendants, and it does not seem to me that they have discharged that burden. In these circumstances their case based upon section 70 of the Contract Act fails.

Then as regards custom, I entirely agree with my learned brother's conclusion, and only wish to say a few words regarding the particular custom alleged with reference to the liability of the defendants' village. Really, there is very little evidence regarding that liability except that which is afforded by Exhibit S, an order from the Collector in 1852 to the Manager of the Estate, in which the tank is situated, and which is apparently in the possession of the present plaintiffs. The Collector's position in this matter is not clear. It is suggested on the one side that he was acting as the Agent of the Court of Wards and that he really was simply a managing superior and was in the position of Zemindar. On the other hand, it is suggested for the plaintiffs, though nothing has been adduced to prove it, that he attached the Estate for the recovery of revenue due on behalf of Government. In Exhibit S, we simply have a reference by the Collector to the fact that Kulavettu, a periodical charge for tank repairs payable by the Inamdar or tenant to the proprietor, had been hitherto levied on this village. But the only evidence the Collector refers to in support of his statement is the information he had received from a Gumasta, whom he names, that in the accounts of one year 1816, about 40 years before he was writing, this Kulavettu had been entered. That is all there is by way of an affirmative statement regarding Kulavettu. The Collector asked the Manager to try and find further evidence and to look to other accounts in order to find it. It is clear that we have here only a very insufficient foundation for a conclusion that any custom ever existed. If any custom did exist, this indicates the existence of only a custom to make a periodical charge and not of a custom which would enable the proprietor or the plaintiffs acting as his representatives to make a definite demand on a particular property for an amount proportionate to the defendants' interest in the tank towards making all these repairs. After Exhibit S, we have not got a reply to it, and we do not know whether anything was found by the Manager by searching the

accounts. So far, therefore, the custom alleged is only as to Kulavettu; and it rests entirely upon what the Collector heard from a Gumasta about an account written 40 years before, which, so far as it appears, no one else ever saw.

The next letter Exhibit S-1 does not mention any further information than that the Collector, for reasons which are not very clear, considered himself justified in directing the Manager to recover a lump sum, which was being claimed on account of repairs; and he directed him to recover it under section 32 of Regulation XXVII of 1802. That section, as my learned brother has pointed out, is, on the information before us, inapplicable to the recovery of any such sum, and the Collector's action must be taken as entirely unauthorized by law. It is in evidence that money was recovered in this illegal way which obviously had nothing to do with the assertion of the custom, and cannot be considered as equivalent to one. After that, there is nothing more for about 30 years. We then have got one or two entries to the effect that insignificant sums are due on account of the repairs. But whether they were ever collected or not there is no evidence to show. On the other hand, it must be borne in mind that the plaintiffs, though they are lessees of the estate, do not suggest that they are under any disability in the way of producing the accounts or that ordinary accounts of the estate have been withheld from them

There is evidence that in comparatively recent times, the tank has been repaired at very considerable expense and we have had no excuse offered for the plaintiffs' failure to produce distinct evidence as to the making of these repairs and as to the recovery of contribution, if any was recovered from the defendants. It seems to me in these circumstances that the plaintiffs have adduced practically nothing in favour of any custom as binding on the defendants' village. I do not wish to add anything to what my learned brother has said regarding the more general custom alleged except that the plaintiffs, who will have all the estate records in their possession, should have been able, if their case was correct, to produce very much clearer evidence either regarding the period to which the accounts they have produced relate or regarding the later period; and it seems to me that their explanation as to what happened in the lower Court for not doing so cannot be accepted, when, as is the case, they have not made any definite request here for an opportunity to repair their failure to adduce evidence at the trial.

Regarding limitation, I think that Article 61 is clearly inapplicable. So far as the claim is made with reference to section 70 of the Contract Act, it is an essential part of the cause of action under that section that the defendants shall have received a benefit from what the plaintiffs have done; and apart from the fact to which my learned brother has referred that Article 61 refers only to money paid for the defendants, and we have no such payment alleged here, there is a further objection to the application of that Article, that there was at the time of payment no question of any immediate benefit being conferred on the defendants by it, for it is not suggested that the benefit derivable by the defendants from the repairs to the tank could have arisen, when the money was paid. No doubt, there are cases in which Article 61 may be applied to claims under section 70. Such application will be legitimate in cases of the common type concerned with payments of revenue or decree amounts on the part of the defendants. The benefit to the defendants is then immediate; but it is quite otherwise, when, as here, the benefit will only arise at a subsequent stage, and the plaintiffs' cause of action will not be complete until that subsequent stage is reached. In these circumstances, no other article having been suggested, we must apply Article 120.

With these observations, I concur in the decretal portion of my learned brother's judgment.

Appeal allowed.

M. C. P.

GUYAN DHANGER *v.* GONDAR.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 585 OF 1917.

April 23, 1918.

Present:—Justice Sir Ali Imam, KT.

GUYAN DHANGER—PLAINTIFF—APPELLANT

versus

Shaikh GONDER—DEFENDANT—RESPONDENT.

Benamidar, *whether can sue for possession of immoveable property.*

A *benamidar* is not competent to maintain a suit for possession of immoveable property. [p. 794, col. 2.]

Appeal from a decision of the Subordinate Judge, Purnea, dated the 28th February 1917.

Mr. *Siva Narain Bose*, for the Appellant.

Mr. *S. N. Sahay*, for the Respondent.

JUDGMENT.—The plaintiff preferred this suit for the declaration of title to and recovery of possession of the land in suit. The lower Appellate Court has reversed the decision of the Munsif and has held that the plaintiff could not maintain the suit as he was only a *benamidar*. It appears that the plaintiff in his evidence had admitted that it was his father who had purchased the property but in the plaintiff's name. On the strength of this admission the lower Appellate Court had held that the plaintiff was a *benamidar*. In appeal it is contended on his behalf that on the authority of *Upendra Nath Nag* v. *Bhupendra Nath Nag* (1) the subsequent conduct of the parties and the surrounding circumstances should have been taken into consideration by the lower Appellate Court before coming to a finding on the question of *benami*. On the other hand reliance is placed on *Gopeekrist Gosain* v. *Gungapersaud Gosain* (2) for the proposition that where purchase of real estate is made by a Hindu father in the name of his son the presumption of the Hindu Law is in favour of its being a *benami*, and that the burden of proof lies on the party in whose name it was purchased to prove that he was solely entitled to the legal and beneficial interest in such purchased estate. Attention is also drawn to *Moulvie Sayyud Uzhur Ali* v. *Musammat Bebee Ultaf Fatima* (3) and *Nawab Azimut Ali Khan* v. *Hurdwaree Mull* (4).

The admission of the plaintiff that the land in suit was purchased by his father is clear and unequivocal. The point was not left in any doubt involving such investigation as was necessary for decision in the case reported as *Upendra Nath Nag* v. *Bhupendra Nath Nag* (1). The lower Appellate Court was, therefore, right in holding that the purchase in plaintiff's name was *benami*. It is, however, contended that even if the plaintiff is only a *benamidar* that ought not to stand in the way of his maintaining the suit. For this proposition reliance is placed on *Dagdu* v. *Balvant Ramchandra Natu* (5) and *Nand Kishore Lal* v. *Ahmad Ata* (6).

Mr. S. N. Sahay, Counsel for the defendant, meets this contention by quoting the ruling reported as *Atrabannessa Bibi* v. *Safatullah Mia* (7). The present suit is for possession of land and he contends that on a review of a very large number of decisions referred to in that case, the Calcutta High Court regards it as a doctrine well settled in that Court that a *benamidar* is not competent to maintain a suit for possession of immoveable property. I accept the contention of the defendant on this point and hold that a *benamindar* cannot succeed in his suit for possession of immoveable property.

The learned Vakil appearing on behalf of the plaintiff-appellant further contends that even if the plaintiff is a trespasser he can maintain the suit on the authority of *Sahodra Kuer* v. *Gobardhan Tiwari* (8). This contention, if accepted, involves a complete change of the entire frame of the plaintiff's suit. He rested his claim in the plaint on the allegation that he was purchaser of the land in suit and that he had a good title thereto but was wrongfully dispossessed by the defendant. To allow the contention of the learned Vakil to prevail would be to transform the entire case of the plaintiff. Moreover, the present case is distinguishable from the case referred to above. I am unable, therefore, to attach any importance to the point raised.

(1) 32 Ind. Cas. 267; 21 C. W. N. 280.

(2) 6 M. I. A. 53; 4 W. R. P. C. 46; 1 Sar. P. C. J. 493; 2 Suth. P. C. J. 13; 19 E. R. 20.

(3) 13 M. I. A. 232; 13 W. R. P. C. 1; 4 B. L. R. P. C. 1; 2 Sar. P. C. J. 522; 20 E. R. 538.

(4) 13 M. I. A. 395; 14 W. R. P. C. 14; 5 B. L. R. P. C. 578; 2 Suth. P. C. J. 343; 2 Sar. P. C. J. 571; 20 E. R. 599.

(5) 22 B. 820; 11 Ind. Dec. (N. S.) 1130.

(6) 18 A. 69; A.W.N. (1895) 160; 8 Ind. Dec. (N. S.) 751.

(7) 31 Ind. Cas. 189; 22 C. L. J. 259; 43 C. 504.

(8) 39 Ind. Cas. 458; 2 P. L. J. 280; 1 P. L. W. 327; (1917) Pat. 164.

As a last resort it is urged on behalf of the plaintiff-appellant that the decree of the Munsif should not have been reversed on account of the father of the plaintiff not having been made a party to the suit. This contention is without any substance inasmuch as the plaintiff, who has been held to be only a *benamidar*, cannot maintain a suit for possession of immoveable property.

The appeal is dismissed with costs.

Appeal dismissd.

CALCUTTA HIGH COURT.

LETTERS PATENT APPEALS NOS. 6 AND 7 OF 1916.

March 19, 1917.

Present:—Sir Lancelot Sanderson, KT., Chief Justice, and Mr. Justice N. R. Chatterjea.

IN APPEAL NO. 7 OF 1916

HARSHANKAR OJHA AND OTHERS—DEFENDANTS—APPELLANTS

versus

GOURI SANKAR MISSIR—PLAINTIFF, AND OTHERS—DEFENDANTS—RESPONDENTS.

IN APPEAL NO. 6 OF 1916

RAM NARESH OJHA AND OTHERS—DEFENDANTS—APPELLANTS

versus

GOURI SHANKAR MISSIR—PLAINTIFF, AND OTHERS—DEFENDANTS—RESPONDENTS.

Appeal, second—False case set up by both parties—Procedure.

Where according to the finding of the first Appellate Court both the plaintiff and the defendant have set up a false case, the way in which the High Court ought to deal with the matter in second appeal is to decide the case upon the facts which have been found by the lower Appellate Court, irrespective of the original cases respectively made by the parties in their pleadings. [p. 797, col. 1.]

Letters Patent Appeals against the judgment of Mr. Justice Roe, dated the 14th December 1915, in Second Appeals Nos. 3476 of 1911 and 531 of 1912.

Dr. Sir *Rash Behary Ghose* and Babu *Surendra Madhab Mullick*, for the Appellants.

JUDGMENT.

SANDERSON, C. J.—(*March. 15th* 1917.)—This was a suit brought by the plaintiff asking that it might be adjudicated that the disputed lands formed part of the *guzasta* lands of the plaintiff, that after the death of the plaintiff's mother and after the expiry of the term of the *pattah* granted by her the plaintiff was entitled to possession, and also asking for a declaration that the proceedings taken at the time of revision of the Settlement were not binding on the plaintiff, that the plaintiff was no party to the same and that the said proceedings were *ultra vires* and illegal.

The plaintiff claimed to hold the lands as an occupancy-*raiyat*, the land consisting of some 25 *bighas*. The plaintiff's mother appears to have given a lease of the land for seven years and the mother died before the expiry of the lease. The lease was granted to the first defendant, whose name was Ram Naresh Ojha. The plaintiff alleged that finding Ram Naresh Ojha in possession on her mother's death she allowed him to remain in possession of the land until the termination of the period for which the lease had originally been granted.

The defendants in this case consist of 26 persons, and they may be divided into six groups. The first group consisting of defendants Nos. 1 to 6 was constituted by the family of Ram Naresh; the other 20 may be divided into five groups, all the people being connected in some way or other by relationship with the first group, defendants Nos. 1 to 6. It appears that the 26 defendants had succeeded in getting their names recorded in the Record of Rights as being in possession of the 25 *bighas* and as *kashtkars* and also in having the record made to the effect that the plaintiff was a tenure-holder.

The plaintiff alleged that this record was not binding upon her, that it had been made in collusion with the husband of the plaintiff who was a man not capable of understanding business.

Defendants Nos. 1 to 6 set up the defence that they were not in possession of the 25 *bighas* but that they were in possession of 5 *bighas* only; that they had entered into possession of these 5 *bighas* not under the lease to which I have referred but that these 5 *bighas* were part of the ancestral property of defendants Nos. 1 to 6; that it was not part of the *guzasta*

land of the plaintiff but that it was part of the *mourusi guzasta* land of these defendants: that the plaintiff was in truth and fact a tenure-holder; and, they further alleged that they, defendants Nos. 1 to 6, had many lands in the Mouzah in question having transferable right; that they were settled *raiyats* in the Mouzah and that consequently these defendants had acquired an occupancy and *guzastadari* right.

The other defendants set up similar defences with regard to the other 20 *bighas*. It was alleged that these 20 *bighas* were split up into five plots of 4 *bighas* each. Just in the same way as the first group of defendants had alleged, they alleged that they had not come into possession of these lands under the *pattah* or under the first group of defendants Nos. 1 to 6, but that these 20 *bighas* were part of the ancestral lands of these defendants Nos. 7 to 26; that the plaintiff was a tenure-holder; and that these lands were part of the *guzasta* lands of the defendants.

The issues which are material to this appeal were the third and fourth issues as stated in the judgment of the learned District Judge. The third issue was, what was the *status* of the plaintiff in the disputed lands; and, the fourth was, what was the *status* of the defendants in the same.

As regards defendants Nos. 1 to 6, their case, as I have stated, was that 5 *bighas* of the 25 *bighas* were held by them under their ancient *raiyati* title; and they asserted that the plaintiff had a *mokurrari* interest of the nature of a tenure. The plaintiff on the other hand alleged that she had no tenure interest, that she was in possession as a *raiyat*.

That issue was found against the plaintiff, and the District Judge held that her interest was of the nature of a tenure.

As regards the fourth issue, namely, what was the *status* of the defendants in the same lands, the learned District Judge came to the conclusion that as regards the first six defendants, that is to say, the Ram Naresh group if I may so call them, they had come into possession of their lands under the lease; that the 5 *bighas* of which they were in possession were not part of their ancient *raiyati* lands but that they were holding the lands as *raiyats*. He also held that inasmuch as these defendants, the Ram Naresh group, had other *raiyati* holdings in the village and were settled *raiyats* of that village, he came to the conclusion that they would have occupancy rights in all lands held by them as *raiyats*. He, therefore, proceeded to consider whether the Ram Naresh group of defendants were holding the lands in suit as *raiyats*; and, as I have said before, he came to the conclusion that Ram Naresh had by virtue of the *pattah* granted to him entered upon possession and remained in possession of the 5 *bighas* of the land in dispute, and consequently, inasmuch as he was a settled *raiyat* holding other lands in the village, he had acquired occupancy right in that portion of the land which was in fact in possession of Ram Naresh and his group. It was pointed out that he claimed 5 *bighas* only of the disputed land on behalf of himself and his group, and consequently the District Judge held that he had acquired occupancy right in the 5 *bighas* only and, therefore, could not be ousted by the plaintiff from those *bighas*.

As regards the other defendants Nos. 7 to 26, the District Judge, having first of all pointed out that they claimed the land as their ancestral *guzasta* land, proceeded to find that that claim was a false one and that that was part of the land which was included in the *pattah* already referred to. Then he went on and found as a fact that these defendants, namely, Nos. 7 to 26, did not claim under the *pattah*, that they did not claim under Ram Naresh or his group and that Ram Naresh himself did not claim anything beyond the 5 *bighas*, and did not put in any claim for the remaining part of the land or that he had settled the 20 *bighas* with the other defendants. He, therefore, came to the conclusion that the remaining defendants were not in possession of the remaining lands in suit as *raiyats* or by virtue of any valid title, and that they were mere trespassers: and that consequently the plaintiff, having title, to the land was entitled to possession. He, therefore, decreed the suit so far as these

defendants were concerned and directed that these defendants be ousted.

Perhaps, before I proceed with my judgment, I ought to point out at this stage that the difficulty in this case has to a certain extent arisen from the fact that both the plaintiff and the defendants have, according to the finding of the learned District Judge, set up a false case in respect of what I have already mentioned, and, that being so, it seems to me that the way in which the Court ought to deal with this matter is to decide the case upon the facts which have been found by the learned District Judge, irrespective of the original cases respectively made. But when the matter came to this Court and was before Mr. Justice Roe, the whole body of the defendants took up the ground of argument as set out in the learned Judge's judgment in this way, "Ram Naresh took a lease of 25 *bighas* of land from the plaintiff's mother, that he was an occupancy-*raiyat* (I think he means there settled *raiyat*) from before the taking of that lease and that from the moment he entered under cover of the lease upon any part of the land, he acquired an occupancy right in the whole 25 *bighas* and that having thus acquired occupancy rights in the whole 25 *bighas* it was immaterial what Ram Naresh chose to do with the land after his first induction upon it." The learned Judge then proceeds to say: "This argument appears at first sight to be one of great weight. It would seem that by the creation of a *pattah* under the signature of the mother of the plaintiff a holding of 25 *bighas* was constituted and that by virtue of that *pattah* Ram Naresh must be considered to have entered upon a holding of 25 *bighas* as a *raiyat*, whether or not he chose to occupy forthwith the whole area and actually manipulate each inch of the soil. Indeed had this contention been put forward on behalf of the Ram Naresh group as the basis of their defence in the lower Court, I cannot conceive how it could have failed. But unfortunately that was not the defence taken in the lower Court." On the other hand, as I have already pointed out, the defence taken by the defendants in the lower Courts was that these lands were part of the ancient lands of the respective groups, and that they were in possession of them before the *pattah* was granted. That point was taken by them, to which I have already referred. A further point was taken by Ram Naresh to this effect that the 25 *bighas* which were the subject-matter of the lease ought to be regarded as one holding; and that if it was found that the first group, that is defendants Nos. 1 to 6, were in possession of any part of it at the institution of the suit, then they must be taken to be in possession of the rest and, inasmuch as they were settled *raiyats* of the village, they must be taken to hold occupancy right not only in respect of the 5 *bighas* of which they were in fact in possession but also in respect of the remaining 20 *bighas* of which in point of fact they were not in possession. Now, with regard to both these points the matter depends upon the provisions of the Bengal Tenancy Act contained in section 21 (1), which runs as follows: "Every person who is a settled *raiyat* of a village within the meaning of the last foregoing section shall have a right of occupancy in all land for the time held by him as a *raiyat* in that village." One has to look to what was the position of affairs at the time of the institution of the suit, and inasmuch as both parties, as I have said before, had set up a false case in their pleadings, one must be guided not by what appears in the pleadings but by the facts as found by the District Judge. The learned Judge has found, as I read his judgment that at the time of the institution of the suit, defendants Nos. 1 to 6 were in possession of the 5 *bighas* and the 5 *bighas* only, and, he has, I think, rightly come to the conclusion that defendants Nos. 1 to 6 were occupancy *raiyats* by reason of the provisions of section 21 (1) of the Bengal Tenancy Act, in respect of the land of which they were in fact in possession for the time as *raiyats*. The words of the section are "shall have a right of occupancy in all land for the time held by him as a *raiyat*." As regards the land which we are now considering, he was holding, as a *raiyat* for the time, 5 *bighas* and 5 *bighas* only. Consequently, in my judgment, the learned Judge came to the right conclusion when he said that as regards those five 5 *bighas* the plaintiff

would not get a decree for evicting defendants Nos. 1 to 6, but that with regard to the rest, neither the first group, Nos. 1 to 6, nor the second group had any right of occupany at the time of the institution of the suit and consequently they must be regarded as trespassers, and the plaintiff is entitled to a decree for possession. I do not think it is necessary for me to add anything more than that.

For these reasons the judgment of the learned Judge must be upheld and these appeals dismissed.

CHATTERJEA, J.—(*March 19th*, 1917.)—I agree in dismissing the appeals. No doubt, a plaintiff seeking possession must show that at the date of the suit he was entitled to such relief, and a landlord cannot sue to eject even trespassers so long as a lease is outstanding. In the present case, however, the defendant No. 1, who is found to have a right of occupancy, claimed such right only in five out of the twenty-five *bighas*. The other defendants did not claim under the defendant No. 1, nor did they rely upon the fact that he had any outstanding lease with regard to the remaining 20 *bighas*, their case being that these 20 *bighas* were held by them as part of their ancestral holdings, which has been found to be false. The defendant No. 1 being a party to the suit does not claim any right to these 20 *bighas* against the plaintiff. Under these circumstances I think the Court below was right in giving a decree to the plaintiff for possession of the 20 *bighas*.

Appeal dismissed.

PRIVY COUNCIL.

APPEAL FROM THE ALLAHABAD HIGH COURT.

March 15, 1918.

Present:—Viscount Haldane, Sir John Edge, Mr. Ameer Ali and Sir Walter Phillimore, Bart.

HET RAM—APPELLANT

versus

SHADI RAM, SINCE DECEASED, AND OTHERS—RESPONDENTS.

Transfer of Property Act (IV of 1882), *ss.* 85, 88, 89 *—Mortgage, suit on—Puisne mortgagee not made party, effect of—Order absolute, for sale effect of.*

Under section 85 of the Transfer of Property Act a first mortgagee is bound to make a second mortgagee a party to his suit for sale, and if he does not do so, the second mortgagee is not bound by any order for sale obtained in such a suit. [p. 800, col. 1.]

On the making of an order absolute for sale under section 89 of the Transfer of Property Act the mortgagee's security as well as the mortgagor's right to redeem are both extinguished, and for the right of the mortgagee under his security there is substituted the right to a sale conferred by the decree. [p. 800, col. 1.]

Appeal from a decree of the Allahabad High Court, dated May 19, 1913, reported as 20 Ind. Cas. 59, modifying a decree of the Assistant Sessions Judge, Moradabad, exercising the powers of a Subordinate Judge.

FACTS.—Certain property was mortgaged *first* to Lachman Das on February 25, 1880: *second* to Shadi Ram, on October 15, 1881. Lachman Das brought a suit for sale, but did not make Shadi Ram a party, although he had notice of Shadi Ram's mortgage. He obtained a decree for sale in 1892, and an order absolute in 1895, but did not proceed further. Shadi Ram brought the present suit for sale in 1910. Het Ram, who had succeeded not only to the rights of the mortgagors, but to the rights (if any) of Lachman Das, claimed that the sale could only be subject to the latter's mortgage. This contention was allowed by the trial Judge, but on appeal the High Court (Richards, C. J., and Lyle, J.) held that Lachman Das's mortgage merged in the decree, and, therefore, expunged the trial Judge's direction that the land should now be sold subject to such mortgage. Hence this appeal.

Mr. *A. M. Dunne*, *K. C.* (with him Mr. *Ramsay*), for the Appellant.—Appellant has succeeded to the rights of both parties in the earlier mortgage suit. The decree in that suit may be barred by limitation, but Het Ram's right to use the mortgage as a *shield* remains. It was no one's intention that the first mortgage should be extinguished for the benefit of Shadi Ram, who was not a party to the suit at all: according to the rule of justice, equity and good conscience it should be treated as remaining alive: *Gokaldas Gopaldas* v. *Puranmal Premsukh Das* (1); *Dinobandhu Shaw Chowdhry*

(1) 11 I. A. 126; 10 C. 1035; 8 Ind. Jur. 396; 4 Sar. P. C. J. 543; 5 Ind. Dec. (N. S.) 692 (P. C.).

v. *Jogmaya Dasi* (2). [Reference was made to *Whiteley* v. *Delaney* (3).]

The mortgagee's security and the mortgagor's (or puisne mortgagee's) right to redeem go together. Shadi Ram was not a party to the suit, and retained his right to redeem. The provisions of section 89 of the Transfer of Property Act apply only between the parties to a suit.

Limitation does not apply as appellant is not suing. Further, he could not execute the decree in any case, as he is now proprietor.

Mr. *Dube*, for the Respondents.—Any rights under the decree are barred by limitation. Not only was the decree itself barred after three years, but even if Lachman had never sued at all, he would be time-barred after 12 years. The fact that Het Ram, assuming him to be the assignee of Lachman, subsequently became proprietor makes no difference, once limitation has begun it runs on: *Soni Ram* v. *Kanhaiya Lal* (4).

This case depends on the procedure laid down in India in the Transfer of Property Act. By section 89 of that Act the security, after the decree for sale was obtained, ceased to exist: there was substituted for it the decree itself, which is now time-barred.

Mr. *Dunne*, in reply.—Shadi Ram was not a party to the suit. Section 89 and the order absolute for sale can only operate in favour of the plaintiff in that suit against the defendant in that suit. The fact that I have not executed the decree is immaterial: the respondent's only security is subject to mine. I am not bound by limitation, as I am not pursuing any remedy: I still have my right.

[VISCOUNT HALDANE.—Section 89 says your right is converted into a right to sell—a right you cannot now enforce].

[SIR W. PHILLIMORE.—How can you be considered an encumbrancer? If you have any rights under the decree, go and execute them.]

[VISCOUNT HALDANE.—Why should the Statute turn a mortgage for all purposes into a mortgage for some purposes only? I think there is no mortgage left.]

JUDGMENT.

VISCOUNT HALDANE.—The material point in this appeal, which comes from the High Court of Judicature for the North-Western Provinces, Allahabad, lies in short compass. The question in the suit was whether property in mortgage to the respondent Shadi Ram, as to which he had sought to obtain a decree for sale under section 88 of the Transfer of Property Act, 1882, should, when sold, be treated as sold subject to an alleged prior right of the appellant under an earlier mortgage. This mortgage was dated the 25th February 1880; Shadi Ram's mortgage was dated the 15th October 1881.

The appellant had become the successor-in-title to the mortgagors, and it is assumed, for the purposes of this appeal, that he had also acquired such title as remained to the mortgagee under the earlier mortgage. In 1892 the prior mortgagee, whose name was Lachman Das, brought a suit on his mortgage and obtained a decree for a sale under the Act referred to. But the suit was brought only against the remaining mortgagor, and the second mortgagee was not made a party. This decree neither Lachman Das nor his successor-in-title took any steps to execute, and under Article 179 of the Second Schedule to the Limitation Act, 1877, it ceased to be operative when three years had elapsed from the date of the decree becoming absolute. It had thus become wholly ineffective long before the present suit was commenced. The only other observation which it is necessary to make before considering the question of law that arises under the Tansfer of Property Act, 1882, is that on the admissions of the parties it is to be taken that the second mortgage was duly registered and that the first mortgagee must be taken to have had notice of it when he brought his suit, and obtained a decree for sale in 1892.

The mortgage made to Lachman Das in 1880 was a simple mortgage within the meaning of section 58 of the Transfer of

(2) 29 I. A. 9; 29 C. 154; 6 C. W. N. 209; 12 M. L. J. 73; 4 Bom. L. R. 238; 8 Sar. P. C. J. 217 (P. C.).

(3) (1914) A. C. 132; 83 L. J. Ch. 349; 110 L. T. 434; 58 S. J. 218.

(4) 19 Ind. Cas. 291; 40 I. A. 74; 17 C. W. N. 605; 13 M. L. T. 437; (1913) M. W. N. 470; 17 C. L. J. 488; 15 Bom. L. R. 489; 25 M. L. J. 131; 35 A. 227; 11 A. L. J. 389 (P. C.).

Property Act, and under section 67 the mortgagee had a right to obtain, as he actually did, an order for sale. The provisions of the Act, inasmuch as section 69 does not apply to a simple mortgage, precluded him from any right to sell without such an order. Under section 85 the first mortgagee was bound to make the second mortgagee a party to his suit for sale, and as he did not do so, the second mortgagee was not bound by the order for sale, which could only have been operative subject to his title. Section 89 is important. Under this section where an order for sale under section 88 has been made, such as was made here in 1892, in favour of the first mortgagee, the mortgagor, or the second mortgagee, if he had been made a defendant, would have had the right to redeem if he had paid on the date fixed by the decree the amount due. If such payment is not made as happened here, an application may be made for an order absolute, and for payment of the amount realised into Court. The section then provides that "the defendant's right to redeem and the security shall both be extinguished." The construction which their Lordships put on the language so used is that on the making of the order absolute the security as well as the defendant's right to redeem are both extinguished, and that for the right of the mortgagee under his security there is substituted the right to a sale conferred by the decree.

As their Lordships have already indicated, the second mortgagee, not having been made a party, was not affected by the decree made in the suit of 1892, and in addition the decree itself became inoperative under the Limitation Act as the result of nothing having been done under it. It follows that the title of the second mortgagee, Shadi Ram, the first respondent, has remained in existence as the only encumbrance prior to the title of the appellant as owner of the equity of redemption.

They concur in the opinion of the learned Judges of the High Court that the decision of the Assistant Sessions Judge of Moradabad, who tried the case, was wrong.

They will humbly advise His Majesty that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for the Appellant.—Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondents.—Messrs. *Pyke, Franklin, and Gould.*

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1419 OF 1917.

April 18, 1918.

Present:—Mr. Justice Shah Din.

SULTAN AHMAD AND OTHERS—DEFENDANTS—APPELLANTS

versus

PALA AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Appeal, second—Finding of fact based on conjecture whether final—Punjab Tenancy Act (XVI of 1887), s. 59—Succession to occupancy holding.

In deciding the question of succession to an occupancy holding under section 59 of the Punjab Tenancy Act conjecture must not be allowed to take the place of legal proof [p. 802, col. 1.]

Where, therefore, in a suit in which the plaintiffs claim to succeed to an occupancy holding on the ground that they are the collaterals of the deceased tenant, the findings of fact arrived at by the lower Appellate Court are based on conjectures, they are not judicial findings and cannot be accepted as final in second appeal. [p. 802, col. 2.]

Second appeal from the decree of the District Judge, Gurdaspur, dated the 5th February 1917, affirming that of the Subordinate Judge, 1st Class, Gurdaspur, dated the 31st October 1916, decreeing the claim.

Mr. *Zafrullah Khan* and Mian *Muhammad Sharif*, for the Appellants.

Lala *Tirath Ram*, for the Respondents.

JUDGMENT.—The facts are fully stated in the judgment of the Subordinate Judge and it is unnecessary to repeat them here. The pedigree-table appended to the judgment of the District Judge will help to explain the nature of the claim. Shib Ram, son of Jawahar, was an occupancy tenant of the land in dispute, which on his death devolved on his widow *Musammat* Santi. The latter died recently and thereupon the proprietors took possession of the land. The plaintiffs, Pala and Gannun, grandsons of Amir Singh, have brought the

present suit to recover possession of it on the ground that they, as collaterals of Shib Ram, are entitled to succeed to the occupancy holding in question under section 59 of the Punjab Tenancy Act. The proprietors, who are defendants in the case, denied that the plaintiffs were the collaterals of the deceased occupancy tenant or that the alleged common ancestor Sher Singh ever held the land comprised in the tenancy; and upon these grounds they pleaded that the plaintiffs had no right to succeed to the land in dispute.

The lower Courts have concurred in holding that the plaintiffs are the collaterals of Shib Ram, deceased, and that their common ancestor Sher Singh occupied the land left by Shib Ram, and they have, therefore, decreed the plaintiffs' claim. The defendants have appealed to this Court, and the main question argued in this second appeal is whether the findings expressly or impliedly arrived at by the District Judge, Mr. H. A. Rose, regarding the agnatic relationship of the plaintiffs to Shib Ram and as to the common ancestor having occupied the land in dispute are judicial findings, which must be accepted as final in this second appeal.

It is urged by the appellants' Counsel that since the District Judge has come to the conclusion that the pedigree-table relied upon by the respondents is incorrect, he should have dismissed the plaintiffs' suit on that ground alone; and further that the District Judge has not come to any explicit finding on the point whether the land in dispute was ever occupied by the alleged common ancestor of the plaintiffs and Shib Ram, the deceased occupancy tenant. It is also urged that inasmuch as the respondents came into Court as plaintiffs to recover possession of the land in dispute by way of inheritance on the ground that they were the collaterals of Shib Ram, being descended from a common ancestor Sher Singh, and that Sher Singh had occupied the land, they were bound to establish their allegations affirmatively by satisfactory evidence; but that the judgment of the District Judge shows that he was not satisfied with the proof adduced by the respondents on these points and has passed his judgment in the respondents' favour largely upon conjectures.

In my opinion, there is considerable force in these contentions and they must be allowed. The District Judge begins his judgment by saying that the pedigree-table propounded by the respondents in this case is not proved to be correct, for whereas in a previous suit they themselves set up their descent from one Rattan Singh, in the present litigation they state that they and Shib Ram are descended from Sher Singh, and that Sher Singh's other name was Rattan Singh. The District Judge holds that the name of the father of Budh Singh was Sher Singh and that the respondents have failed to prove that he also bore the name of Rattan Singh. In the concluding portion of his judgment the learned Judge says that there can be no doubt that the respondents have made conflicting statements regarding the name of the common ancestor of themselves and Shib Ram; and he thinks that the truth of the matter is that the name of the common ancestor has been forgotten. In the former suit, to which a reference has been made by the District Judge in his judgment, the respondents stated not only that the common ancestor's name was Rattan Singh, but they also said that Budh Singh's name was Labh Singh, and the District Judge is hardly right when he says that this latter statement was due to a clerical error, the words *budh* and *labh* being somewhat similar when written in Urdu. The last assumption is clearly unwarranted; but granting that the District Judge is right on this point, the similarity of the two names when written in Urdu is insufficient to explain how the respondents themselves could be misled into stating that the name of the father of Hira and Jawahar was Labh Singh and not Budh Singh.

It seems to me, therefore, that the District Judge, while entertaining considerable doubt as to the correctness of the pedigree-table propounded by the respondents, was not justified in ultimately accepting that pedigree as sufficient to establish the claim of the plaintiffs as to their agnatic relationship to Shib Ram on the strength of certain entries in the

Settlement Record of 1852 and in the *naqsha tanqih huquq muzarian*. After carefully examining the entries in the said Settlement Record and the *naqsha tanqih huquq muzarian*, I do not agree with the District Judge that those entries necessarily justify the conclusion either that at one time Sher Singh occupied the land in dispute or that after the death of Kahna in 1865 Hira, son of Budh Singh, and the two sons of Amir Singh (Mula and Sant Singh, fathers of the present plaintiffs) had inherited his holding. It is admitted that Jawahar Singh, brother of Hira, is nowhere shown in the revenue records as holding any portion of Kahna's land; and the District Judge admits that it has not been explained how Jawahar came to be excluded from Kahna's inheritance. The learned Judge, however, says that the entries in the *tanqih huquq muzarian* of 1865 show that by implication Hira claimed occupancy rights in the land of Kahna, and that he could only have claimed those rights as his heir. He then goes on to say: "no doubt all this is largely *presumption* or *conjecture* because the records do not clearly show what was claimed on either side, or what admissions the parties made, but I do not see what other presumption is possible under the circumstances." This extract from the judgment of the District Judge shows that he has disregarded the sound rule of law that in matters like the one under consideration "conjecture" must not be allowed to take the place of legal proof, and the appellants' Counsel is perfectly justified in urging that on his own showing the District Judge's main conclusion in support of the respondents' claim is based on conjectures and that this vitiates his whole judgment.

With reference to the proceedings of 1865 as contained in the *naqsha tanqih huquq muzarian*, the District Judge has relied on the opinion of Assessors as noted in that *naqsha* in support of the respondents' contention that Hira and the sons of Amir Singh were Kahna's nephews. But in another part of his judgment the District Judge says, by reference to the finding of Mr. Martineau, District Judge, Gurdaspur, in Appeal No. 189 of 1914, to which the present respondents were parties, that Mr. Martineau's view that the opinion of the Assessors, as recorded in 1865, was no legal proof of the alleged relationship between Kahna and Hira and the sons of Amir Singh, was perfectly correct (see the 6th ground of appeal); and yet in the very next sentence Mr. Rose says that the opinion of the Assessors is affirmed by the fact that Hira and the two sons of Amir Singh acquired the occupancy rights held by Kahna after his death, and that this acquisition must have been based on rights of inheritance showing that Kahna, deceased, and Hira and the sons of Amir Singh must have been descended from the same common ancestor.

The alleged acquisition of Kahna's occupancy land by the above named persons by right of inheritance is not supported by anything in the Revenue Record of 1865, except indirectly by the extra-judicial opinion of the Assessors recorded in the *naqsha tanqih huquq muzarian*, to which reference has been made above, and it is clear to my mind that the District Judge was not justified in coming to his conclusion in support of the respondents' claim on the assumption that the Assessors' opinion is correct, which opinion, he himself admits, does not amount to legal proof of the alleged descent of the above-mentioned persons from one common ancestor.

It will be observed that the District Judge has recorded no distinct finding that Sher Singh, the alleged common ancestor of the respondents and Shib Ram, ever occupied the land in dispute, though there is an implication underlying his judgment in support of this view. For the reasons given I have no hesitation in holding that the District Judge's findings regarding the collateral relationship of the respondents to Shib Ram deceased and as to the alleged common ancestor having occupied the land left by Shib Ram are not judicial findings and cannot be accepted as final in this second appeal.

After giving my best consideration to the whole case by the light of the entries in the revenue records referred to by the lower Courts, I have come to the conclusion that the respondents, on whom the onus lay, have failed to prove that they are collaterals of Shib Ram, or that Sher Singh, the alleged common ancestor of themselves and Shib Ram, ever occupied

the land in dispute. I accordingly accept this appeal, set aside the judgment and decree of the District Judge, and dismiss the suit of the plaintiffs with costs throughout.

Appeal accepted.

MADRAS HIGH COURT.

APPEAL SUIT No. 393 OF 1915.

January 17, 1918.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Spencer.

K. GOPALAKRISHNA KUDVA—

PLAINTIFF—APPELLANT

versus

BANGLE NARAYANA KAMTHY—

DEFENDANT—RESPONDENT.

Malicious prosecution—Proof—'Reasonable and probable cause,' meaning of—Innocence, proof of, by plaintiff, whether necessary.

In an action for malicious prosecution the plaintiff must prove four things, (1) that he was prosecuted, (2) that the prosecution ended favourably to him, (3) that the defendant acted without reasonable and probable cause, and (4) that the defendant was actuated by malice. Under the second and third heads, questions as to plaintiff's innocence generally arise. But they must be regarded only as incidental to the question whether the prosecution ended in the plaintiff's discharge or acquittal and whether the defendant acted without reasonable or probable cause. [p. 805, col. 2; p. 806, col. 1.]

The plaintiff is not charged with the onus of affirmatively proving his innocence. [p. 806, col. 2.]

Abrath v. *North Eastern Railway Co.*, (1883) 11 Q. B. D. 440; 52 L. J. Q. B. 620; 49 L. T. 618; 32 W. R. 50; 47 J. P. 692, explained.

Nalliappa Goundan v. *Kailappa Goundan*, 24 M. 59, doubted.

Reasonable and probable cause means an honest belief in the guilt of the accused based on a full conviction, founded upon reasonable grounds of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed. [p. 804, col. 2.]

Appeal against the decree of the Court of the Sub-Judge, South Kanara, in Original Suit No. 8 of 1914.

Mr. *C. Madhavan Nair*, for the Appellant.

Mr. *K. Srinivasa Aiyangar*, for the Respondent.

JUDGMENT.—The plaintiff's suit, which was brought to recover Rs. 3,500 as damages for malicious prosecution, was dismissed in the Court of the Subordinate Judge of South Kanara and the plaintiff appeals. The plaintiff was the managing trustee of Shri Venkataramana temple of Mulki and the defendant complained to the Sub-Divisional Magistrate of Mangalore that the plaintiff had, as trustee, committed offences of criminal misappropriation and criminal breach of trust in respect of the temple properties. At the trial the plaintiff was discharged under section 253, Criminal Procedure Code, by the Magistrate on July the 15th, 1912.

For the purposes of this case we may leave out of consideration those allegations of the defendant which merely imputed breach of the rules framed under the award of arbitrators for the management of the temple, and we may at once proceed to those charges in which an element of criminal dishonesty was disclosed by the prosecutor's allegations In the defendant's complaint, which was prepared by Counsel, were specified eight acts of the plaintiff as constituting offences of the above description under the Penal Code. Of these the most substantial were, (1) that the accused had constructed a golden palanquin and had misappropriated about 4 seers of gold of the value of Rs. 2,000 by charging the temple with the value of 30 seers of gold while utilising only 26 seers, (2) that the accused had debited the temple with Rs. 400 worth of fire works for use at festivals, although the amount really spent was only Rs. 200, and that he had misappropriated the difference, (3) that Rs. 4,843 had been paid into Court about six months previously but had not been brought into the temple accounts and that the accused was using the same for his own purposes, and (4) that the accused had misappopriated 50 Muras of rice and Rs. 10 collected as offerings to the temple. In his sworn statement to the Magistrate, the defendant further alleged that if the temple chest was examined, it would be found that there was a deficiency in the money in hand when compared with the amount stated in the accounts.

The first charge, namely, that of misappropriating Rs. 2,000 worth of gold is a very serious one and, in our opinion, was quite unwarranted by the information of

which the defendant was at the time possessed or by what has since transpired. When the defendant was in the witness box and was asked upon what basis he made this allegation, his only explanation was that many people were saying that the plaintiff undertook the work of repairing the palanquin with a view to commit misappropriation and that he also believed that the plaintiff was going to misappropriate the gold. He admitted that he had not personally examined the goldsmith who made the palanquin before he complained to the Magistrate. The only information that he had was that which Vasudeva Shanbhogue and Hari Pai gave him. These persons have not been examined as witnesses and it is clear from the defendant's own statement that he had no information, that could justify him in making the statement that the accused had misappropriated this large amount of gold. The Magistrate's judgment shows that this charge was dropped at the trial as the prosecution found it to be groundless.

The second allegation of importance, which is the 4th charge in Exhibit C, namely, that the accused had misappropriated Rs. 4,843 belonging to the temple, was equally unjustifiable. This money had been recovered by a suit instituted on behalf of the temple and the money was in the hands of the Vakil who represented the temple. In the Vakil's hands, it was, presumably, quite safe. The defendant admitted in cross-examination that he knew that the amount had been with the Vakil. Yet he had the audacity, in his complaint, to declare that the accused was utilising the same for his own purposes. The fact that this money was not entered in the temple accounts as having been paid to the Vakil would not justify the defendant in making such an accusation when, as he admits, he had no information that the plaintiff had actually misappropriated the amount.

The next accusation, which is number 3 in serial order, is that the accused had misappropriated about Rs. 200 shown as spent on fire works by means of entries in the accounts showing payments to certain fictitious persons. When he was asked about this, the defendant stated that, before the institution of the criminal complaint, all he knew was that the plaintiff had made it appear in the accounts that fire works had been purchased from unlicensed vendors, but he did not know the names of the persons from whom the purchases had been made. He gathered from the fact that it was entered in the accounts of the plaint temple that fire works had been obtained from unlicensed persons, that the plaintiff must have misappropriated the money under this head of expenditure. That, again, seems to have been a reckless and unwarranted assumption. He stated that the payments had been shown in the accounts as having been made to several fictitious persons, but he took no trouble to ascertain whether the persons shown as having sold the fire works were really fictitious. As observed by Lord Atkinson in *Corea* v. *Peiris* (1) the pivot upon which all such actions turn is the state of the mind of the prosecutor at the time that he institutes or authorises the prosecution.

In *Hicks* v. *Faulkner* (2) Hawkins, J., defined reasonable and probable cause to be "an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed."

Applying these tests, it can only be concluded on the evidence that the defendant must have acted without reasonable or probable cause when he accused the plaintiff of misappropriation and criminal breach of trust with respect to the above-mentioned three charges.

The fourth of the charges which we need consider relates to the misappropriation of 50 Muras of rice and Rs. 10. At the criminal trial, an entry of Rs. 256 in the accounts was shown as representing the value of these 50 Muras of rice and Rs. 10. The accused had not brought this item into the general accounts, but had kept it under the head of "Kadanathaya." The

(1) (1909) A. C. 549; 79 L. J. P. C. 25; 100 L. T. 790; 25 T. L. R. 631.
(2) (1882) 8 Q. B. D. 167; 51 L. J. Q. B. 268; 30 W. R. 545.

prosecution failed to prove that this entry of Rs. 256 related to any money received from any other source. The statement that the accused had misappropriated this amount was not justified, but as the defendant might have entertained some reasonable suspicion from the manner in which the entry was made in the accounts we do not think that in respect of this item there was entire absence of reasonable cause.

As regards the defendant's allegations that there was deficiency in the cash balance, the Magistrate found on examination Rs. 492 as the deficiency. But this was accounted for by a loan of Rs 510 granted upon the pledge of jewels as evidenced by an entry in the account book seized at the search. As the Magistrate observed, there was no reason to suppose that there had been any falsification of accounts or misappropriation of money in respect of these items. At the same time we do not consider that the defendant's statement in this respect was without reasonable cause, as there was an actual shortage of cash.

On the whole, we cannot agree with the Subordinate Judge in his finding that no case has been made out of malicious prosecution. Leaving aside the statements made in the complaint with regard to inaccuracies in the accounts or to irregularities in the plaintiff's conduct as trustee, there are at least 3 serious accusations of misappropriation which the defendant had no justification for making. We are of opinion on the first issue that the complaint in question was in these respects made without any reasonable and probable cause.

There is also no doubt from the evidence that the defendant's action was dictated by malice. Shortly before the accusation was made the plaintiff had excommunicated the defendant. The defendant retaliated by accusing the plaintiff of defamation. The defendant in his evidence admitted that there had been misunderstanding between him and the plaintiff in the year 1907, in consequence of dealings which they had with one another in respect of a mortgage transaction which resulted in civil litigation. The manner in which the defendant raked together every conceivable charge in his endeavour to procure the conviction of his enemy and to cause him the maximum amount of difficulty in defending himself spells vindictiveness. It was provided in the scheme sanctioned by the award of arbitrators for the conduct of the temple affairs that this defendant and others might inspect the accounts at any time for ascertaining whether they were properly kept and that the temple money was properly accounted for. Instead of proceeding accordingly and inspecting the accounts before launching the criminal prosecution the defendant rushed into Court and attempted to make criminal charges out of trifling irregularities, which might very well have served as grounds for applying for the removal of the trustee in proceedings properly instituted for that purpose in a Civil Court, but not for his prosecution.

As Mr. K. Srinivasa Aiyangar, in his arguments for the respondent, has raised the question whether the plaintiff in an action of this kind is bound to prove his innocence, and as the Sub-Judge's judgment containing a remark that the plaintiff had not proved his innocence by the mere fact that he was discharged in the Magistrate's Court, it is necessary to say a few words on this point. It is well settled that in actions for malicious prosecution, the plaintiff must prove four things: (1) that he was prosecuted, (2) that the prosecution ended favourably to him, (3) that the defendant acted without reasonable and probable cause, and (4) that the defendant was actuated by malice. Under the second and third heads questions as to the plaintiff's innocence generally arise. But they must, we think, be regarded only as incidental to the questions whether the prosecution ended in the plaintiff's discharge or acquittal and whether the defendant acted without reasonable or probable cause. In *Abrath* v. *North Eastern Railway Company* (3), where the plaintiff had been acquitted of the criminal charge and the Jury had expressed the opinion that he left the Court without a stain upon his character and his innocence was not challenged by the defendants at the trial of his action for malicious prosecution, Bewen, L. J., as he then was, in discussing the onus of proof in such cases, observed that the plaintiff in an action

(3) (1883) 11 Q. B. D. 440; 52 L. J. Q. B 620; 49 L. T. 618; 32 W. R. 50; 47 J. P. 692.

for malicious prosecution must prove, first, that he was innocent and that his innocence was pronounced by the Tribunal before which the accusation was made. As already observed, no question as to proof of innocence arose in the case, and we do not think that the learned Lord Justice intended to do more than lay down that the prosecution must be shown to have ended favourably to the accused. The substance of the judgment was that proof of innocence was not by itself *prima facie* proof of want of reasonable and probable cause. This would appear to be the view taken by Sir Frederick Pollock in his well-known work on Torts, as after citing Bowen, L. J.'s observations in the text he observes in a note—"A plaintiff who being indicted on the prosecution complained of has been found not guilty on a defect in the indictment is sufficiently innocent for this purpose." It is in the same sense that the word "innocent" appears to have been used by Lord Macnaghten in *Pestonji Muncherji Mody* v. *Queen Insurance Company* (4) and by Lord Davey in *Cox* v. *English, Scottish and Australian Bank, Ltd.* (5) and by Maclean, C. J., in *Harish Chunder Neogy* v. *Nishi Kanta Banerjee* (6). In some cases the innocence of the paintiff has been treated as an element of consideration that enters into the question whether the defendant acted without reasonable and probable cause. If in *Nalliappa Goundan* v. *Kailappa Goundan* (7) the learned Judges intended to lay down that something further must be proved in suits of this nature beyond proof that the prosecution ended favourably for the accused and that there was an absence of reasonable cause in the prosecution, then we think that they went too far and that Lord Bowen's observation above referred to does not support their dictum to that extent. Failure to prove more than this may be relevant to the question of damages. In our opinion the Subordinate Judge misdirected himself in observing that the fact of the plaintiff having been discharged by the Magistrate was no evidence of his innocence, and in assuming, apparently, that the plaintiff was *prima facie* guilty and that he was bound affirmatively to prove his innocence. In parts of his judgment, *e.g.*, paragraphs 69, 104 and 107, the learned Subordinate Judge has applied to the plaintiff's conduct the test whether his motive was righteous or unrighteous, which is of course quite beside the point. We cannot accept the view of the Subordinate Judge in paragraph 108 of his judgment that the "plaintiff has failed to establish his innocence in respect of any one of the accusations."

As regards damages, the plaintiff states that he had to pay about Rs. 2,500 as Vakil's fees in defending himself at the criminal trial. Exhibit B series are receipts for Rs. 1,150 passed by certain Pleaders in his favour. In allowing this appeal and reversing the decision of the Subordinate Judge, we allow the plaintiff altogether Rs. 2,000 as damages, and we direct the defendant to pay the plaintiff's costs in this and in the lower Court.

Appeal allowed.

M. C. P.

(4) 25 B. 332; 2 Bom. L. R. 938; 4 C. W. N. 781 (P. C.).
(5) (1905) A. C. 168; 74 L. J. P. C. 62; 92 L. T. 483.
(6) 28 C. 591; 6 C. W. N. 159.
(7) 24 M. 59.

PRIVY COUNCIL.

APPEALS FROMS THE CALCUTTA HIGH COURT.

December 14, 1917.

Present:—Lord Buckmaster, Sir John Edge, Sir Walter Phillimore, Bart., and Sir Lawrence Jenkins.

RADHAKANT LAL AND OTHERS—APPELLANTS

versus

Musammat NAZMA BEGUM AND OTHERS—RESPONDENTS

AND

RADHAKANT LAL AND OTHERS—APPELLANTS

versus

Musammat NASIBAN—RESPONDENT.

Hindu Law—Mitakshara—Joint family—Joint and self-acquired property, blending of, effect of—Gift by managing member of joint family property, validity of.

A member of a Hindu joint family may convert his self-acquired property into ancestral family estate by throwing it into the common stock. [p. 809, col. 2.]

A Mitakshara family of five brothers separated in estate. *D.* and *K.*, two of the brothers, continued

to live together, *D.* acting as guardian of *K*, who was a minor. Later on a son *R.* was born to *D.* Later still *D. D.*, a third brother, died, and property came to *D.* and *K.* from his estate. *D.* kept only one account of the profits of this property, even after *K.* came of age, and he kept only one account for all his receipts from this and other property and of all his expenditure. A partition by metes and bounds was later effected between *D.* and *K*, and mutual exchanges were made whereby *D.* gave up his share in certain ancestral property for *K.'s* share in property acquired from *D.D.'s* estate and *vice versa.*

In a suit by *D.'s* son and grandsons after *D.'s* death to set aside deeds of gift executed by *D.* in favour of the respondents, on the ground that the property given was ancestral property and the gifts in consequence were invalid:

Held, that even assuming that the property coming from *D.D.'s* estate was *D.'s* self-acquired property, yet by blending the income of that property in the accounts with the income of the new joint family constituted on *R.'s* birth by *D.* and *R.* and by the mutual exchanges with *K. D.* had shown his intention to treat what came to him from *D. D.* as joint property and had converted it into ancestral estate and that the properties included in the deeds of gift were, therefore, joint family properties of which *D.* had not the right to dispose, and that the appellants were entitled to recover them. [p. 809, col. 2; p. 812, col. 2.]

Lal Bahadur v. *Kanhaiya Lal*, 34 I. A. 65; 9 Bom. L. R. 597; 11 C. W. N. 417; 5 C. L. J. 340; 4 A. L. J. 227; 2 M. L. T. 147; 17 M. L. J. 228; 29 A. 244 (P.C.) and *Suraj Narain* v. *Ratan Lal*, 40 Ind Cas. 988; 44 I. A. 201; 21 C. W. N. 1065; 20 O. C. 211; 2 P. L. W. 160; 33 M. L. J. 180; 15 A. L. J. 684; 19 Bom. L. R. 737; 22 M. L. T. 121; 26 C. L. J. 267; 6 L. W. 509; (1917) M. W. N. 477; 4 O. L. J. 762 (P. C.), followed.

Consolidated appeals from decrees of the Calcutta High Court, dated June 2, 1913, reversing the decrees of the Subordinate Judge, Gaya.

FACTS are sufficiently stated in their Lordships' judgment.

The plaintiffs Radha Kant Lal and others sued to set aside two deeds of gift made by their ancestor Drigpal Lal, deceased, in favour of his mistress Nazma Begum, and his daughter by her Kuisam Bibi. The main question for determination was whether the properties comprised in the deeds of gift were the self-acquired properties of Drigpal or whether they were or had become the ancestral properties of the joint family of which Drigpal and plaintiffs were the co-parceners. The Trial Judge substantially allowed the plaintiffs' claim but on appeal the High Court (Chitty and Teunon, JJ.) reversed this decision and dismissed the suit. Hence this appeal.

Mr. *De Gruyther*, *K. C.*, (with him Sir *W. Garth*), for the Appellants, submitted that Drigpal and his brothers did not inherit Din Dayal's properties as collaterals (in which case they would be self-acquired), but obtained them for valuable consideration paid out of joint family funds, and that the properties were, therefore, joint family property. Even assuming that the properties were self-acquired when they first came to Drigpal's hands, yet he threw them into the common stock of the joint family and treated them as joint. That was clear from the way in which the accounts were kept and the subsequent partition proceedings between Drigpal and his brothers. They relied on *Suraj Narain* v. *Ratan Lal* (1) and *Lal Bahadur* v. *Kanhaiya Lal* (2).

The respondents did not appear.

JUDGMENT.

SIR WALTER PHILLIMORE, BART.—The suits to which these consolidated appeals relate concern the validity and effect of two deeds of gift made by one Drigpal Lal, deceased, the father of the first plaintiff and appellant, and grandfather of the other plaintiffs and appellants, in favour of two concubines and the daughter of one of them.

The son asserts that he and his father were joint members of a Hindu family, and that the properties to which the gifts relate were part of the joint family estate. This is the question to be determined in the suit.

Some of the properties in question came to Drigpal from the estate of his brother, Din Dayal, and others were acquired by the use of the revenues of Din Dayal's estate; and the first matter to be enquired into is whether the property which came to Drigpal from Din Dayal's estate was self-acquired property or came to him as part of the joint family estate.

The circumstances in which it was acquired are as follows:—

Drigpal and Din Dayal were two of five brothers who were at one time all members

(1) 40 Ind. Cas. 988; 44 I. A. 201; 21 C. W. N. 1065; 20 O. C. 211; 2 P. L. W. 160; 33 M. L. J. 180; 15 A. L. J. 684; 19 Bom. L. R. 737; 22 M. L. T. 121; 26 C. L. J. 267; 6 L. W. 509; (1917) M. W. N. 477; 4 O. L. J. 762 (P. C.).

(2) 34 I. A. 65; 9 Bom. L. R. 597; 11 C. W. N. 417; 5 C. L. J. 340; 4 A. L. J. 227; 2 M. L. T. 147; 17 M. L. J. 228; 29 A. 244 (P. C.).

of a joint Hindu family. Din Dayal was adopted by his uncle and went out of the family. Another brother died without male issue. This left Duli Chand, Drigpal, and Kanhaya.

These three brothers separated in estate in the year 1876.

Din Dayal died on the 8th March 1878 leaving no issue, but leaving surviving him his widow, Rukmini, and two widows of his adoptive father.

The succession to his estate if he died intestate would, therefore, be as follows:—

The widow Rukmini would take for her life, giving maintenance to the other widows. These, if they survived her, would take for their lives (it matters not for this purpose in which order *inter se*), and then those who at the death of the survivors of the three widows would be the male heirs would take the property. At the moment of Din Dayal's death these would be the three brothers; but it could not be foreseen who would be the male heirs when the succession ultimately devolved upon them. Din Dayal, though he made no legal Will, expressed his last wishes as to the disposal of his estate, and they were, according to the recital in an *ekrarnama*, dated the 3rd April 1878, and executed by the widow, to the following effect:—

"That after my death, you" (that is, Duli Chand and Drigpal) "and Babu Kanhaya Lal shall, as proprietors, enter upon possession of all my properties, moveable and immoveable, all mortgage and simple bonds, all decretal moneys, *zarpeshgi* moneys and Bhurna moneys, houses and money at Ramna situated in Sahebgunge, Zillah Gaya, and over every other kind of properties belonging to me; that you shall allow my wife to remain during her lifetime in possession of my dwelling-house situated in Kasba Haswa . . . . ; that you shall pay to her one lakh of rupees in cash to defray the expenses of performing religious rites and pilgrimage, from your own pocket; that you shall allow all money in cash and ornaments which are in the house at Haswa to remain in the possession of the *Musammat* during her life; that you shall pay her Rs. 10,000 in cash annually, besides clothing and grains sufficient for her use; that you shall pay to *Musammat* Jado Koer and Dhupa Koer, the widows of Babu Murali Ram, who are my mothers, Rs. 2,500 each annually in cash, besides clothing and grains sufficient for their use; that you shall make a *hiba* or gift to *Musammat* Ram Koer, daughter of Babu Girdhar Lal, my deceased brother, of 16 annas of Mouzah Lodipur Jafra and Shaikhpara appertaining to Lot Lodipur Jafra, 16 annas of Mouzah Korigawan appertaining to Lot Sandha Manjhigawan . . . . and 16 annas of Mouzah Kumharwa Girji Bandbanna appertaining to Lot Samandih, etc., being 12 *kalams* known as Mahal Ratni . . . . with all the dependencies and all the Chucks of the Mouzah aforesaid, situate in Zillah Gaya; that you shall pay Rs. 1,800 in cash annually, and clothing and grains sufficient to meet her requirements, to *Musammat* Annapurna, *Tawaif*, provided that she does not lose her chastity and character and continues in the Pardah; that you shall make gift to Babu Somar Ram of 16 annas of Mouzah Jatsari . . ; and that you shall execute deeds in accordance with the above directions in favour of these persons."

All parties were desirous that these wishes should be carried into effect, and accordingly a series of documents were executed, the first being the *ekrarnama* already mentioned whereby the widow purported to dispose of all the property of her deceased husband in favour of the three brothers.

Then there was a bond given by the brothers to the widow with a mortgage, to secure the payment of the lakh of rupees; a covenant, with a charge on certain property, to pay to the father's widows the stipulated annuities and maintenance; a covenant with the concubine to pay her the agreed annuity and maintenance; a deed of gift in favour of the adopted nephew; and a similar deed of gift in favour of the niece.

The lakh of rupees was paid in two instalments within six months of the death, and the bond was discharged. The money found to pay Rukmini by the three brothers came out of ancestral family property.

The three brothers entered into possession of the estate, and paid the annuities and maintenance to the various ladies. The father's widows died first, and then

Rukmini in the course of the year 1882.

The annual income of the property is said to have been rather more than half a lakh, so that the arrangement, as it turned out, was not such a bad bargain for Rukmini, and was advantageous to the father's widows. For the concubine, niece, and adopted nephew it was pure gain.

It was contended on behalf of the defendants that the *ekrarnama* of the 3rd April 1878 executed by Rukmini in favour of the three brothers was inoperative to pass more than her life-interest, and that the brothers who survived her must be deemed to have taken the property by inheritance, in which case, being an inheritance from a collateral, it would be self-acquired, and not to have taken it by purchase, in which latter case it would be ancestral family property.

That it was the intention of the deed to pass the whole property is obvious. If Rukmini was only conveying her life-interest, and if either of the father's widows had survived her, the survivor's estate would have been interposed before that of the brothers. Even if it be supposed that the father's widows were so far parties to the transaction that they could not have claimed their life-interset in the event of their surviving Rukmini, there was, as already observed, no certainty that the three brothers would have all survived Rukmini, so as to be the heirs at her death. Moreover, the gifts in favour of the adopted nephew and niece would have failed.

It may be, however, that though this was the intention of the deed, its only legal operation would be the restricted one for which the defendants contend.

A widow has only a limited power of disposition of the property. She can, however, alienate the estate in certain circumstances and under certain conditions. Whether in the circumstances of this case she could effect a valid alienation is a matter of some difficulty. The Subordinate Judge thought that she could; the High Court held that she could not.

Their Lordships are relieved from pronouncing upon this point of law, because they are of opinion that as regards the property which came from Drigpal the plaintiffs can succeed upon another ground. Assuming that the three brothers—and in particular Drigpal—acquired this property as collateral heirs, and took it, therefore, as self-acquired property, it is well established that a member of a Hindu family may convert his self-acquired property into ancestral family estate by throwing it into the common stock and this is, in their Lordships' opinon, that which happened in the present case.

As already stated, Drigpal and his two brothers had made a partition of their joint family estate in 1876. At the time of the death of Din Dayal and the accession of the three brothers to his property, Drigpal was acting as guardian of his younger brother Kanhaya. Accordingly one book was kept for their joint share of Din Dayal's estate; and this system of book-keeping, which started on the 2nd October 1878, was continued till the 11th February 1880, when Kanhaya came of age. Thereafter no separate book was kept by or for Drigpal in respect of the property which had come to him from Din Dayal; but there was one account for all Drigpal's receipts from all sources, whether it was income from joint family property, or from that which he had acquired from Din Dayal, or any other source of revenue, and similarly for all his expenditure of whatever kind.

Now his son, Radhakant Lal, the first plaintiff and appellant, had been born on the 31st May 1877, and from that time forward there had been a joint family estate for him and his father. And, if the accounts from 1880 onwards are such as to show a blending of the properties, the ordinary inference to be drawn is that Drigpal had thrown the property which he had acquired from Din Dayal into the common stock.

This matter has come more than once before this Board, and was the subject of decision in the cases of *Lal Bahadur* v. *Kanhaiya Lal* (2) and *Suraj Narain* v. *Ratan Lal* (1) decided on the 30th January 1917.

The Subordinate Judge held that Drigpal had amalgamated the two properties, and the two grounds upon which his decision to this effect is supported by the present appellants are;—

First, the intermixture of and the blending of the receipts and payments in one account with those belonging to the ancestral family property;

and *secondly*, that when Drigpal and his younger brother Kanhaya took the further step of effecting what is called "a Deorh partition," that is, not merely a separation of interest, but an actual partition of the several properties constituting their estates, mutual exchanges were made whereby Drigpal gave up his share in some ancestral family property for Kanhaya's share in property which came from Din Dayal, and *vice versa*.

The High Court took the opposite view. As to the argument drawn from the exchange, the judgment of the High Court is as follows :—

"The first point made was with regard to the Deorh partition which took place between Drigpal Lal and Kanhaya Lal on the 8th May 1881. It was argued that, on that partition, Din Dayal's properties were exchanged for joint properties and *vice versa*. When, however, this point came to be investigated it appeared that there was no such general interchange as the plaintiffs would have us believe. Only two possible instances were given us, and of these one is capable of an obvious explanation and the other is not fully proved. The first instance was with regard to Mouzahs Sikandarpur and Asarhi. It is doubtless the case that Mouzah Sikandarpur was ancestral while Mouzah Asarhi had come from Din Dayal. These Mouzahs are contiguous and of equal value so far as one can tell from the *jama*. They both form part of Mahal Asarhi Sikandarpur. At the partition it seems that Drigpal took 10 annas 8 pies of Sikandarpur, while Kanhaya Lal took 10 annas 8 pies of Asarhi, so that each brother got two-thirds of a separate village instead of a one-third share in the two. This clearly was a matter of convenience and cannot, we think, be regarded as evidence of amalgamation of properties ancestral and acquired from Din Dayal. Neither of these villages, it may be observed, forms part of the subject matter of the present suit.

"Then it was said that for Mouzah Pillich, Touzi No. 204, an ancestral Mouzah, two Mouzahs, Nanand and Sonchari, which came from Din Dayal, were exchanged. For this the evidence is Exhibits 45 and 47, applications made by Drigpal Lal, and Exhibit 64, an application made by Kanhaya Lal, for mutation of names. The exchange of these villages does not appear to have been very satisfactorily established from these two Exhibits. In the absence of any *koras* or other reliable evidence as to the precise details of this partition, it would be impossible to draw the conclusion which the plaintiffs wish us to draw from the very meagre evidence with regard to these two exchanges."

It should be observed that the High Court agrees with the Subordinate Judge in respect of the exchange of Sikandarpur and Asarhi; and their Lordships are of opinion that the exchange of Pillich for the two Mouzahs specified was satisfactorily proved by the documentary evidence. This evidence was further supplemented by the oral evidence of the witness Gajadhar Lal. Moreover, there was oral evidence uncontradicted from this witness and from Bhekhi Lal, proving the exchange of two more villages. A more striking proof of the throwing together of the two properties into a common stock there could hardly be.

Drigpal gives ancestral family property, and receives his brother's share in property coming from Din Dayal. He gives Din Dayal property and receives his brother's share of ancestral family property.

There is not only one case which standing by itself could with difficulty be explained away; but there are four instances.

Turning now to the accounts, the Judges of the High Court agree that, from and after the "Deorh partition" in 1881, Drigpal's accounts were undoubtedly more or less mixed up. But they observed that Drigpal had five Tehbils or tills. The judgment then proceeds as follows :—

"We have been taken through the accounts at great length by the learned Counsel for the respondents, and we do not think that it is possible to draw any very definite conclusion from these accounts; first, because a large number of the accounts which were kept by Drigpal or under his direction, relating to his estate, have not been produced; and secondly, because the plaintiff Radhakant, who alone could speak with authority as to these accounts, and their precise object and nature, has not ventured to go into the box. All the papers which were in the possession

of Drigpal at the time of his death have passed to Radhakant, and the fact that he has not produced so many of them must weigh very strongly against him. There is no one general or central account which shows that the whole of Drigpal's estate was dealt with as a unit. In particular, we may mention that with the exception of Exhibits 16 and 18 no books of account of the mica mining business—either the Seha books at the mines or the stock books—are forthcoming. None of the '*khazana haveli*' or of the Calcutta books have been produced, nor have any books after 1308. In 1304 certain Mouzahs acquired after the death of Din Dayal, and in 1310 certain of the Din Dayal villages, were set apart for the pocket expenses of Drigpal, and in 1309, it is said, a certain ancestral village was set apart for the pocket expenses of Radhakant. In respect of the village set apart for Drigpal, separate accounts were admittedly kept. None of these books have been produced. The Tamasuki Bahis dealing with bonds and money-lending business are not forthcoming, nor the books of the mail-cart business. The learned Counsel for the respondents attempted to minimise the effect of this non-production of books ; but it is, in our opinion, a very serious matter. If all the books of Drigpal had been produced, it might have been possible to ascertain preciseiy how his accounts were kept and with what object."

The plaintiffs are said not to have produced the books of the general account already mentioned, which was begun on the 11th February 1880. The books of the general account were produced to about the end of the year 1892 The explanation offered of the non-production of the later books is that after 1892 they were thought to be of no importance, because all the properties which Drigpal bought had been acquired by this time, and the only object of producing the accounts after the first year or two was to show that these properties had been bought out of the common stock, and, therefore, formed part of it.

This is not strictly accurate, for one property at least was bought after 1892. But once given that the account shows that the properties had been blended, the later accounts are, for this purpose, immaterial. Properties once brought into a common stock cannot be taken out of it again.

Then, as to the statement that "there is no one general or central account which shows that the whole of Drigpal's estate was dealt with as a unit," their Lordships cannot accept this as accurate.

The account already so often mentioned purports to be a general account, into which all receipts and payments are brought. It might, perhaps, be said that it is only a cash book and not a ledger. But it appears to be a similar book to that which was produced to the Board in the case of *Suraj Narain* v. *Ratan Lal* (1), as to which their Lordships observed: "It is not strictly an account book at all, but a book in which is recorded from day to day various payments and receipts of money from different sources" ; and from which their Lordships drew the inference in that case that the man who kept the account had "so blended his own property with the joint property as to make the whole joint property."

As to the non-production of the *khazana haveli*, their Lordships cannot see what assistance the production of these books, if, indeed, such are kept, would have been.

No doubt the plaintiff, Radhakant, did not give evidence ; but the men of business of the family did. And it does not appear that any point was made in cross-examination or in the conduct of the trial, that any material books had been kept back ; and no such idea seems to have occurred to the Subordinate Judge.

There remains one piece of evidence which makes in favour of the respondents, and that is furnished by the recitals in the two deeds which are attacked by the present suits. They are in similar terms and are as follows :—

" My income from ancestral properties was only Rs. 13,000 but subsequently I got the estates of Babu Girdhari Lal and Babu Dindyal Lal, yielding an income of Rs. 23,000. After my separation from Babus Dulichand and Kanhayalal, I acquired lots of properties by my own labour and exertions and from my own fund, by means of trade, and the 'ticca' (meaning a Ticca lease of Dourchanch, which by making improvement now yields an income of

Rs. 38,000). In this way I am now possessed of four kinds of properties, *viz.*:—

"(1st.) The ancestral properties ;

(2nd.) The estate of Babu Girdhari Lal ;

(3rd.) The estate of Babu Dindyal Lal; and

(4th.) The self-acquired properties ;

with regard to which I have full powers of transfer."

The effect of these recitals, which were probably intended to make evidence, is somewhat weakened by the fact that, in a deposition made in another suit, Drigpal stated that a property which he gave to a son by one of these concubines, named Sultan Bahadur, had been given with the consent of his lawful son, the plaintiff Radhakant; and this property came from Din Dayal.

Their Lordships cannot attach sufficient countervailing weight to these recitals to displace the strong evidence from the exchanges and the accounts, and upon the whole, they come to the conclusion that, assuming that Drigpal acquired his share of the property of his brother Din Dayal as self-acquired property, he so dealt with it afterwards as to make it joint property with his ancestral family estate, of which family, the first plaintiff and, as they were born, the other plaintiffs were members.

Turning now to the deeds of gift which are attacked by the plaintiffs in the present suits, the four properties purported to be conveyed to *Musammat* Nasiban, which are the subject-matter of the second suit, were properties which form part of the estate of Din Dayal, and, therefore, could not be conveyed away from the joint family estate.

As to the properties purported to be conveyed to *Musammat* Nazma Begum and her daughter, the matter is more complicated. There are thirteen properties: two appear to have come from Din Dayal; the rest appear to have been bought by Drigpal at various times after Din Dayal's death.

Drigpal had a nucleus of joint family property, the income of which was nearly half a lakh. He carried on for some years a business of extracting and selling mica, as he says in the recitals in the deeds of gift; and he also claims to have carried on a profitable mailcart business.

It was suggested for the respondents and accepted by the High Court that the profits of these two businesses and the properties purchased with them might be considered self-acquired. But in one instance certainly the land from which the mica was extracted was ancestral family property. It appears also from some of the books which have been produced that the moneys paid for wages and other expenses of winning the mica were supplied out of the general income of Drigpal, and that the profits were—as the Subordinate Judge has found—devoted to the general maintenance of the family and the education of the son Radhakant. From whatever source some of the lands from which the mica was gotten may have been acquired, the mica business was dealt with as part of the joint family property.

As to the mail-cart business, it was doubtful whether there were any profits ; and the receipts and payments in connection with it were all brought into the one general account.

The final result, therefore, is that all the properties purporting to be conveyed to the respondents were joint family property of which Drigpal could not so dispose, and that the plaintiffs and appellants are entitled to recover them from the respondents, that is, the two concubines, and the daughter of the one, and the mortgagees.

It is right to say that their Lordships were informed by Counsel at the Bar that so far as the deeds of gift purported to pass personal property, they are not to be deemed to be attacked in the present suits, and that the recovery is to be limited to the lands.

The Subordinate Judge only gave a judgment in respect of five-sixths of the property, taking it that, at the time of Drigpal's death, there were six members of the family, namely, Drigpal himself, Radhakant, and the latter's four sons, and being of opinion that Drigpal had, therefore, one-sixth share in the properties which he could pass by the deeds of gift.

This, however, is an error. Drigpal had no separate sixth share. The whole property belonged to the one Hindu family, and accrued upon his death to the surviving members.

The plaintiffs appealed in respect of this matter to the High Court, and their Lordships are of opinion that their appeal should have been allowed.

Their Lordships will, therefore, humbly advise His Majesty that these appeals should be allowed; that the judgment of the High Court should be reversed; that the judgment of the Subordinate Judge should be varied by declaring that the plaintiffs have right to the whole, and should get possession of the whole, of the landed properties covered by the two deeds of gift, instead of five-sixths only, and that it, so varied, should be restored; and that the plaintiffs should have their costs in the High Court, and on appeal to His Majesty in Council.

The judgment of the Subordinate Judge decreeing that each party should bear his own costs of the proceedings before him should be allowed to stand.

Appeal allowed.

Solicitors for the Appellants:—Messrs. *Heath* and *Hamilton*.

Solicitor for the Respondents:—Mr. *E. Dalgado*.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1374 OF 1916.

November 16, 1917.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

AMIR BI BI—PLAINTIFF—APPELLANT

versus

AROKIAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Award, oral, on voluntary submission, nature of—Allocation of hypothecation bond to a party—Suit on bond, maintainability of—Title, whether conferred by award—Execution of further conveyances, whether necessary—Registration, want of, effect of—Transfer of Property Act (IV of 1882), whether exhaustive.

A suit on a hypothecation bond allotted to the holder by an oral award of arbitrators passed on a voluntary submission is maintainable without the execution of further instruments following on the award. [p. 813, col. 2.]

An award may be oral and it is as binding on the parties as a written award. [p. 815, col. 2.]

Per *Seshagiri Aiyar, J.*—An award by arbitrators is as binding in its nature as a judgment of Court and a right of suit accrues to a party to whom a bond is allowed by virtue of such award. [p. 814, col. 2.]

Bhaurao Jiraji v. *Radhabai*, 2 Ind. Cas. 431; 33 B. 401; 11 Bom. L. R. 406, followed.

An oral award may also be enforced as an oral partition which is effective without writing or registration. [p. 815, cols. 1 & 2.]

The Transfer of Property Act is not exhaustive of all modes of transfer and does not deal with transfer by an award. If there is a transfer of property which does not come within the special modes dealt with in the Act, the conditions as to writing and registration prescribed therein have no application. [p. 815, cols. 1 & 2.]

Per *Napier, J.*—The only method by which an award can be made efficacious for process by the Court is by making the submission a rule of Court, and unless this is done, and enforcement can be had under the processual law, it cannot be said to operate as a judgment of Court. Even if it is equivalent to a judgment for some purposes, in the sense that it may have the same effect in barring suits, it is not a judgment in any real meaning of the word, far less is it a decree. [p. 816, cols. 1 & 2; p. 817, col. 2.]

Krishna Panda v. *Balaram Panda*, 19 M. 290; 6 Ind. Dec. (N. S.) 907 and *Jadunath Chowdhury* v. *Kailash Chandra Bhattacharya*, 2 Ind. Cas. 414; 37 C. 63; 10 C. L. J. 41; 14 C. W. N. 75, explained.

Sheo Narain v. *Beni Madho*, 23 A. 285; A. W. N. (1901) 83, distinguished.

An oral award can, however, pass title without any further action by the parties on any other footing, as, by the submission, the arbitrators are constituted the parties' agents for the purpose of doing such things as are specifically or by implication embodied in the terms of the submission. [p. 817, col. 2.]

Second appeal against the decree of the Court of the District Judge, Salem, in Appeal Suit No. 56 of 1915, preferred against that of the Court of the Principal District Munsif, Salem, in Original Suit No. 188 of 1914.

Mr. *K. V. Krishnasami Aiyar*, for Mr. *T. M. Krishnasami Aiyar*, for the Appellant.

Mr. *C. Madhavan Nair*, for the Respondents.

JUDGMENT.

SESHAGIRI AIYAR, J.—This is a suit on a hypothecation bond. The plaintiff alleges that in a family settlement between herself, her mother-in-law and brother-in-law the arbitrators chosen by them are alleged to have given an oral award under which this bond and some other bonds were allotted to her share. The hypothecation bond was originally executed to her father-in-law. She now sues on it.

The only plea of the defendant with which we are concerned, relates to the unsustainability of the suit on the ground that even if the award was true, as it was not followed by an execution of a

conveyance, plaintiff is not entitled to maintain a suit to recover the money due under the bond. The learned District Judge has accepted this plea and has dismissed the suit. I am unable to agree with him.

There are two aspects of the question; one is that the award itself operates to vest the property in the plaintiff, and the other, an award not being one of the instruments specially dealt with in the Transfer of Property Act no writing or registration is necessary to give validity to the award. Upon the first question it may now be taken as settled law that an award may be oral. *Kula Nagabushanam* v. *Kula Seshachalam* (1), *Savlappa* v. *Devchand Valchand* (2) and Second Appeal No. 837 of 916 have held that an oral award is as binding upon the parties as a written award. The further question is whether the award of an arbitrator is only a contract between the parties who submitted their disputes to his decision or whether it has the attributes of a judgment as well. There are no doubt *dicta* in certain cases that an award of the arbitrators must be regarded as in the nature of a contract. These are cases in which it was held that the award can be varied like a consent judgment, in certain particulars. I do not think that these authorities lay down that an award has no greater effect than a contract of the parties. It is true that under the English Law as pointed out by Russell on Awards at page 311, "An award of the arbitrators must be followed up by execution of the necessary documents to give efficacy to it." As Mr. Krishnasami Ayyar pointed out, an examination of the cases cited as authorities for this proposition does not fully bear out this statement of the law. For example, the case of *Johnson* v. *Wilson* (3) was one in which a further act would have been required to give the validity to the decision even if it had been regarded as one passed by a Court of Law. But there are some cases which bear out the view enunciated. I do not think that these decisions should be followed in India. In this country, decisions by Panchayats have been accepted as binding long before the regular Courts were established by the British Government and there is nothing in the Second Schedule to the Code of Civil Procedure to suggest that the decisions of the arbitrators are not valid until they are followed by the execution of the documents. Of course, in cases relating to specific performance or where one of the parties sues another for the enforcement of a particular act, the decree of the Court would still leave the parties under an obligation to perform the directions given in the judgment of the Court. But where a complete adjudication of the rights of the parties is given by the judgment, the parties are concluded by it and it is not incumbent upon either of them to take further steps, unless they be the modes prescribed by processual law to give effect to the decree of the Court. This is undoubtedly the position so far as the judgments of the ordinary Tribunals of the country are concerned. Is the position of the arbitrators different? In my opinion, the fact that the parties have chosen to invoke the aid of the private Tribunal to settle their differences should not make any difference as regards the efficacy of the decision come to by such a Tribunal. So long as the resort to such a Tribunal is authorised by the law, I can find no justification for not giving the same finality to the pronouncement of such a Tribunal as is accorded to that of the ordinary Tribunals. The fact that in submitting reference to arbitration no Court-fee is paid does not in the least affect the question. There are authorities which support the conclusion at which I have arrived. In *Muhammad Newaz Khan* v. *Alam Khan* (4) the question related to the applicability of the principle of *res judicata* to awards of arbitrators. Their Lordships of the Judicial Committee point out that the fact that no application was made to make the award a decree of Court did not render the award any the less valid. The logical result of this conclusion is to regard the award as binding in its nature as a judgment of Court. In *Somavalli Ammal* v. *Muthayya Sastrigal* (5) the learned Judges point out that the award is not simply a contract between the parties, but had the

(1) 1 M. H. C. R. 178 at p. 180.
(2) 26 B. 132 at p. 135; 3 Bom. L. R. 691.
(3) (1740) 125 E. R. 1156; Willes 248.

(4) 18 C. 414; 18 I. A. 73; 15 Ind. Jur. 284; 6 Sar. P. C. J. 26; 70 P. R. 1891; 9 Ind. Dec. (N. S.) 276.
(5) 23 M. 593; 10 M. L. J. 205; 8 Ind. Dec. (N. S.) 816.

effect of conferring title upon them. In *Jadunath Chowdhury* v. *Kailash Chandra Bhattacharya* (6) it was held that the award can be pleaded in bar to a suit relating to the subject-matter covered by the award. *Sheo Narain* v. *Beni Madho* (7) is also to the same effect. See also *Krishna Panda* v. *Balaram Panda* (8) and *Subbaraya Chetti* v. *Sadasiva Chetti* (9). In *Bhaurao Jivaji* v. *Radhabai* (10) the learned Judges, relying upon the decision of the Judicial Committee in *Muhammad Newaz Khan* v. *Alam Khan* (4), came to the conclusion that no further instrument need be executed to give validity to the award of the arbitrators. I am prepared to follow this decision. As regards *Talewar Singh* v. *Bahori Singh* (11), the learned Judges themselves point out that something had to be done in pursuance of the decision of the arbitrators. It is upon that ground they distinguish *Sornavalli Ammal* v. *Muthayya Sastrigal* (5). I am therefore of opinion that by virtue of the award of the arbitrators the right to recover upon the mortgage bond accrued to the plaintiff.

As I stated at the outset, there is also another aspect from which the award can be viewed. It has been held that oral partitions can be enforced notwithstanding the fact that there is no writing or registration to evidence such a partition. See *Thiruvengadachariar* v. *Ranganatha Aiyangar* (12), *Alamelu Ammal* v. *Balu Ammal* (13), *Latchumammal* v. *Gengammal* (14) and *Gyannessa* v. *Mobarakannessa* (15). It was also held that an oral dedication of property to an idol is valid. See *Pallayya* v. *Ramavadhanulu* (16). The principle of these decisions is that the Transfer of Property Act is not exhaustive of all modes of transfer and if there is a transfer of property which would not come within the special modes discussed in the Transfer of Property Act, the conditions as to writing and registration prescribed by the Act have no application. The mode of transfer by an award is not dealt with by the Transfer of Property Act. Consequently the decision of the arbitrators by which they are said to have given the mortgage bond to the present plaintiff is enforceable between the parties, if there is an oral award. In this view also plaintiff would have acquired a title to sue upon the hypothecation bond.

For both these reasons I am of opinion that the judgment of the District Judge must be reversed and the appeal should be sent back to him for disposal on the merits. Costs to abide the result.

NAPIER, J.—This second appeal arises out of the refusal of the District Judge of Salem to recognise an award as passing title to the appellant in the suit and thus enabling her to sue a third party on the strength of it. The case before the Court was that there was an oral submission to arbitration by certain members of a family of their claim to various properties and that an oral award was given by the arbitrators by which, among other arrangements, the property in question in the suit was given to the appellant, although she was not a party to the submission, and that the value of the property is below Rs. 100. On these facts it is contended before us that the award operated to vest title in her and the contention was sought to be supported on two grounds, *first*, that the award operated as a judgment, *secondly*, that the property being under Rs. 100 in value, the arbitrator nominated by the parties had authority to transfer it orally and this award had had that effect.

It is undoubtedly settled law that an oral award is as binding between the parties as a written award, though the further question might arise whether even if a written award could operate as a judgment, an oral award would have the same effect. The contention that an award operates as a judgment and the further contention that *qua* judgment it can pass title, is one that would have such far-reaching results that I think it necessary to examine it carefully.

(6) 2 Ind. Cas. 414; 37 C. 63; 10 C. L. J. 41; 14 C. W. N. 75.
(7) 23 A. 285; A. W. N. (1901) 83.
(8) 19 M. 290; 6 Ind. Dec. (N. S.) 907.
(9) 20 M. 490; 7 Ind. Dec. (N. S.) 347.
(10) 2 Ind. Cas. 431; 33 B. 401; 11 Bom. L. R. 406.
(11) 26 A. 497.
(12) 13 M. L. J. 500.
(13) 26 Ind. Cas. 455; 28 M. L. J. 685; 16 M. L. T. 592; (1915) M. W. N. 26.
(14) 7 Ind. Cas. 858; 34 M. 72; 8 M. L. T. 233; (1910) M. W. N. 632.
(15) 25 C. 210; 2 C. W. N. 91; [13 Ind. Dec. (N. S.) 142.
(16) 13 M. L. J. 364.

AMIR BI BI v. AROKIAM.

The first difficulty to be met is as to the effect of a judgment alone as passing title. The primary effect of a judgment is to give a right to have the adjudication of the Court embodied in a decree under section 33 of the Civil Procedure Code. 'Judgment' is defined in the Civil Procedure Code as "the statement given by the Judge of the grounds of a decree or order," and I know of no process by which a judgment can be rendered effective without a decree or order having been passed. I must assume, therefore, that when the word 'judgment' is used it is intended to convey the idea of decree or order made by a person constituted by agreement of parties as a Court *ad hoc*. Assuming that this is so, I am unable to see how the matter is carried any further. Decrees and orders of a Court have to be executed by the Court and elaborate provisions are contained in the Civil Procedure Code regulating the procedure. It has not been contended before us that the provisions of Part II of the Code or Order XXI are applicable to awards by an arbitrator, and it would be a strange result that, whereas execution of a decree entitling a person to recover property has to be by delivery of the property specifically decreed under section 51, the award of an arbitrator should be a judgment and decree capable of passing property without delivery.

Another difficulty in the way of this contention is that no period of limitation would affect the efficacy of this judgment or decree. The only provisions in the Limitation Act which touch awards are Articles 45, 46 and 158. The first has a reference to a suit to contest an award, the second to a suit to recover any property comprised therein and the third to an application to set aside an award under the Second Schedule of the Civil Procedure Code. None of these Articles has any application.

The next difficulty is that the Code expressly provides a method by which an award made on a reference to arbitration without the intervention of the Court may become a judgment within the meaning of the Code. That is clause 21 of the second Schedule which provides for the Court pronouncing judgment and a decree following. On such a decree execution would follow and limitation would apply. This is, of course, the only method by which execution can be procured on an award, and that being so, I cannot see how an award on which a Court has not pronounced judgment and issued a decree can be a judgment capable of passing rights. In *Krishna Panda* v. *Baluram Panda* (8) the learned Judges used the phrase "an award duly passed in accordance with a submission of the parties is equivalent to a final judgment," but that language is only used as introductory to the proposition that 'to give effect to it the subsequent consent or approval of neither party is required.' I do not think that this *dictum* helps the appellant on this point. I am unable to find any other case in this Court where language of this sort has been used. The case of *Jadunath Chowdhury* v. *Kailash Chandra Bhattacharya* (6) was also relied upon. In that case an award on a private reference was held to be sufficient answer to a suit to recover property. Their Lordships did not, however, put it on the ground that the award operated as a judgment, but on the ground that the value of the property being under Rs. 100, the provisions of the Registration Act of 1908 did not prevent title passing. The case reported as *Sheo Narain* v. *Beni Madho* (7) has also no bearing on this point and nothing was said in it to suggest that the award was a judgment.

Reference was made to the English Law on the subject and I agree that if authority could be found in England for the proposition that an award on a voluntary reference operated as a judgment, the argument of the learned Vakil for the appellant would receive great support, for it must be borne in mind that under the English procedure a judgment is not merely a statement given by the Judge but is the formal adjudication on which execution arises. The authority is, however, all the opposite way. It would be sufficient to refer to section 12 of the Arbitration Act which deals with reference by consent out of Court, and provides that an award on such submission may, by leave of a Court or a Judge, be enforced in the same manner as a judgment or order to the same effect, a provision analogous to that contained in clause 16 of the Second Schedule to the Civil Procedure Code. It is common knowledge that the Courts of Law in England have in times past strenuously opposed the idea that the

parties could by an agreement between themselves oust the jurisdiction of the Court. The only method by which the arbitration proceedings could be made in any way efficacious for process by the Court was by making the submission a rule of Court. When that had been done, the Court would, in a proper case and on application made, enforce an award by attachment as proceedings in contempt. No formal execution for the recovery of the money or land would, however, issue even where a submission had been made a rule of Court, and of course far less so where there had been no rule. After the passing of the Judgments Act of 1838 the practice began, in cases where submission had been made a rule, of applying after the passing of the award to the Court for a rule calling upon the party to show cause why he should not pay the amount of the award (*vide* Russell on Arbitration, page 352) and on this rule execution would issue. An old case of *Owen* v. *Hurd* (17) is instructive on the difference between awards made without a rule of Court, and those with. In that case there had been a submission between A and B which had been made a rule of Court. The arbitrator had not, however, proceeded and C who was the person really interested agreed with B for a second arbitration and they appointed an arbitrator. This submission was, however, not made a rule of Court. On the arbitrator making the award, attachment was moved against one of the parties for not obeying the award. But the Court pointed out that the submission on which the award had been made had not been made a rule of Court and stated that the award was a mere nullity. This proposition may be too broad, but it is sufficient to dispose of any suggestion that such an award could operate as a judgment, while a modern case is indicative of the same idea even after the passing of the Arbitration Act. The case is *Bankruptcy Notice, In re* (18). A party to an arbitration procured an order under section 12 of the Arbitration Act that the award could be enforced in the same manner as a judgment, and then applied to the Registrar in Bankruptcy to issue a bankruptcy notice, he having served on the debtor a notice requiring him to pay the judgment-debt in accordance with the terms of the judgment as required by section 4 clause (*g*) of the Bankruptcy Act, 1883. The Court of Appeal upheld the Registrar's refusal to do so and Vaughan Williams, L. J., states the law as follows: "All that is done by section 12 of the Arbitration Act is to give the successful party under the award the right to enforce it as if it were a judgment. I have grave doubts whether there was any jurisdiction to enter judgment in this case," while Fletcher Moulton, L. J., says as follows: "The arbitration was one outside the Court altogether. The powers of the Court in such a case are defined by section 12 of the Act which provides that an award on a submission may by leave of the Court be enforced in the same manner. But it gives no power to turn such an award into a judgment". This expression of opinion as to the present state of the law even after the passing of the Arbitration Act is conclusive as to the view which the English Courts take as to the character of an award made on a voluntary submission. For the above reasons I am satisfied that even if an award is equivalent to a judgment for some purposes in the sense that it may have the same effect as a judgment has in barring suits, it is not a judgment in any real meaning of the word, far less is it a decree.

The next question is whether the award could pass title without any further action by the parties on any other footing. In my opinion, the appellant is entitled to succeed on this point, both on principle and on authority. The parties by their submission agreed to be bound by the decision of the arbitrator and constituted him their agent for the purpose of doing such things as are specifically or by implication embodied in the terms of the submission. This doctrine is laid down by Lord Ellenborough in *Hunter* v. *Rice* (19). In that case an arbitrator as on a voluntary submission had awarded that the tenant should deliver to the landlord certain hay stacked on the premises. The landlord, assuming that title

(17) (1788) 100 E. R. 346; 2 T. R. 643.

(18) (1907) 1 K. B. 478 at p. 481; 76 L. J. K. B. 171; 96 L. T. 131; 14 Manson 1; 23 T. L. R. 214.

(19) (1812) 15 East 100 at p. 102; 104 E. R. 782; 13 R. R. 394.

has passed to him, brought a suit against the tenant for coversion. The Court held that on the terms of the award no title passed and his remedy was on the award. Lord Ellenborough in delivering the judgment said as follows:—"There is a difference between property awarded to be transferred by the owner and property which is actually transferred by the contract of the owner through the medium of his agent". We have here, apart from the distinction, the foundation of an arbitrator's powers, namely, contract and agency. There are limitations to the exercise of these powers due to the formal requirements of the law, such as, in England, requirements of a conveyance by deed for land and, in India, the provisions of the Transfer of Property Act and the Registration Act, but outside these limitations it must be held that an arbitrator legally authorised can carry out the directions of the parties as their agent.

Apart from principle, there is abundant authority, *vide Subbaraya Chetti* v. *Sadasiva Chetti* (9) and *Somavalli Ammal* v. *Muthayya Sastrigal* (5). In this latter case the Court pointed out the same distinction as was the basis of the judgment in *Hunter* v. *Rice* (19). The language is: "The award does not provide for the execution of any instruments between the parties or the performance of any conditions precedent to the plaintiff's enjoyment of the land. In other words, the plaintiffs acquired under the award a complete title to the land on the date of the award and were entitled to take possession thereof from that date," and the same view was taken in *Sheo Narain* v. *Beni Madho* (7). For the above reason I think the appeal must succeed. It is to be noted that it was only ascertained in this Court that the property was under the value of Rs. 100; for the District Judge bases his refusal to accept the award as conferring title on the absence of a fully registered instrument, which have only reference to the requirements of section 54 of the Transfer of Property Act. I agree with the order proposed by my learned brother.

M. C. P.

Appeal allowed; Case remanded.

PRIVY COUNCIL.

CONSOLIDATED APPEALS FROM THE CALCUTTA HIGH COURT.

March 21, 1918.

Present:—Viscount Haldane, Sir John Edge, Mr. Ameer Ali and Sir Walter Phillimore, Bart.

BASUDEO ROY AND OTHERS—APPELLANTS

versus

Mahant JUGALKISHWAR DAS AND ANOTHER—RESPONDENTS

AND

RUPE LAL RAUT AND OTHERS—APPELLANTS

versus

Mahant JUGALKISHWAR DAS AND ANOTHER—RESPONDENTS.

Hindu Law—Religious endowments—Debutter—Asthal, *nature of—purchases out of* asthal *income, nature of—Alienation by guardian of minor* mahant *with leave of Court, whether binding on* asthal *property.*

The *mahant* of a Hindu *asthal* or *math* holds the property of the *math* in trust for the institution itself. He can only alienate it in case of necessity. [p. 821, col. 2]

Acquisitions with the income of an *asthal* are subject to the same trust as the original property. [p. 821, col. 2]

In the absence of such necessity as would render the debts contracted by him binding on the institution, a *mahant* has no power to alienate its properties for the purpose of discharging those debts and if the *asthal* is not liable for such debts, the successor of the *mahant* is entitled to have the alienations set aside. [p. 822, col. 1.]

J., a *mahant*, appointed the first respondent, a minor, his successor and left a Will whereby he appointed *C.* guardian of the first respondent. *J.* had mortgaged the *asthal* property. The mortgagees after his death brought or threatened proceedings on the mortgages. To pay off these liabilities *C.* obtained from the District Judge leave to sell certain of the *asthal* properties

Held, that *C.*'s powers could not be larger than those of the actual *mahant* and that in the absence of proof that the original debts were binding on the *asthal*, the sales must be set aside [p. 822, col. 1.]

Consolidated appeals from two decrees of the Calcutta High Court, dated the 22nd July 1913, reversing those of the District Judge, Darbhanga.

FACTS of the case are sufficiently stated in their Lordships' judgment.

The present Mahant of an *asthal* sued to set aside certain alienations of *asthal* property made during his minority by his guardian appointed by the Will of the former Mahant. The Trial Judge dismissed the suits, holding that necessity for the alienations was proved: the High Court (Chitty and Teunon, JJ.) reversed this decision and decreed the suits. Hence this appeal.

BASUDEO ROY v. JUGALKISHWAR DAS.

Sir *W. Garth*, for the Appellants —These are suits to set aside alienations made by an executor with the leave of the Court. They are founded on allegations of fraud: plaintiff knew he could not succeed without such allegations; but no fraud is proved. The property alleged to be *debutter* was not really such; on the proper construction of the *sanads* and on the other evidence the truth is that it was held in beneficial ownership by the successive Mahants, subject only to a trust to devote a part only of the income to feeding mendicants. The powers of the guardian of an infant heir are set out in *Hunoomanpersaud Panday* v. *Musammat Babooee Munraj Koonweree* (1). The authority of the *sebait* of an idol or of a Mahant are similar: *Prosunno Kumari Debya* v. *Golab Chand Baboo* (2). The Mahant is estopped by what the executor has done if it was done *bona fide*.

[VISCOUNT HALDANE referred to *Attenborough* v. *Solomon* (3).]

Reference was also made to *Palaniappa Chetty* v. *Sreemath Deivasikamony Pandara Sannadhi* (4).

As to how far the compromise with the mortgagees is binding on the present Mahant, see *Hossein Ali Khan* v. *Mahanta Bhagaban Das* (5).

The property here is not really *debutter*. There is no suggestion that it was dedicated to an idol or idols, there is no mention of idols in the *sanads*.

[Mr. AMEER ALI.—It will be difficult to show that in all such cases there must be an idol to which Bairagis come.]

The District Judge held himself bound by *Sheo Shankar Gir* v. *Ram Shewak Chowdhri* (6), but that case is distinguishable: the grant there was to a Mahant, while here the grantee was only a Gossain, though he was called a Mahant later: further, the grant here is not entirely for maintenance.

Even assuming that the property is *debutter*, still if a Mahant sells *bona fide* his successor is bound. If the executor acts without fraud or collusion, he is in exactly the same position as the Mahant.

Reference was also made to *Nanda Lal Dhur Biswas* v. *Jagat Kishore Acharjya* (7) and *Murugesam Pillai* v. *Gnana Sambanda Pandara Sannadhi* (8).

Mr. *DeGruyther*, *K.C.* (with him Mr. *Dube*), for the Respondents.—If the mortgagees' decrees were not binding on the present Mahant, no amount of pressure under them would justify the sales. We say neither the decrees nor the mortgages on which they were based were binding. A person in charge of *asthal* property who desires to mortgage, whether as manager or guardian, must show necessity; and in the case of a *math* the necessity must be the necessity of the institution itself, not of the incumbent. The onus is on the person dealing with a qualified owner to show one of two things:—

1. Actual necessity, or
2. that he made a proper enquiry, which led him to believe there was necessity.

There is no proof of either in the present case, and the High Court were right, therefore, in setting aside the sales.

JUDGMENT.

MR. AMEER ALI.—These two consolidated appeals from a judgment and two decrees of the High Court of Calcutta, bearing date the 22nd July 1913, arise out of two suits brought by the plaintiff-respondent in the Court of the Subordinate Judge of Darbhangah on the 8th July, 1907. The object of both suits was to recover possession of certain landed property alleged to have been improperly alienated during the plaintiff's minority by one Chattar Pandey, purporting to act as his guardian.

The facts on which the two actions are based are fully set forth in the judgment

(1) 6 M. I. A. 393; 18 W. R. 81 *note*; Sevestre 253 *n*; 2 Suth. P. C. J. 29; 1 Sar. P. C. J. 552; 1 E. R. 147.

(2) 2 I. A. 145 at p. 151; 14 B. L. R. 450; 3 Sar. P. C. J. 444; 23 W. R. 253; 3 Suth. P. C. J. 102 (P. C.).

(3) (1913) A. C. 76; 82 L. J. Ch. 178; 107 L. T. 833; 57 S. J. 76; 29 T. L. R. 79.

(4) 39 Ind Cas. 722; 40 M. 709; 21 C. W. N. 729; 15 A. L. J. 485; 1 P. L. W. 697; 33 M. L. J. 1; 19 Bom. L. R. 567; 22 M. L. T. 1; (1917) M. W. N. 477 and 597; 26 C. L. J. 153; 6 L. W. 222 (P. C.).

(5) 34 C. 249 at p. 255; 11 C. W. N. 261; 6 C. L. J. 442.

(6) 24 C. 77 at p. 80; 12 Ind. Dec. (N. S.) 717.

(7) 36 Ind. Cas. 420; 43 I. A. 249; 20 M. L. T. 335; 31 M. L. J. 564; (1916) 2 M. W. N. 336; 4 L. W. 458; 18 Bom. L. R. 868; 14 A. L. J. 1103; 24 C. L. J. 487; 1 P. L. W. 1; 30 C. W. N. 225; 44 C. 186; 10 Bur. L. T. 177 (P. C.).

(8) 49 Ind Cas. 650; 44 I. A. 98; 21 M. L. T. 288; 32 M. L. J. 369; 15 A. L. J. 281; 1 P. L. W. 457; 5 L. W. 759, 21 C. W. N. 761; 40 M. 402, 19 Bom. L. R. 456; 25 C. L. J. 589; (1917) M. W. N. 487 (P. C.).

of the High Court. It is not necessary, therefore, to give more than a bare outline.

The plaintiff-respondent is admittedly the present Mahant of the Bairagi *Asthal* of Lowthwa, in the district of Darbhangah. His predecessor, Janki Das, died in 1894. Before his death he appears to have appointed the plaintiff (his nephew by blood relationship) his successor to the office of Mahant, and it is alleged, and not controverted, that his nomination was confirmed, in accordance with the custom governing the succession to the Mahantship, by the Mahants of the neighbouring *asthals*. It is not disputed that at the time of Janki Das's death the plaintiff was a minor and that in consequence thereof Janki Das had, by a testamentary document executed shortly before, appointed Chattar Pandey as his guardian. Chattar obtained probate of Janki's Will on the 6th February 1894; and from that time purported to act as the guardian of the minor and manager of the *asthal* property.

It is quite clear that for some years before his death Janki Das was heavily involved in debt. On the 29th January 1885 he had executed a mortgage in favour of one Tej Narain Roy in respect of six annas of the village of Majhowra for Rs. 5,500. On the 31st May 1889 he had created a mortgage in favour of one Ram Narayan Roy, in respect of four annas of Majhowra for a sum of Rs. 3,500; and a third also in favour of Ram Narayan for Rs. 2,605 on the 17th May 1892, in respect of another share of the same village. All three mortgages were outstanding at the time of his death, though on the first a sum of Rs. 9,000 is said to have been repaid, leaving a balance of something like Rs. 6,000. For the realisation of this amount, the defendants to the first action, who are representatives of Tej Narain Roy, the mortgagee under the first deed, brought a suit on the 20th February 1899, against the present plaintiff as the legal representative of Janki Das. The plaintiff (defendant to that action), being a minor at the time, was sued as such under the guardianship of Chattar Pandey. Before, however, any defence was entered, Chattar entered into a compromise with the mortgagees by which, in consideration of the remission by them of Rs. 600, he consented on behalf of the minor to a mortgage decree against the six-annas share of the village of Majhowra that had been mortgaged to Tej Narain Roy. The decree of the Subordinate Judge embodying the terms of the compromise bears date the 27th April 1899.

Three years later, on the 16th June 1902, Ram Narayan Roy brought a suit on the second mortgage for the realisation of this debt, which ended similarly in a decree based on a compromise entered into by Chattar Pandey. This decree bears date the 21st July 1902. Subsequently Ram Narayan Roy obtained a decree absolute for sale, and in fact initiated proceedings to have the mortgaged property sold under process of the Court.

It is stated that, although no proceedings had actually been taken to enforce the third mortgage, an action was threatened, and in consequence thereof an agreement was arrived at between the creditors and Chattar Pandey.

In order to pay off these liabilities Chattar Pandey, on the 19th July 1905, applied to the District Judge of Tirhoot for leave to sell an eight-anna share of the village of Majhowra to the two sets of purchasers whose sales are impugned in the present suits, one of whom was in fact the representative of the original mortgagee; and on the 12th August 1915 obtained the sanction prayed for. On the 19th of the same month Chattar executed in favour of the appellant Basudeo Roy and his brothers a deed of sale in respect of six annas; and in favour of the appellants in the second appeal a deed in respect of two annas of the village.

The plaintiff sues to have these sales set aside on the allegation that the property forming the subject-matter of the present actions was *debutter*, or endowed property, and that neither Janki Das nor Chattar Pandey had any right or power to encumber or alienate it. He further charges that there was no valid necessity for the alienation, nor were the debts of Janki Das binding on the property of the *asthal*. The defendants controverted both allegations, and the parties went to trial on two simple issues: *firstly*, whether the property was *debutter*, and consequently subject to rules governing religious or charitable endowments, and, *secondly*, whether there was any such justifying necessity as

would render its alienation valid under the Hindu Law.

Both the Courts in India found that the property was acquired with the funds of the institution, and was *debutter*, but they have differed on the question of necessity. The Trial Judge was of opinion that the defendants—the purchasers under the two deeds of sale which the plaintiff seeks to set aside—had sufficiently established a legal necessity of a pressing kind " to justify the alienations made by him, " and he accordingly dismissed both suits. On appeal, the learned Judges of the High Court of Calcutta, on the issue of valid and justifying necessity, came to an opposite conclusion, and in that view decreed the plaintiff's claim.

Before this Board Counsel for the defendants assailed the findings of the High Court on both points. He contended that under the grant to which reference will be made presently the Mahant for the time being is absolutely entitled to the income of the property attached to the *asthal*, and that any property bought out of such income became the personal property of the Mahant. And he argued in the alternative that, even if the property were to be regarded as part of the *asthal* property, the facts proved in the case amply established pressing legal necessity as found by the Trial Judge.

Their Lordships have, therefore, to examine, in the first place, the character and scope of the original grant to the founder of Lowthwa *Asthal*. The nature of these institutions and the circumstances under which they come into existence are described in the judgment of this Board in *Ram Parkash Das* v. *Anand Das* (9). " An *asthal*, commonly known in Northern India as a *math*," says Lord Shaw, who delivered the judgment of the Board—" is an institution of a monastic nature. It is established for the service of a particular cult, the instruction in its tenets, and the observance of its rites ... ... The Mahant is the head of the institution. He sits upon the *gaddi* ; he initiates candidates into the mysteries of the cult ; he superintends the worship of the idol and the accustomed spiritual rites: he manages the property o the institution ; he administers its affairs : and the whole assets are vested in him as the owner thereof in trust for the institution itself. "

And Lord Shaw went on to add:—

" The nature of the ownership is, as has been said, an ownership ... for the *math*, or institution itself, and it must not be forgotten that, although large administrative powers are undoubtedly vested in the reigning Mahant, this trust does exist and... must be respected. "

The grant in the present case is set out *in extenso* in the judgment of the High Court. It is an ordinary *birt*, or charitable and religious grant, by a pious Hindu Raja to a Hindu *gossain* (Batran Das). The following words clearly show that, though the property was granted to an individual, it was burdened with an explicit and unambiguous trust :—

" Mouzah, with boundaries, you will, at ease of mind, make cultivation and settlement of, and making distribution out of the proceeds that may arise among *sadhus* and *sants* (holy and religious men) , you with your disciples and companions will enjoy (the remainder) without any anxiety. Knowing this to be a grant made for the love of the deity named above, no one will offer any opposition. "

The subsequent confirmation of this grant in 1786 by one of the successors of the original grantor removes all doubts and ambiguity as to the meaning of the grant. By that time the present *asthal* had sprung up, and the *guru* or preceptor had become the head of an institution with a seat af honour (the *gaddi*). The *asthal* was henceforth an institution devoted to the cult of the worshippers who congregated there. Their Lordships concur with the learned Judges of the High Court and the Trial Judge that the village of Lowthwa attached to the *asthal* is endowed property subject to the trust set out in the grant, and that all acquisitions with the income thereof are subject to the same trust. This being their Lordships' view regarding the character of the village in suit, the next question is : Have the defendants discharged the onus which rests on them to establish justifying necessity? Chattar Pandey, whether acting as executor to the Will of Janki Das or as guardian of

(9) 33 Ind. Cas. 583; 43 I. A. 73, 20 C. W. N. 802; 14 A. L. J. 621; (1916) 1 M. W. N. 403; 31 M. L. J. 1; 18 Bom. L. R. 490; 3 L. W. 556; 24 C. L. J. 116; 43 C. 707; 20 M. L. T. 267 (P. C.).

the minor Mahant, cannot be said to have possessed larger powers than the actual Mahant, and the validity of his transaction in relation to the *asthal* property must be judged by the same rules as apply to the acts of the *de jure* head of the institution. In the absence of a necessity which would make the debts contracted by him binding on the institution, the Mahant has no power to alienate its properties for the purpose of discharging those debts, and if the *asthal* was not liable for such debts, his successor would be clearly entitled to have the sales set aside. *A fortiori*, the same considerations apply to the dealings of Chattar Pandey.

Although the defendants throughout appear to have contended that Majhowra was the personal property of Janki Das, upon the facts proved there can be no doubt they must have known that it was part of the *asthal* property. It is contended that the mortgages, for the discharge of which the sales now impugned were effected, were executed by Janki Das for the satisfaction of some older debts. There is no evidence that the defendants made any enquiry as to the character of those debts, whether they were incurred for the benefit of the *asthal*, or for the benefit of Janki Das, in his capacity as Mahant. It is in evidence that Janki Das was a man who did not live up to the standard of the community to which he belonged, and of which he was the head. There is nothing to show that any portion of the monies borrowed in the first instance went for purposes which would make them binding on the *asthal*. On the whole, their Lordships concur with the reasons given by the learned Judges of the High Court in holding that the defendants in these suits have wholly failed to establish any justifying necessity for the sales by Chattar Pandey; and they are of opinion that these appeals should be dismissed with costs. They will humbly advise His Majesty accordingly.

Appeals dismissed.

Solicitors for the Appellants: Messrs. *T. L. Wilson & Co.*

Solicitors for the Respodonts: Messrs. *Watkins* and *Hunter*.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No 54 OF 1917.

April 29, 1918.

Present:—Sir Daniel Twomey, KT., Chief Judge and Mr. Justice Maung Kin.

DAVID M. BRUCE AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

MG. KYAW ZIN—DEFENDANT—RESPONDENT.

Master and servant—Liability of master for servant's wrong—Principal and agent—Agent, authority of, limit of—Burden of proof—Evidence Act (I of 1872), s. 106.

A master is answerable for every such wrong of his servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved. [p. 826, col. 2.]

The owner of a vessel is not liable *qua* owner for damage caused by the negligence of the crew. He is liable only as employer of the wrong-doer. [p. 824, col. 2.]

In a case where the question is whether a particular act was or was not within the scope of an agent's employment, the burden of proving the limit of the agent's authority is on the principal, inasmuch as the character of the authority is a matter specially within the knowledge of the latter. [p. 824, col. 2.]

Appeal against the decree of the Original Side of this Court, in Suits Nos. 219 and 220 of 1915.

Mr. *Lentaigne*, for the Appellants.

Mr. *Vakharia*, for the Respondent.

JUDGMENT.

TWOMEY, C. J.—These appeals which were heard together arise out of two suits in which the plaintiffs-respondents (1) Messrs. Walker and Whyte, Ltd., and (2) Mr. and Mrs. Bruce claimed damages from the defendant-respondent Mg. Kyaw Zin on account of a collision between Kyaw Zin's motor launch "Handy" and Walker and Whyte's "Triad" on the evening of the 7th January 1915 in the Kanoungto Creek. The Triad's bows were smashed and she sunk and Mr. and Mrs. Bruce who were crossing in the Triad to the Rangoon side had to swim for their lives. The collision was admittedly caused by the negligence of Haidayut Ali, the Serang of the Handy. His certificate was afterwards suspended and he was also prosecuted and punished under the Indian Penal Code. Kyaw Zin, the owner of the Handy, lives at Kya In, a village in the delta about 7 hours' journey from Pyapon. The launch was used by him to ply with goods and passengers in the delta. He sent it in July 1914 to

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Messrs. G. Nichols and Co., Marine Contractors, Rangoon, to have a new engine put in. In November Nichols wrote that the new engine was ready and asked Kyaw Zin to send Rs. 4,000, the amount agreed upon. Kyaw Zin sent his young cousin Klai Po to Rangoon to pay the money and bring the launch to Pyapon. She was not brought back at once. She was hired out with a crew of a Serang and engine driver, first to the Arracan Co. for 18 days at Rs. 500 a month and subsequently to Messrs. Steel Bros., Ltd., at Rs. 15 a day. She had been only for 2½ days with Steel Bros. when the accident occurred. The plaintiffs' case in both suits is that Klai Po was Kyaw Zin's agent, that the crew were engaged by Klai Po, that the launch was hired out by Nichols as broker for Klai Po to Steel Bros. and that Kyaw Zin is responsible as owner of the launch and as Klai Po's principal for the results of the Serang's negligence. The defendant-respondent Kyaw Zin has not been consistent in his defence. In a letter, Exhibit 5, written by his legal adviser Mr. Broadbent two months after the accident, it is said that Klai Po without authority from Kyaw Zin hired out the launch to Nichols and that it was Nichols who engaged the crew and that he let out the launch on his own account to the Arracan Co. and afterwards to Steel Bros. In his written statement Kyaw Zin takes up a different position, *viz.*, that Nichols having possession of the launch hired it out without any authority. The written statement does not refer to Klai Po at all. When examined at the hearing Kyaw Zin at first said that Klai Po came back to Kya In in December for a few days and left word that he had hired out the launch to Nichols, but when the evidence was read over to Kyaw Zin he altered this statement and said Klai Po left word merely that "Nichols had hired out the launch." Klai Po in his evidence said that Nichols asked him to hire the launch to him but that they did not agree about the rate of hiring. He denied that the Serang and engine driver were engaged by him and denied also that the launch was hired by his authority to Steel Bros.

The learned Judge found that it was Klai Po who engaged the crew and also that Klai Po hired out the launch to Steel Bros. through Nichols as broker. But the Judge held that Klai Po was employed by Kyaw Zin merely as a clerk and that he had no authority to hire out the launch and that in hiring it out he acted beyond the scope of his employment. The Judge added: "To hold otherwise means to hold that he had powers of management and was in fact the agent of defendant for which there was no justification." The plaintiffs' suits were, therefore, both dismissed.

It is urged for the defendant that this decision is right if it be assumed that the crew was engaged and the launch hired out by Klai Po, but we are asked to go further and hold on the evidence produced that Klai Po did not engage the crew and that if he did hire out the launch he hired it only to Nichols, who thereupon engaged the crew and sublet the launch on his own account. Klai Po is clearly not a truthful witness and Nichols has a strong motive for supporting the view that he himself acted merely as a broker. The documentary evidence is very much against the defendant. Nichols' salary book Exhibit R, which appears to be kept regularly, does not show that Haidayut Ali and Tha Maung the Serang and engine driver were employed by Nichols during the material period November 1914 to January 1915. If these men were engaged by Nichols for the period in December when the launch was hired out to the Arracan Co. and the period in January when she was hired out to Steels, their names, salary and acquittances would probably appear in this book in the ordinary course of business. It is true that Chinasawmy Pillay, who was at that time a clerk of Nichols, refers at the end of his evidence to another book, an "engagement book", as showing for what periods Nichols' men were employed. But in an earlier part of his evidence this witness says there is no other establishment book except Exhibit R and that this is the only book by which he could say who the employees were. This witness says that receipts for salary were sometimes taken on slips of paper and not in the book. He supports the defendant's case that it was Nichols who engaged the crew and says that so far as he knows, Nichols had no authority from Klai Po to hire out the launch. But Chinasawmy is unfriendly to

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Nichols. He is now a rival in the stevedoring business. He admits that he left Nichols partly "because he could not put up with his ways and manners" and that he afterwards wrote to a Liverpool firm with which Nichols had business a letter, Exhibit Q, in which he tried to injure Nichols and get the English firm's business in Rangoon away from Nichols. It seems to me, Exhibit R must be regarded as strong negative evidence against the defendant. Tha Maung (P. W. No. 8) himself said that he was engaged by the clerk Klai Po and worked for him as engine driver on the Handy for over two months and was paid by him altogether Rs. 75 or Rs. 80. But Tha Maung's evidence must be accepted with considerable reserve as he is a nephew of Mrs. Nichols. Klai Po admits that he paid Tha Maung Rs. 30 but says he took him on only after the collision. He admits, however, giving Tha Maung a certificate Exhibit B on 1st February, in which he says that Tha Maung worked for him for three months. Then we have Exhibit 5 in which there is a clear admission that Klai Po paid off the crew, though it is said that Nichols induced him to do so "taking full advantage of his simplicity and ignorance of business." Kyaw Zin gives Klai Po's age as 20; but Klai Po himself owns to nearly 24, and he has a fair knowledge of English as he passed the 8th standard. After the collision he signed the receipts Exhibits D and E for the hire of the launch by the Arracan Co. and Steels and in each of these receipts the transaction appears as a hiring out by Nichols as broker on behalf of Maung Kyaw Zin. These are both signed "E. T. Klai Po, for Mg. Kyaw Zin." We are asked to believe that this is only another instance of Nichols' superior cunning and Kali Po's ignorance and simplicity, but it is hardly likely that Klai Po signed the receipts without reading them and without noticing that Nichols figured in them merely as a broker. On the evidence there can be no reasonable doubt that it was Klai Po who engaged the crew and that Nichols was authorized by him to hire out the launch to the Arracan Co. and to Steels.

It remains to consider whether the Judge was right in absolving the defendant on the ground that Klai Po acted beyond the scope of his employment in hiring out the launch through Nichols. The owner of a vessel is not liable *qua* owner for damage caused by the negligence of the crew. He is liable only as employer of the wrong-doer. The wrong-doer in this case, *i. e.*, Serang was employed by Klai Po. The Judge considered that there was no justification for holding that Klai Po was an agent of the defendant. In this Court Mr. Vakharia for the defendant does not go so far as this. He only urges that Klai Po in his capacity of clerk was an agent with strictly limited authority. I think it is for the owner to show clearly the character of Klai Po's agency and to prove that Klai Po exceeded his authority by hiring out the launch at Rangoon. The burden of proof on this point lay on the defendant according to the principle of section 106, Evidence Act, for the character of Klai Po's authority was a matter specially within the principal's knowledge. We cannot rely on the evidence of either Kyaw or Klai Po. They have contradicted themselves and one another and their evidence conflicts in material particulars with the statements made on Kyaw Zin's instructions in Exhibit 5. It is clear on Exhibit 5 that Klai Po was sent to Rangoon to take delivery of the launch and bring her to Pyapon, and Klai Po admits that he did bring her to Pyapon after the collision, having hired a Serang under Kyaw Zin's express instructions. Kyaw Zin has a brother Kya Zin also called Mg. Di, and Klai lives with the two brothers who are related to him as second cousins once removed, but he calls them both his "uncles". Kya Zin as well as Kyaw Zin had a launch. It was called the Admire. Klai Po admittedly looked after it. It was Klai Po who started negotiations with Nichols for the purchase of the Admire. He went to Pegu with Nichols and saw the launch there and liking the look of her took her to Kya Zin, who then bought her. After the collision Klai Po had the Handy repaired at Rangoon, meeting the costs of the repairs out of the money received from the Arracan Co. and Steels. During this time he also applied to the Port Commissioners on behalf of his principal Kyaw Zin for license to ply the launch for hire. The engine-driver Tha Maung says that before return-

ing to Pyapon after the collision the launch was again hired by a broker and taken to a village beyond Kyauntan and that Klai Po directed him, Tha Maung, to go there with the launch, but Klai Po denies this hiring also. After returning to Pyapon the launch was plied for about 6 months in the delta and Klai Po was on the launch during the greater part of this time. According to Kyaw Zin he was on her for about 5 months out of the 6. Kyaw Zin says that Klai Po was on the launch to look after the money and that he was only acting as a clerk. Klai Po himself says that he did not act as a clerk and he does not say in what capacity he was on the launch, except that he washed the launch when it was dirty. He got no pay. It is a legitimate inference that at this time at any rate, *i. e.*, after the collision, he was looking after the Handy for Kyaw Zin as he had previously looked after the Admire for Kya Zin. He was evidently regarded by the Police as the person in charge of the launch, for he was arrested and kept in custody for a week or more when the Handy collided with a Sampan in the delta. As a matter of fact it seems likely that Kya Zin and Kyaw Zin were in partnership in the launch business, though Klai Po says that they were only planning to work together. Klai Po wrote and signed several letters about the launches for both the brothers. Several letters are produced written by Klai Po and signed by him for Kyaw Zin. Exhibits L, M, N, O are signed "Kyaw Zin Bros." while one letter, Exhibit P, is signed "Mg. Kyaw Zin Sagun" Mg. Sagun being the father of the two brothers.

Kyaw Zin and Klai Po would have us believe that Klai Po's principal object in going to Rangoon was to get employment for himself and that Kyaw Zin seized the opportunity of his going to Rangoon to send the Rs. 400 to Nichols. It is clear, however, that Klai Po remained at Rangoon only as long as the launch was plying there and then returned with her to his village after carrying out the repairs rendered necessary by the collision and obtaining a plying license from the Port Commissioners. The admissions of the defendant and Klai Po and the circumstances are, in my opinion, entirely inconsistent with the view taken by the learned Judge as to the nature of Klai Po's employment. The facts appear to me to show that Klai Po, being the best educated member of the family, was entrusted with a wide degree of control at Rangoon in the absence of Kyaw Zin. The very fact that he was paid no salary is significant. Kyaw Zin deputed him to bring the launch from Rangoon, which would necessarily involve hiring a crew. When Nichols proposed that the launch should be hired out in Rangoon, it seems probable that Klai Po readily agreed to the proposal. The launch had admittedly been plying at a loss in Pyapon—*vide* Kyaw Zin's evidence—and the opportunity of lucrative employment at Rangoon would no doubt be acceptable to Kyaw Zin. Klai Po admits that he did not communicate Nichols' proposal to Kyaw Zin at all. He probably thought that there could be no doubt as to his principal's approval. When he went back to Kya In for a few days in December, he left word for Kyaw Zin who was absent that the launch was being hired out at Rangoon. Kyaw Zin says that after receiving this message he wrote to Klai Po to tell Nichols to send the launch back to Pyapon at once. But he admits that he did not write until two weeks after Klai Po's return to Rangoon and a week after his own return to Kya In. Klai Po, on the other hand, denies that he received any letter from Kyaw Zin, but says he did receive a verbal message from him on the day of the collision to the effect that the launch should be sent back. It is clear at any rate that Kyaw Zin expressed no disapproval of the hiring out at Rangoon. When the plaintiffs demanded compensation through their lawyers, Kyaw Zin visited Mr. Bruce and asked him to let him off. So far from disclaiming responsibility for the accident he offered to give up his own launch the Handy and his brother's launch "Admire" by way of compensation. The inclusion of the Admire in this offer lends colour to the suggestion that the two brothers were really in partnership, though it may have been that Kyaw Zin only counted on obtaining the consent of Kya Zin to sacrifice the Admire.

BRUCE, D. M. *v.* KYAW ZIN.

I would hold that the defendant failed entirely to prove that Klai Po was a mere clerk with no powers of management and that on the contrary the evidence is sufficient to show that Klai Po had considerable powers of control at Rangoon. He was sent there to bring the launch to Pyapon. He had to get a license from the Port Trust, to hire a crew, and to buy petrol for the launch. While at Rangoon he saw that it would be to his employer's benefit to hire out the launch there and that he did so apparently without consulting the owner or thinking it necessary to do so. But he was acting for the owner's benefit and he evidently considered it so much a matter of course that he did not inform Kyaw Zin of what he was doing until he went back to the village some weeks later, and even then he only left a casual message that the launch had been hired out at Rangoon. It is unlikely that Klai Po would have acted in this manner if his authority from Kyaw Zin was not wide enough to let out the launch at all. Kyaw Zin's inaction on hearing of the letting out, his apparent acquiescence in what Klai Po had done, suggests that Klai Po had in fact the necessary authority. The relations between Klai Po and his two uncles and the admissions of Klai Po as to his connection with the Admire and the Handy strongly support this inference. It is instructive to remember that an interval of about three weeks elapsed between the time that Klai Po went to Rangoon for the launch and the time in December when he returned to the village for a few days. If he had no authority from Kyaw Zin except to go and fetch the launch, Kyaw Zin would probably have written or sent a message enquiring the reason of delay in bringing the launch to Pyapon. His inaction leads to the inference that he had constituted Klai Po his representative and agent for the purpose of dealing with the launch and that it was left to Klai Po either to bring the launch back at once or to deal otherwise with it as might seem profitable. The case falls within the general rule laid down by Lord Justice Willes in *Barwick* v. *English Joint Stock Bank* (1): "The general rule is, that the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved. That principle is acted upon every day in running down cases. It has been applied also to direct trespass to goods, as in the case of holding the owners of ships liable for the act of masters abroad improperly selling the cargo. It has been held applicable to actions of false imprisonment, in cases where officers of Railway Companies, intrusted with the execution of bye-laws relating to imprisonment, and intending to act in the course of their duty, improperly imprisoned persons who are supposed to come within the terms of the bye-laws. It has been acted upon where persons employed by the owners of boats to navigate them and to take fares have committed an infringement of a ferry, or such like wrong. In all these cases it may be said, as it was said here, that the master has not authorised the act. It is true, he has not authorised the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in."

I would set aside the decrees of the Original Side in both cases and would record a finding in favour of the plaintiffs on the 1st issue and remand the suits for further enquiry as to the amount of damages in each case and for final disposal. The costs of the appellants in this Court should be borne in both cases by the defendant.

MAUNG KIN, J.—I concur.

Decrees set aside;
Case remanded.

(1) (1867) 2 Ex. 259 at p. 265; 36 L. J. Ex. 147; 16 L. T. 461; 15 W. R. 877.

JOYTI PRASHAD SINGH DEO BAHADUR v. KUMUD NATH.

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

March 21, 1918.

Present:—Viscount Haldane, Lord Dunedin, Lord Sumner, Sir John Edge and Mr. Ameer Ali.

Raja JOYTI PRASHAD SINGH DEO BAHADUR—APPELLANT

versus

KUMUD NATH CHATTERJI AND OTHERS—RESPONDENTS.

Bengal Patni Taluks Regulation (VIII of 1819), s. 14, proceedings under—Money paid to stop sale, whether recoverable—Collector, powers of—Chota Nagpur Encumbered Estates Act (VI of 1876), applicability of, to immoveable property outside Chota Nagpur.

In proceedings under section 14 of the Bengal Patni Taluks Regulation, 1819, the Collector acts not in a judicial but in a ministerial capacity. Those who pay money under such proceedings are not in the same position as persons who pay a claim brought against them in an ordinary suit which they have a full opportunity of resisting and who, not having availed themselves of such opportunity then, are debarred from doing so hereafter. Whether or not he contests the claim, a *talukdar* to stop a sale under section 14 has to deposit the full amount claimed and such deposit does not preclude him from thereafter raising the question of title in an ordinary suit. [p. 829, col. 2.]

The Chota Nagpur Encumbered Estates Act, 1876, has no application to immoveable property outside the limits of Chota Nagpur [p. 830, col. 2.]

Bhicha Ram v. *Bishambar Nath*, 17 Ind. Cas. 957; 16 C. L. J. 527; 17 C. W. N. 754, approved.

Appeal from a decree of the Calcutta High Court, dated July 23, 1914, and reported in 27 Ind. Cas. 526, affirming a decree of the Subordinate Judge, Burdwan.

FACTS of the case are sufficiently set out in their Lordships' judgment.

Respondents sued to recover sums paid by them to appellant in proceedings taken by the latter under the Patni Taluks Regulation to realise arrears of Patni rent; they alleged that no such arrears were due. Appellant contended that the mortgage bond executed by his predecessor, under which the Patni rents were set off against the interest due to the plaintiffs under the mortgage, had been paid off by the manager appointed under the Chota Nagpur Encumbered Estates Act, 1876, and also that plaintiffs could not recover the sums paid, as even if not legally due, those sums were paid voluntarily, or if not voluntarily, under stress of legal proceedings in which the plaintiff had not chosen to defend himself. The Subordinate Judge overruled these contentions and decreed the suit and his decree was affirmed by the High Court. Defendant appealed.

Messrs. *Upjohn, K.C., De Gruyther, K. C.*, and *J. M. Parikh*, for the Appellant, submitted that this was a case for money had and received, and that money having been paid under stress of legal proceedings, plaintiffs could not recover. The Raja issued notice under section 8 of the Regulation: respondents had it in their power to take summary proceedings under section 14, and in such proceedings the validity of the Raja's claim would have been decided. They failed to raise in any such proceedings the question whether the mortgage was discharged, and they cannot raise it now.

Marriott v. *Hampton* (1), *Moore* v. *Fulham Vestry* (2).

[The Board referred to *Cooper* v. *Phibbs* (3) and *Beauchamp (Earl)* v. *Winn* (4) and observed that the question was whether the respondents knew their rights when they paid. It seemed they did not discover their rights till afterwards. Could they not then sue?]

We submit, not. There is no evidence of any mistake at all; if they made any mistake, it was as to the construction of a General Act (the Chota Nagpur Encumbered Estates Act) and that is a mistake of law, not of fact; it is a mistaks as to *lex*, not as to *jus privatum*.

Reference was made to *Dulichand* v. *Ramkishen Singh* (5) and *Kanhaya Lal* v. *National Bank of India Ltd.* (6).

The lands concerned are outside Chota Nagpur, but the application of Act VI of 1876 is not limited to lands in Chota Nagpur. Section 2 vests in the manager appointed under the Act all the immoveables of the landholder wherever situate and all immoveables which may be acquired by or devolve on him or his heirs. The acquisition or devolution of the property is not confined to property situated in Chota

(1) (1797) 7 T. R. 269.

(2) (1895) 1 Q. B. 399; 64 L. J. Q. B. 226; 14 R. 343; 71 L. T. 862; 43 W. R. 277; 59 J. P. 596.

(3) (1867) 2 H. L. 149; 16 L. T. 678; 15 W. R. 1049.

(4) (1873) 6 H. L. 223; 22 W. R. 193.

(5) 8 I. A. 93; 7 C. 648; 4 Sar. P. C. J. 245; 5 Ind. Jur. 402; 3 Ind. Dec. (N. S.) 966 (P. C.).

(6) 18 Ind. Cas. 943; 40 I. A. 56; 17 C. W. N. 541; (1913) M. W. N. 476; 13 M. L. T. 406; 11 A. L. J. 413; 17 C. L. J. 479; 15 Bom. L. R. 472; 184 P. L. R. 1913; 25 M. L. J. 104; 40 C. 598 (P. C.).

Nagpur. Under section 3 the bar as to process in respect of debts and liabilities extends to all Courts in British India. Debts must include secured debts: there is nothing in the context to limit the generality of the provision. The disability as to contract is extended to the landholder's heirs. Appellant's contention is borne out by a review of the whole Act, and a consideration of the purpose which the Act was intended to effect. If unsecured creditors are barred all over British India, why should secured creditors outside Chota Nagpur escape? We admit the contrary view has been taken in *Bhicha Ram* v. *Bishambar Nath* (7), but that case was wrongly decided.

Messrs. *Dunne*, *K. C.*, and *Ramsay*, for the Respondents, were not called on.

JUDGMENT.

VISCOUNT HALDANE.—This is an appeal from a decree of the High Court, Fort William in Bengal, affirming a decree of the Subordinate Judge of Burdwan. The respondents as plaintiffs brought a suit to recover Rs. 6,848-8-0, being the amount of Patni rents for the years 1902—1910 paid by them, as they alleged, although not due, in order to save their lands from sale under the powers conferred on Zemindars by section 14 of Regulation VIII of 1819.

The appellant, on whose behalf as having rights conferred on a Zemindar, it had been proposed to put the power of sale in force, contended, in the first place, that the money could not now be recovered, on the ground that even if not legally due it was paid voluntarily, or, if otherwise than voluntarily, as the result of proceedings in which the respondents had not chosen to defend themselves, and which consequently could not be reviewed. In the second place, he contended that the amount paid was due under the provisions of "The Chota Nagpur Encumbered Estates Act" (VI of 1876).

The facts do not appear to be obscure, and if the appellant's contentions are right on either of the points stated he may be entitled to succeed. As, however, their Lordships are of opinion that the argument addressed to them from the Bar fails on both points, they have not found it necessary to call on the respondents to support the judgments in the Courts below, either on the two questions referred to, or on certain minor points which their Lordships did not consider to be tenable.

The appellant is Raja of Pachete, in Chota Nagpur. He succeeded to the title and estates on the death of his grandfather, the late Maharajah Nilmoni Singh Deo. The late Maharajah, in 1887, borrowed from one Mahesh Chandra Chatterji, a resident of Madanapur, in Burdwan, Rs. 22,435, giving the latter security in the form of a usufructuary mortgage of lands constituting four lots, three in the district of Bankura, and one in the district of Burdwan. Of these four lots the Maharajah had previously granted Patni leases to Mahesh Chandra Chatterji. The respondents are the successors-in-title of the latter in respect both of the leases and of the mortgage security. All of the four lots, the subjects of the leases and the mortgages, lie outside the boundaries of Chota Nagpur.

The mortgage was effected by a Sudbandhaki mortgage bond under which it was stipulated that interest at the rate of 14 annas per 100 rupees, equivalent to 10½ per cent. per annum, should be payable and that this interest, which was substantially equivalent to the amount of the annual rents payable under the Patni leases, should be set off as against the interest until re-payment of the principal sum due under the mortgage.

In 1895 the affairs of the late Maharajah having become embarrassed, the provisions of the Chota Nagpur Act were applied to his case. The language and scope of this Act their Lordships will refer to later. For the present it is sufficient to state that the management of the Maharajah's estate was vested in a manager appointed under section 2 of the Act and that a vesting order appears to have been published in the "Calcutta Gazette," in terms wide enough to apply, if the Act enabled it to do so, to all his immoveable property both within and outside the boundaries of Chota Nagpur. In response to a notice issued by the manager, the respondents, among other creditors, put in a claim. They submitted their mortgage bond with a petition praying for a settlement. The manager dealt with the claim under section 8 of the Act, and purported to settle the amount of principal

(7) 17 Ind. Cas. 957; 16 C. L. J. 527; 17 C. W. N. 754.

due, and, what was in the circumstances still more important, to reduce the future interest to 6 per cent. per annum. He also determined that in every half year the difference between the interest as thus reduced and the amount of the Patni rents should be applied in satisfaction of the principal. The Commissioner, on whom jurisdiction to do so was claimed to have been entrusted by the Act, sanctioned the arrangement.

In 1907 the debts due by the estate were considered to have been povided for, and the possession and management were made over to the appellant, who had succeeded to the title. Thereafter he collected from the respondents the amounts of surplus Patni rents in question in the suit, on each occasion applying to the Collector of the district where the lots were situated for authority to put in force the summary provisions for sale for recovery of Patni rents enacted by the Regulations of 1819 hereinafter referred to. The respondents, on receiving the successive notices to this effect authorised by the Collector, paid the amounts for the recovery of which they have brought the present suit. They appear to have made no formal protest, but the learned Subordinate Judge who tried the case has found that the circumstances were such that they cannot be taken to have made the payments gratuitously, a conclusion of act from which the High Court did not dissent on appeal, and from which their Lordships do not dissent.

It is important to see what were the terms of section 14 of the Regulation of 1819, under which these payments were insisted on. Section 8 had enacted that Zemindars in the position of the present appellant should be entitled in certain cases to apply for sales of Patni tenures for arrears of rent. Section 14 defines in its first branch the procedure in case the Talukdar objects. He may stop the sale by lodging the amount demanded. He may also bring a suit and obtain a reversal of the sale and damages. By its second branch the section provides that if the Talukdar desires to contest the Zemindar's demand he may apply for a summary investigation. If this takes place and an award results in time the effect of the award is to prevail. But if the proceedings be still pending the sale is nonetheless to take place unless the amount claimed be deposited, and if such deposit is not made the Talukdar is to have no remedy excepting by a regular action for damages and reversal of the sale. Under an amendment of the Regulation passed in 1832 the conduct of the proceedings in regard to such sales is given to the Collector, Deputy Collector or Head Assistant.

Their Lordships are of opinion that the procedure provided for by section 14 is such as not to put those submitting to pay money under it in the position in which they would have found themselves had they paid a claim brought against them in an ordinary suit in which they could have set up a full defence but had failed to do so. In such a case those who pay lose their right to resist, however good, because, having had the full opportunity of doing so which the law allows them once for all, they have not availed themselves of the opportunity so given. But section 14 expressly recognises the right to bring a separate suit in an ordinary Court, the proceedings before the Collector notwithstanding. If the purchaser at the sale impeached is made a party, the sale may even be set aside. All the Talukdar gets by demanding a summary investigation before the Collector is an award the application for which will not stop the sale. The only step by which the sale can be stopped is by a deposit of the full amount claimed, and when this is done the question of title remains capable of being raised in an ordinary suit. Their Lordships are accordingly of opinion that the rule which prevents a person from recovering back money which he has paid on a claim in legal proceedings to which he might have set up a defence but has failed to do so, has no application here. This conclusion is, under the circumstances already referred to, fatal to the first branch of the case presented by the appellant. On the argument addressed to them on this part of the case they have only to add the observation that the proceedings before the Collector are of an administrative rather than a properly judicial character. The Zemindar who has a power of compelling a sale is to exercise this power through the instrumentality of the Collector himself, who acts, not magisterially, but ministerially, and who has, in the true view of his functions, no capacity to give effect

to any enquiry he may make into title comparable to the capacity possesssed by an ordinary judicial tribunal.

Their Lordships now turn to the second argument by which the learned Counsel for the appellant supported the case made. This argument turned on the question whether the powers conferred by the Chota Nagpur Act extend to land outside the limits of Chota Nagpur. The language of the Act is obscure and their Lordships have found it necessary to look at the whole of its provisions somewhat closely in order to arrive at a conclusion on the point. The preamble is material, for it defines the purpose of the measure as the provision of "relief of holders of land in Chota Nagpur who may be in debt, and whose immoveable property may be subject to mortgages, charges, and liens." *Prima facie* the immoveable property would, therefore, mean such property in Chota Nagpur and this is borne out by the title of the Act, which is: "The Chota Nagpur Encumbered Estates Act." Section 2 enacts that where "any holder of immoveable property" (which plainly means here immoveable property in Chota Nagpur, and there only) applies to the Commissioner stating that the holder of the "said property" is subject to, or that "his said property" is subject to, debts or liabilities, the Commissioner may, with the consent of the Lieutenant Governor of Bengal, by Order published in the "Calcutta Gazette," appoint an officer called a manager, and vest in him the management of the whole or any portion of the immoveable property of the holder. The application must state the particulars of the debts or liabilities to which the holder is subject, or with which his immoveable property is charged, and also the particulars of the immoveable property to which he is entitled. Section 3 provides that on the publication of the Order "all proceedings which may then be pending in any Civil Court in British India in respect to such debts or liabilities shall be barred and all processes, executions and attachments for or in respect of such debts and liabilities shall become null and void." Among other things, the section further provides that the holder and his heir shall be incompetent to mortgage, charge, lease, or alienate their immoveable property, or to grant receipts for rents or profits, and shall be incompetent to enter into any contract which may involve them in pecuniary liability. Section 4 confers on the manager during his management "of the said immoveable property" large powers of management and of settling debts. Section 5 provides that, on the publication of the Order vesting the management in him, the manager is to publish a notice in English, Urdu, and Hindi (not, their Lordships observe, in the remaining languages vernacular in other parts of India), calling for the presentation of claims, and all claims not duly presented are to be barred. Section 8 enables the manager to determine the amounts of principal justly due to the creditors of the holders of the property and to the mortgagees on it. By section 9 the manager may enquire into the consideration given for leases and, if it appears insufficient, cancel them. Section 10 gives an appeal against proceedings of the Collector to the "Deputy Commissioner within whose jurisdiction the property is situate," if not himself the manager. Sections 17 and 18 confer on the manager power to lease and to mortgage and sell (in the latter cases with the assent of the Commissioner). Section 19 enables the Lieutenant-Governor of Bengal (within which Chota Nagpur is situate) to make rules for the administration of the Act. Section 23 saves the jurisdiction of the Courts in Chota Nagpur in certain kinds of suits relating to immoveable property brought under the operation of the Act.

Their Lordships have not had before them the Order published in the "Calcutta Gazette," by which the Commissioner appointed the manager in the present case, and vested in him the management of some or all of the immoveable property of the late Maharjah; but, however wide the terms of this Order may have been, the scope of its operation depended on the scope of the Act itself. After considering the Act as a whole, their Lordships have arrived at the conclusion that the primary intention to be collected from its language is that of providing, by a measure of local application, for the relief of the burdens affecting the land within Chota Nagpur owned by a class of landholders there. The governing purpose related to a particular locality. It is not a Statute analogous to a Bankruptcy Act, the controlling purpose of which is provision for creditors in a liquida-

tion. To this end section 16 confers the jurisdiction requisite to enable the manager to recover immoveable property in the possession of a mortgagee or vendee in the Court of the Deputy Commissioner within whose jurisdiction the property is situate. But in Regulation Districts, where there is no Deputy Commissioner, these words would be inapt, and the inference is that they were intended to apply only to immoveable property in Chota Nagpur, where a Deputy Commissioner has jurisdiction. This conclusion is borne out by section 23, which saves, as already observed, the jurisdiction of the Courts of Chota Nagpur over certain questions and not the corresponding jurisdictions of Courts outside it.

Their Lordships agree with the views of the scope of the Act expressed by the learned Judges who decided the case of *Bhicha Ram* v. *Bishambhar Nath* (7). They think that the Act has no application to immoveable property outside Chota Nagpur. The main purpose is, as they have already observed, the protection of Zemindars within that district: and any provisions which affect rights to enforce in jurisdictions outside it personal debts or liabilities are merely ancillary to the main purpose of the Act, which is directed to improving the position of persons owning land within it. If this be so, no claims *in rem* of land outside it ought to be construed as affected by the merely general and ambiguous expressions which the Act contains.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

Appeal dismissed.

Solicitor for the Appellant:—Mr. *E. Dalgado.*

Solicitors for the Respondents:—Messrs. *T. L. Wilson & Co.*

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 127 OF 1917.

April 26, 1918.

Present:—Sir Daniel Twomey, KT., Chief Judge, and Mr. Justice Ormond.

MAUNG BA HAN—PLAINTIFF—APPELLANT

versus

MA TIN *alias* MA PU TIN—DEFENDANT—RESPONDENT.

Buddhist Law, Burmese—Marriage of minor girl—Consent of father, whether necessary.

There cannot be a valid marriage of a minor Burmese Buddhist girl without her father's express consent.

Appeal against the decree of the District Court, Hanthawaddy, in Civil Regular No. 56 of 1915.

Mr. *Broadbent*, for the Appellant.

Mr. *Connel* (with him Mr. *Maung Thin*), for the Respondent.

JUDGMENT.—The plaintiff and defendant are Burmese Buddhists The plaintiff is a young man of 23 years of age and sues for restitution of conjugal rights. The defendant Ma Tin is 16 or 17 years of age and is admittedly a minor. She eloped with the plaintiff and lived with him for four days in Mg. Gyi's house in the same village in which she lived with her father. Lugyis intervened on behalf of the plaintiff to persuade the defendant's father to allow them to marry. When the Lugyis first intervened, they were under the impression that the father would consent to a marriage. On the fourth day the Lugyis and the young couple returned to the defendant's father's house and there was an interview which lasted some hours. The father asked his daughter if she had gone willingly with the plaintiff and she said that she had done so because she loved him. The father told the two young people to go up into the house and the Lugyis also went into the house. Shortly afterwards the girl said she did not want to remain in her father's house because she thought her father wished to separate her from the plaintiff. Some of the witnesses say that the father said: "as you love him, I will not interfere," but others who were present do not give evidence to this effect. The Lugyis were present in order to be witnesses of a consent to the marriage, but no express consent was given. We are asked to find that there was an implied consent in view of the fact that the father told the

plaintiff and defendant to go into the house, and in view of the evidence of certain witnesses that the father said he would not interfere, but as against that there was the conduct of the girl and the fact that the plaintiff did not stay in the house that night; there is the further fact that when he came next morning he was refused admission and that he has not been allowed to see the girl since. The only question in this appeal is:—Did the father give his consent? The facts are fully dealt with by the learned Judge and we agree with him in the view he has taken, namely, that no real consent was given.

Mr. Connel, for the respondent, contends that even if the father did give his consent, that would not convert the elopement into a marriage with retrospective effect, but that further co-habitation would be necessary after such consent in order to constitute a marriage and he quotes the Upper Burma case of *King-Emperor* v. *Nga Ni Ta* (1). But it is unnecessary to go into that question in this appeal, because we find that the father did not in fact give his consent to a marriage between the parties, and Mr. Broadbent for the appellant admits that without such consent there could be no valid marriage and that the plaintiff's suit would have to be dismissed. The appeal, therefore, is dismissed with costs.

Appeal dismissed.

(1) U. B. R. (1902-03), I, Penal Code, 15.

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS APPEAL No. 34 OF 1917.

August 1, 1917.

Present:—Mr. Stuart, A. J. C.

Saiyid FIDA ABBAS AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

RAHIM BAKHSH AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, rr. 23, 27—Appellate Court, power of—Lower Court refusing to record evidence—Remand, order of, validity of—Procedure.

Where an Appellate Court considers that certain evidence refused to be recorded by the lower Court ought to have been recorded, it has no power to remand the suit for re-hearing *ab initio* under Order XLI, rule 23, Civil Procedure Code, but can direct any additional evidence to be recorded, under Order XLI, rule 27.

Appeal against the order of the Subordinate Judge, Unao, dated the 12th June 1917, setting aside that of the Munsif, North Unao, dated 27th March 1917.

Chaudhri *Ram Bharose Lal*, for the Appellants.

Mr. *M. A. Khan*, for the Respondents.

JUDGMENT.—In this case the learned Subordinate Judge has remanded the suit for re-hearing *ab initio* under the provisions of Order XLI, rule 23. Those provisions have no application. This was not a case in which the Court from whose decree the appeal has been preferred has disposed of the suit upon a preliminary point and the decree has been reversed in appeal. The Court from whose decree the appeal has been preferred has refused to record certain evidence which the learned Subordinate Judge considered ought to have been recorded. The learned Subordinate Judge could have directed any additional evidence to have been recorded under the provisions of Order XLI, rule 27.

I, therefore, allow this appeal. I set aside the order remanding the case under Order XLI, rule 23, and direct that the learned Subordinate Judge take the appeal on his file again and proceed to decide it. He will be at liberty to utilize the provisions of Order XLI, rule 27, in any manner which may appear good to him. As the difficulty has arisen not through the action of the parties but through the action of the Court, I direct that the costs of the present appeal abide the result.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 15 OF 1917.

February 11, 1917.

Present:—Pandit Kanhaiya Lal, A. J. C.

TRIBHAWAN AND OTHERS—ACCUSED—APPLICANTS

versus

EMPEROR—COMPLAINANT—RESPONDENT—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 186—Obstructing public servant in discharge of public function—Written order, whether must be shown to accused.

In order to constitute an offence under section 186 of the Penal Code, it is not necessary to prove that the written order under which the public servant was acting was actually shown to the accused. It is enough if it is found that the public servant had the order with him and could show it to anybody who wanted to see the same or question his authority.

Criminal revision against the order of the District Magistrate, Gonda, dated the 9th January 1917, modifying that of the Deputy Magistrate, 2nd Class, Gonda, dated the 22nd November 1916.

Mr. *F. G. D. Lincoln*, for the Applicants.

The Government Pleader, for the Crown.

JUDGMENT.—In a suit brought by Tribhawan against Raghu for damages for malicious prosecution, Raghu was awarded Rs. 25-9-0 about his costs. Raghu applied for the execution of his decree for costs, and got twe bullocks, belonging either to Tribhawan or his father or to both, attached. When the process-servers were preparing the list of attachment, Tribhawan and the other accused appeared, and assaulted the decree-holder who was holding the ropes of the bullocks and took the bullocks away. They have accordingly been convicted of offences under sections 183 and 186 of the Indian Penal Code and sentenced to different terms of imprisonment.

On behalf of the accused it is urged that they have been improperly convicted, as no warrant of attachment was shown to them and that the convictions under both sections were in any case illegal. Both the peons, however, say that they had gone with the warrant of attachment, and the cattle were rescued after they were attached. There is nothing to show that they were asked to show the warrant or that they refused to show them. It was sufficient that they had the warrant which they could show to anybody who wanted to see the same or question their authority.

As the attachment had already taken place, and the cattle were rescued before the process-servers could make any arrangements for their custody, the accused were rightly convicted under section 186 of the Indian Penal Code for obstructing public servants in the discharge of their duty. Section 183 of the Indian Penal Code only applies when the seizure of the cattle is obstructed. No force was used to the public servants and even the decree-holder hardly received anything more than a knocking. Tribhawan is a well-to-do Zemindar and the amount of the decree was small. The rescue was probably due te some misunderstanding and a sentence of fine would have been sufficient. The applicants have, however, undergone a good portion of the sentence.

The conviction under section 183 of the Indian Penal Code is set aside and that under section 186 of the Indian Penal Code is maintained. The sentence under the latter section will be reduced to the period of imprisonment they have already undergone.

Order modified.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 55 OF 1918.

April 26, 1918.

Present:—Mr. Findlay, Offg. A. J. C.

BAIJA—COMPLAINANT—APPLICANT

versus

BABU AND ANOTHER—ACCUSED—NON-APPLICANTS.

Penal Code (Act XLV of 1860), s. 499, Excep. 9—Defamation—Statement, relevant, by party to suit—Privilege—Malice.

A statement made by a party to a suit in good faith and for the protection of his interests, and which is relevant to the matter in issue, falls under exception 9 of section 499 of the Penal Code and is privileged. In order to take such a statement out of the exception, express malice must be proved. [p. 834, cols. 1 & 2.]

Criminal revision of the order of the Sessions Judge, Nagpur.

KISHEN DAYAL SINGH JAGLAL MANDAL.

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

The Hon'ble Mr. *G. P. Dick*, for the Crown.

Mr. *M. R. Bobde*, for the Non-Applicant Accused.

ORDER.—The only point involved in this application for revision is whether a certain statement made by a party in a civil proceeding was privileged or not under the law applicable to the law of defamation. The non-applicants Babu and Sonya were prosecuted in the Court of the First Class Bench Magistrates, Nagpur, in respect of part of a written statement given in by them in a rent suit in which they were defendants. The statement being to the effect that Babu and applicant had had criminal intimacy and that later the applicant had had a paramour one Baburao. The Honorary Magistrate held that the statement had been made without any malicious intent and discharged the non-applicants. An application on revision to the Sessions Judge was similarly unsuccessful, the learned Judge after a brief review of the conflicting case-law on the matter of the extent of the privilege accorded to witnesses and parties in respect of their statements in civil proceedings holding that it was not a case where he should interfere.

I find it unnecessary, however, in the present case to decide the point as to whether on this subject the view of the Madras High Court which accords absolute privilege to such statements or the more modified view of other High Courts should be followed, for it seems to me that the alleged defamatory pleading was clearly relevant to the rent suit in question, as was held by the District Judge in his judgment dated 11th April 1917. I fully concur in this connection with the decision of Sale and Stanley, JJ., in *Woolfun Bibi* v. *Jesarat Sheikh* (1); it must be remembered that the Calcutta High Court has declined to follow the English rule of absolute privilege in this connection but even so in the case quoted, which is absolutely analogous to the present one, the decision was as stated. To take the opposite view would obviously lead to most untoward results in the administration of justice and in the present case the alleged defamatory statement was clearly covered by the ninth exception to section 499, Indian Penal Code. The statement was clearly made in good faith for the protection of the interests of the defendants in the suit and as such under any view of the law taken by the High Courts in this country was privileged. Express malice would have to be proved for applicant to succeed and this has not been done. The application is accordingly dismissed.

Application dismissed.

(1) 27 C. 262; 14 Ind. Dec. (N. s.) 173.

PATNA HIGH COURT.

CRIMINAL REVISION No. 1 OF 1918.

March 5, 1918.

Present:—Mr. Justice Jwala Prasad.

KISHEN DAYAL SINGH—PETITIONER

versus

JAGLAL MANDAL—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 195—Sanction to prosecute for forgery—Document not before Court granting sanction—Delay in applying for sanction, effect of—Revision—High Court, power of interference of—Civil Procedure Code (Act V of 1908), s. 115.

Before granting sanction to prosecute an accused person for forgery it is desirable that the Court should examine the alleged forged document. [p. 835, col. 2.]

Inordinate and unexplained delay in making an application for sanction to prosecute is a sufficient ground for refusing the sanction. [p. 836, col. 1.]

The High Court has power to interfere with an order of a Civil Court refusing or granting sanction for prosecution under section 195, clause (6), of the Criminal Procedure Code and not only under section 115 of the Civil Procedure Code. [p. 837, col. 1.]

Criminal revision from an order of the District Judge, Purnea, dated the 16th June 1917.

Messrs. *Hasan Imam* and *Lal Mohan Ganguly*, for the Petitioner.

Messrs. *Krishna Sahay* and *Shiveswar Dayal*, for the Opposite Party.

JUDGMENT.—This is an application against an order of the District Judge of Purnea, dated the 16th June 1917, confirming sanction to prosecute the petitioner under sections 465, 471 and 196 of the Indian Penal Code passed on the petitioner. The sanction relates to an entry in a Bahi filed in the Civil Suit No. 506 of 1913 in the Court of the Subordinate Judge of Purnea. The entry in the Bahi was

held by the Subordinate Judge, who tried the case, to be a "childish forgery" by his judgment dated the 8th of September 1914. On appeal by the petitioner the District Judge agreed with the view taken by the Subordinate Judge as to the forgery of the entry in question in the Bahi. The judgment of the Appellate Court was passed on the 22nd of December 1915. There was a second appeal by the plaintiff to the High Court, but the said appeal was summarily dismissed. The exact date of the dismissal of the appeal is not known, but the appeal must have been filed within three months from the date of the decree of the first Appellate Court, that is, before the 22nd of March 1915.

The present application for sanction to prosecute the petitioner was filed by the opposite party, who was a defendant in the original suit on the 22nd June 1916. The application was disposed of by the Subordinate Judge on the 16th June 1917. The Subordinate Judge granted the sanction, whereupon the petitioner moved the District Judge under clause 6 of section 195 of the Code of Criminal Procedure. The appeal before the District Judge was disposed of on the 7th November 1917. It may be mentioned here that after the dismissal of the appeal in the civil suit by the District Judge and apparently after the application for sanction was made before the Subordinate Judge, an application on behalf of one Rash Behari Lal was made to the District Judge for the return of the document. This application is not dated but the seal of the Court bears the date 1st July. The document was taken back from the Judge's record room, but when and by what order of the Court is not at all clear from the papers on the record. In the list of exhibits there is a note against the Bahi in question as having been received under a signature which purports to be that of a Rash Behari Lal. It is not at all shown who this Rash Bihari Lal is, on whose behalf the application for return of the Bahi was made and who eventually succeeded in taking back the document during the pendency of the application for sanction. Rash Bihari does not appear to be one of the parties concerned in the case. The receipt given on the document is also not dated.

The order of the Court of the 16th June 1917 calling upon the opposite party to produce the document does not appear to have been complied with, nor was there any insistence by the opposite party to have the document produced in Court. Nor did the Court itself consider it desirable or necessary to have the document produced before it. The result was that the document was not produced and sanction was granted merely upon the finding of the predecessor of the Subordinate Judge, recorded in the judgment of the original suit. Likewise the District Judge also did not take any steps to have the document produced and based his conclusions on the finding of his predecessor-in-office, who had heard the appeal in the original case.

In a case of entries in the Bahi held by one Court to be a "childish forgery" and by the other Court to be "clumsy," I think it was important for the Court below, as it would be for the trying Court, if the sanction is not revoked, to inspect the document and to determine by inspection of the entries as to whether they were tampered with or forged. It is conceded that the sanction granted will become infructuous and the prosecution cannot at all proceed without the production of the document in the trying Court. There is to my mind absolutely no chance of getting the document at all. The document has been taken away by some one whose identity before me has not been disclosed. If that person is under the influence of the petitioner, it is certain that the document will not be produced at all whatever may be the result of the disobedience of the order of the Court. The petitioner himself has refused to produce it when called upon to do so by the Subordinate Judge and is not likely to obey the order of the trying Court when called upon to do so.

The petitioner showed cause by a petition, which also is not dated but from the seal of the Court it appears to be 21st December 1916. I cannot refrain from remarking that it appears to be the practice of the Purnea Court not to insist upon accepting petitions and documents and papers etc., in Courts duly signed and dated by the parties filing them. Of course this does not affect the merits of the case but has an important

bearing as regards the conduct of the cases in the District of Purnea. The petition does not disclose where the document is and who took it away from the Court.

There is, therefore, as I have said before, not the faintest chance of having the document before the Court. The prosecution, therefore, cannot at all proceed.

It is strange that such an important document, in respect of which the Subordinate Judge and the District Judge had given their decisive opinion that it was a forgery, should have been allowed to be taken back from the record room. This again discloses the state of affairs that prevails in the Purnea Court. The sanction should, therefore, be withheld on that ground alone.

Apart from this there is another important ground which by itself was sufficient to refuse the sanction. The application in this case was made about 21 months after the order of the Subordinate Judge and six months after the order of the District Judge in appeal. It is contended that the opposite party awaited the result of the appeal in the High Court, if any. References have been made to certain cases to show that it is desirable to await the result of the appeal and that an application made after the disposal of the appeal should not be considered to have been unduly delayed. But in all those cases, if I remember rightly the application was made soon after the disposal of the case, but the order of the Court, was suspended till after the disposal of the appeal.

There may be some cases where the application might also be allowed to be made after the disposal of the appeal, but it has to be judged from the circumstances of each case whether the delay was undue or was unreasonable. In the present case the delay after the disposal of the appeal by the District Judge is unexplained. The decree was passed on the 23rd December 1915 and there was no reason why the opposite party should have waited three months from the date of the decree of the District, Judge. The delay is, therefore, in this particular case unexplained and is inordinate, considering that the delay has enabled the document to be taken way from Court. I do not see any reason also why there was delay in the disposal of the application by the Subordinate Judge. It took one year to dispose of a miscellaneous appeal in which no evidence was taken and in which the judgment itself was a short one. The appeal was disposed on the 16th June 1917. The opposite party may not be responsible for this delay, but still whoever may be responsible, there has been a delay in the disposal of a charge pending against the petitioner and hanging over his head.

It is now about 4 years from the time that this document was filed in Court and the case disposed of by the Subordinate Judge. It is not, therefore, desirable on this ground also to allow the sanction to be used by the opposite party in order to harrass the petitioner.

The third ground is equally important and is in favour of the petitioner. The Court that decided that the entry in the Bahi was a forgery did not at all consider the evidence to be of such a character as to justify his prosecution under section 467 of the Code of Criminal Procedure. There were two documents filed in support of the claim of the plaintiff, the mortgage bond which was the basis of the suit, and the Bahi, to prove that consideration money was paid to the executant of the bond. The first Court held that the bond was genuine and was admitted by the *Musammat* before the Registrar, but that the Bahi was concocted and forged for the purpose of affording evidence to prove the passing of the consideration. I mean the District Judge in appeal suspected that the bond also was not executed by the *Musammat*, but did not clearly find that it was a forgery. The Court which tried the case or the appeal, would have been in a better position to judge whether the ends of justice required that the petitioner should be prosecuted for using the forged document. We do not know what would have been the opinion of those Courts if the application for sanction was heard by them. The delay has, therefore, deprived the petitioner of the opinion of the Courts which tried the case on the merits. It is clear that the opposite party, in order to serve its own ends and out of grudge and malice, wants to take this vindictive action

against the petitioner. Under all these circumstances no sanction should be allowed to serve such a purpose and the order is liable to be set aside on this ground also.

The learned Vakil for the opposite party contested the jurisdiction of this Court to intefere with the order made by the District Judge or the Subordinate Judge. True, the order in question was made in connection with the civil suit decided by the Subordinate Judge and as such the application in respect of the sanction would be heard by the civil side of this Court and not by the criminal side. But this Court is hearing this application on its civil side. The learned Vakil further urged that this Court can only deal with the order of the District Judge under section 115 of the Civil Procedure Code and that the order should only be set aside if it was without any jurisdiction or was exercised with illegality or material irregularity in terms of that sanction. I do not at all feel inclined to agree with this view. The power is exercised by this Court under clause (6) of section 195 of the Code of Criminal Procedure to grant or revoke sanction refused or granted by inferior Courts. The High Court is the Appellate Court from their decision in civil suits and as such is the superior Court under clause 7 of section 195, and is, therefore, competent to deal with their order granting or revoking sanction under clause 6 of the sanction. The Madras and the Calcutta High Courts have taken the above views, *vide Muthuswami Mudali* v. *Veeni Chetti* (1), *Girija Sankar Roy* v. *Binode Sheikh* (2) and *Habibur Rahman* v. *Munshi Khodabux* (3). The view taken in *Hamiuddi Mondl* v. *Damodar Ghose* (4) quoted by the learned Vakil for the opposite party was not followed in the later rulings referred to above of the same Court. Personally I have no doubt in my mind that this Court has jurisdiction to deal with the order of the inferior Courts on merits under clause 6 of section 195 and not only under section 115, Civil Procedure Code, and that the view taken in the case by the learned Judge who decided the case of *Hamiuddi Mondel* v. *Damodar Ghose* (4) was not the correct view, and in fact did not recommend itself to the very learned Judge who subsequently in *Girija Sankar Roy* v. *Binode Sheikh* (2) distinguished that ruling.

The order of the District Judge in this case confirmed the sanction given by the Subordinate Judge and comes well within the aforesaid order.

The result is that the sanction granted by the Subordinate Judge and confirmed by the District Judge is set aside. The proceedings that may have been instituted on the basis of this sanction are hereby revoked and quashed.

Sanction set aside.

(1) 30 M. 382; 2 M. L. T. 239; 17 M. L. J. 266; 6 Cr. L. J. 102 (F. B.).
(2) 5 C. L. J. 222; 5 Cr. L. J. 188.
(3) 11 C. W. N. 195; 5 C. L. J. 219; 5 Cr. L. J. 29.
(4) 10 C. W. N. 1026; 4 Cr. L. J. 168.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL No. 1003 OF 1917.

March 18, 1918.

Present:—Mr. Justice KNOX.

HAR KESH AND ANOTHER—APPELLANTS

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 366—Kidnapping from lawful guardianship—Offence, essentials of.

A girl, under 16 years of age, was sent by her father to take food to the bullocks, when on her way she was persuaded by the accused to accompany him. The latter cut off her hair and dressed her up in boy's clothes and lived with her for some time:

Held, that the accused was guilty of the offence of abduction under section 366 of the Penal Code with the intent that the girl might be compelled to marry against her will or forced or seduced to illicit intercourse. [p. 839, cols. 1 & 2.]

Criminal appeal from an order of the Additional Sessions Judge, Meerut.

Mr. *A. H. C. Hamilton*, for the Appellant.

Mr. *Lalit Mohan Banerji* (Government Pleader), for the Crown.

JUDGMENT.—Harkesh and Bhullan have been convicted of offences under sections 366 and 368 of the Indian Penal Code. The charge-sheet, to which they were called upon to plead, as regards Harkesh is:—"That you about the month of April forcibly took

Musammat Hardai, a minor girl of about 15 years, from the lawful guardianship of her parents, with intent that she may be seduced to illicit intercourse and be sold in marriage to some one." As regards Bhullan the charge runs :—" That you about the month of June, July, and a part of August kept *Musammat* Hardai, hiding her identity that she was a girl, with the intention of giving her in marriage and raising money from the transaction, knowing that she was a minor girl kidnapped by Harkesh." The case was tried with two assessors. Both assessors gave it as their opinion that Harkesh and Bhullan were guilty of the offence specified in the charge. The learned Judge agreed with the assessors. Harkesh and Bhullan are described as Jats, the girl, respecting whom they have been charged, is also a Jat girl. Both the accused have been represented in this Court by learned Counsel. Great stress has been laid on the improbability of the story given by the girl. The medical evidence shows that she is a girl under 16 years of age and in considering whether the offence charged has been committed by the accused or not, the evidence to which we should first turn is not the evidence of the girl but the evidence of her father, Niadar. The offence is primarily an offence against him. I have carefully considered his evidence and I see no reason to doubt it. He tells us that at the time when the girl Hardai disappeared he was ill with fever. The girl was sent one evening to take food to the bullocks. The husband and wife returned shortly after and found the girl had not gone home and had not fed the bullocks. He made inquiries from his neighbours but no one had seen the girl. He was laid up with fever for several days but as soon as he could, he went and searched in the neighbouring villages but could find no trace of his daughter. He tells us that this was not the only occasion upon which he searched for his daughter. He admits that he made no report at the *thana*. Stress is laid upon this as being improbable conduct and not in harmony with the rest of his deposition. But he gives his explanation. He was afraid that if inquiry was made the girl might be spirited off further, and he adds that he did fear that the chances of marrying would be spoilt if the news got about. Any one who is aware of a Jat's difficulties and prejudices can easily understand this and I see nothing at all improbable in it. The medical evidence places beyond doubt that the girl at the time the occurrence took place was under 16 years of age. Niader is supported in his statement by the witness Bija. I have examined his evidence also with much care and it fully supports what Niadar has said. If their statements can be believed—I see no reason why they should not be believed and they have been believed by both the Judge and the assessors who heard the evidence, there is no room for supposing that Niadar was in any way privy to the removal of the girl or that he took no interest in her welfare.

When the girl was found first to the knowledge of Niadar, she had been discovered in a village not far distant from the village in which Niadar resides. There is not one word in the cross-examination which supports that either Niadar or Bija or any of the Jats of Kutta had any cause for quarrel or grudge against either of the accused.

It is admitted by both the accused that the girl Hardai was in their company at about the time when she disappeared and it undoubtedly rests with Harkesh and Bhullan to explain how the girl under these circumstances came into their company. The girl was a female under 16 years of age her lawful guardian had not consented to her being removed out of his guardianship. As regards the matter of time the story is here taken up by the girl. I agree that what she says cannot be believed. Her account is that she met Harkesh, was assaulted by him, dressed in male clothes, taken and shut up and her hair cut. This is only one of the stories told by her and it entirely disagrees in important points with the second story which she told. I discard her evidence and put it out of consideration. What I have to see is how the girl passed from the guardianshipof Niadar to the keeping of Harkesh. It is quite possible that Harkesh came upon her as she was on her way home to do her father's bidding and that she was persuaded by him to accompany him and afterwards to put on male clothes and to work for him. There is evidence put forward for the defence that the girl came wandering dressed in boy's clothes, that she asked for work and was engaged by Harkesh.

I agree with the learned Judge and assessors in not believing this story. It is in the first place improbable and in the second place the evidence given is so vague, just when it ought to be definite.

Bearing all this in mind I am satisfied that an offence under section 366 of the Indian Penal Code has been fully proved against Harkesh and I dismiss his appeal.

With reference to Bhullan there is the evidence of his witness Shera, which is of great importance. No reason has been shown why Shera'a evidence should not be believed. He tells us that he had seen this girl living at Bhora first with Harkesh and then with Bhullan. She was dressed as a boy. People began to suspect she was not a boy but a girl. On his making enquiry as to her sex Hardai said she was a girl. Next morning both the accused and the girl had disappeared. Lohari who is Chaukidar says that as he was going to his field, about the time mentioned, with other people, he saw the girl dressed in boy's clothes and crying, Bhullan and Harkesh were quarrelling close by. Each was saying that he would take away the girl; he asked the girl, thinking it was a boy, but the reply was, "I am not a boy but a girl." She also said they were taking her about and she feared they would kill her. Upon this Bhullan began to make off but the witness ran after him and arrested him. There is nothing in the cross-examination to show that this witness has any malice against Bhullan. I hold this evidence is enough to show that at that time the girl was being by force compelled to go about with these two accused and that their act amounted to abduction. On behalf of the accused I was referred to the case of *Ewaz Ali* v. *Emperor* (1). That, however, was a different case. The girl in that case was one who was found to have left the guardianship of her husband with intention to remain out of that keeping. It so far differs from the present case and I am not prepared to follow it. I was also referred to the case of *Empress of India* v. *Sri Lal* (2). That was an absolutely different case and in no way a guide in the present case. The case of *Emperor* v. *Ramchander* (3) is also quite different, but I need only refer to the concluding words of that judgment to show that the circumstances of that case and of this case do not agree. The learned Judges say, "We need hardly point out that the case would be very different if the girl had been going on a visit or message or any such like occasion." The evidence in the present case satisfies me that the girl was going on a message when she disappeared. The case of *Emperor* v. *Jetha Nathoo* (4) is, in my opinion, a case exactly in point. As the learned Judges there point out, what have to be considered are the broad features of the case. I hold that a case of abduction with intent that the girl might be compelled to marry against her will or forced or seduced to illicit intercourse has been abundantly proved against Bhullan and I dismiss his appeal.

My attention has been called to the case of *Abdur Rahman* v. *Emperor* (5). With great respect to the learned Judge who decided that case I hold that in that case the evidence showed that Abdur Rahman, if he did any act at all, did an act subsequent to the alleged offence of kidnapping. The Indian Penal Code does not recognize abetment after the main act, and the arguments, therefore, really amount to an *obiter dictum*.

There remains the question of sentence. Looking at all the features of the case I think the sentences have been unnecessarily severe.

I allow the appeal, so far that I reduce the sentences passed to a sentence of three years' rigorous imprisonment, both in the case of Harkesh and Bhullan; the sentences served by them will be considered part of this sentence. So far and no further I allow their appeals.

Sentences reduced.

(1) 20 Ind. Cas 647; 37 A. 624; 13 A. L. J. 848; 16 Cr. L. J. 663.

(2) 2 A. 614; 1 Ind. Dec. (N. S.) 1023.

(3) 23 Ind. Cas. 473; 12 A. L. J. 265; 15 Cr. L. J. 265.

(4) 6 Bom. L. R. 785; 1 Cr. L. J. 931.

(5) 36 Ind. Cas. 466; 14 A. L. J. 765; 17 Cr. L. J. 498; 38 A. 664.

91 CHIT THA *v.* EMPEROR.

LOWER BURMA CHIEF COURT.]
CRIMINAL APPEAL No. 947 OF 1917.
January 10, 1918.
Present:—Sir Daniel Twomey, KT., Chief Judge, and Mr. Justice Ormond.
CHIT THA—APPELLANT
versus
EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 302—Murder—Sentence—Youth of offender, consideration of.

Ordinarily youth is in itself an extenuating circumstance in murder cases as in other criminal cases. Cases of extreme depravity do occur in which the youth of the accused may not be a sufficient reason for imposing the lesser sentence. But the youth of the criminal is a circumstance which should always be taken into account by Sessions Courts in exercising the discretion vested in them by section 302 of the Indian Penal Code [p. 840, col. 2.]

JUDGMENT.—The appellant Nga Chit Tha has been sentenced to death for murder. The case is clear and the appeal was admitted only for the purpose of considering the propriety of the sentence. The appellant who is an agricultural labourer had been working with a wood-cutting *dhama* in his hand and returned to his employer's house to get a light for his cheroot. There he suddenly encountered the deceased Maung San Mya with whom he had a quarrel some months before. He fell upon the deceased with the *dha* and inflicted fatal wounds on his head. The appellant at first stated that he had been threatened with death in an anonymous letter which he attributed to San Mya and when he suddenly met San Mya, he was terrorstruck and attacked him so as to prevent San Mya from attacking him. The Sessions Judge was inclined to believe this story, though the appellant modified it considerably when he was examined in Court. He then alleged that the deceased abused him and assaulted him when he entered the cooking place of the house.

There can be no doubt that the appellant was rightly convicted of murder. His age according to the medical subordinate who gave evidence at the trial is between 17 and 19. The Superintendent and Medical Officer of the Jail where Chit Tha is now confined was asked to give his opinion on this point, and he reports that in his opinion Chit Tha is 16 years of age.

The Sessions Judge thought that he would not be justified in remitting the extreme penalty on the ground of youth only. The learned Judge was perhaps influenced by the ruling in *Nga Pyan* v. *Crown* (1). The following is an extract from Mr. Justice Fox's judgment in that case:—

"The present case is one in which a youth must have silently brooded for a considerable time over chidings and abuse addressed to him by the man he subsequently murdered, but in the end his act was deliberate, previously meditated, done in cold blood, and was accompanied by great ferocity.

"To refrain from confirming a sentence of death in such a case on account of the criminal's youth would, in my opinion, be an act of pure mercy. The exercise of mercy is the prerogative of the Crown to be exercised in this country by the very highest authorities, and, if mercy is exercised towards a criminal, he and the public should understand that the mitigation of the sentence passed upon him by the Court of Justice is due to the exercise of the power of clemency, which is an attribute of the King-Emperor alone."

In the murder case now under consideration there appears to have been no deliberation; it is probable that the appellant acted on a sudden impulse. The case is, therefore, distinguishable from that of Nga Pyan.

As to the general principle we are of opinion that ordinarily youth is in itself an extenuating circumstance in murder cases as in other criminal cases. We refrain from laying down that the lesser penalty should be awarded in every murder case where the accused is below a certain age. Cases of extreme depravity do occur in which the youth of the accused may not be a sufficient reason for imposing the lesser sentence. But the youth of the criminal is a circumstance which should always be taken into account by Sessions Courts in exercising the discretion vested in them by section 302 of the Indian Penal Code. We respectfully dissent from the view suggested in Nga Pyan's case that a Sessions Court, which on the ground of the criminal's youth imposes on him the lesser sentence provided in section 302,

(1) 1 L. B. R. 359.

is thereby encroaching on the prerogative of the Crown.

Having regard to the youth of the present appellant and the circumstances of the case we consider that the sentence passed on him may properly be reduced to one of transportation for life and it is reduced accordingly.

Sentence reduced.

CALCUTTA HIGH COURT.

CRIMINAL REFERENCE No. 40 OF 1917.

January 9, 1918.

Present:—Mr. Justice Chitty and Mr. Justice Smither.

EMPEROR—PROSECUTOR

versus

ASIMODDI AND OTHERS—ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 297, 298, 299—Misdirection to Jury, whether ground for setting aside verdict—Functions of Judge and Jury—Forgery—Penal Code (Act XLV of 1860), ss. 193, 465, 467.

The accused were tried by the Sessions Judge and a Jury on charges under sections 465, 467 and 193, Indian Penal Code, on the allegations that by personating one Mir Baksha, the husband of a certain woman, before the Muhammadan Marriage Registrar, they had induced the Registrar to make an entry of the divorce of the woman by her husband, to which entry they had affixed their thumb impressions, and thereby made a false document within the meaning of sections 463 and 464, Indian Penal Code

In his charge to the Jury, the Sessions Judge said: "If the person who put his thumb impression in the register as Mir Baksha was not really Mir Baksha, it is clear that he made a false document within the meaning of section 464 and that his intention was that fraud should be committed and also that injury should be caused to Mir Baksha. He, therefore, committed forgery:"

Held, that there was a misdirection on the part of the Judge as he did not leave it to the Jury, as he should have done, to say whether on the evidence they found that the intention of the accused was dishonest and fraudulent; but that although the misdirection might have been under certain circumstances, a reason for setting aside the verdict of the Jury, yet as the verdict was not erroneous and was perfectly correct on the evidence, it should not be set aside. [p. 342, col. 2.]

Reference made by the Sessions Judge, Dacca, dated the 3rd October 1917.

Mr. *Orr*, for the Crown.

Babu *Rajendra Chandra Guha*, for the Accused.

JUDGMENT.—This is a somewhat peculiar case. Three persons Naimoddi, Asimoddi and Musti were placed upon their trial before the Sessions Judge of Dacca and a Jury on charges under sections 465, 467 and 193, Indian Penal Code. The offence alleged against the accused was that, by personating Mir Baksha, the husband of one Sabjan and brother-in-law of the accused Naimmuddi before the Muhammadan Marriage Registrar in Dacca, they had induced the Registrar to make an entry of the divorce of Sabjan by her husband Mir Baksha, to which entry they had affixed their thumb impressions and thereby made a false document within the meaning of sections 463 and 464, Indian Penal Code. At the trial it appeared that the accused Musti, who was said to have been present in the Registrar's office, had taken no active part in the proceeding, and he was accordingly acquitted by the Jury. Nothing more turns upon his share in the case. As to the other accused, in the case of Asimoddi, the Jury, by a majority of 3 to 2, found him not guilty. The Judge, disagreeing with that verdict, has referred the case to this Court under section 307, Criminal Procedure Code. In the case of Naimoddi, the Jury, by a majority of 3 to 2, found him guilty of an offence under section 465, Indian Penal Code. The Judge accepted the verdict of the majority in his case and sentenced him to five years' rigorous imprisonment. We may state in passing that this sentence was illegal, inasmuch as the maximum sentence under section 465, Indian Penal Code, is imprisonment for two years. Naimoddi appealed to this Court from jail. We directed that his appeal should be put up before us at the time the reference in the matter of Asimoddi was taken up. This was done, and Naimoddi has also instructed the same Pleader as Asimoddi. The case made for Naimoddi was that there had been misdirection on the part of the Judge and that the sentence was illegal. We accordingly admitted his appeal and the learned Deputy Legal Remembrancer waiving service of notice of this appeal on behalf of the Crown, Naimoddi's appeal has been argued along with the reference in the matter of Asimoddi. We can, therefore, dispose of the two cases in one judgment.

EMPEROR v. ASIMODDI.

It will be convenient to take the case of Naimoddi first. The trial being by Jury, he could only appeal on a question of law and that in this case would be misdirection by the Judge. In his grounds of appeal he gives two instances of misdirection which, in our opinion, do not amount to any misdirection at all; but a perusal of the heads of charges shows that there was a misdirection on the part of the Judge on another point. The Judge says: "If the person who put his thumb impression in the register as Mir Baksha was not really Mir Baksha, it is clear that he made a false document within the meaning of section 464 and that his intention was that fraud should be committed, also that injury should be caused to Mir Baksha. He, therefore, committed 'forgery.' There are two questions: (1) Is the page of the register, Exhibit 8, a forgery? (2) Did accused Naimoddi and Asimoddi forge it." Throughout the rest of the charge we find nothing stated by the learned Judge on the question of fraud or dishonest intention on the part of the two accused. He states (in the words which we have quoted) an apparently self-evident fact, and has not left it to the Jury, as he should have done, to say whether on the evidence they found that the intention of the accused or either of them was dishonest or fraudulent. This might under certain circumstances have been a reason for setting aside the verdict of the Jury. But section 423 (2) of the Criminal Procedure Code says: "Nothing herein contained shall authorize the Court to alter or reverse the verdict of a Jury, unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge or to a misunderstanding on the part of the Jury of the law as laid down by him." Here we are asked to set aside the verdict of the Jury, and to order a retrial. The question is whether we should do that in a case where we are of opinion that the verdict is not erroneous and has not been made erroneous owing to the misdirection by the Judge, but which, on the evidence which we have perused in the course of the hearing of these two cases, is perfectly correct. Though the Judge may have been wrong in not directing the Jury more explicitly with regard to the fraudulent or dishonest intention of the accused, it cannot be said that owing to that the Jury have arrived at an erroneous verdict. It appears to us that, so far as the facts of the case and the conviction of Naimoddi on these facts are concerned, it would be idle to send the case back, because it appears to be a perfectly clear case on the evidence against both the accused. We, therefore, dismiss the appeal of Naimoddi so far as it relates to the misdirection by the Judge. But the sentence upon him of five years' rigorous imprisonment was clearly illegal. We think that the circumstances of the case will be met by a sentence upon Naimoddi of one year's rigorous imprisonment.

Turning to the case of Asimoddi, that is before us on a reference under section 307, Criminal Procedure Code, and we are not only entitled but bound to go into the facts, and giving due weight to the opinions of the Judge and the Jury, to decide the case upon the evidence. The case, as we have already intimated in speaking of Naimoddi, is perfectly clear against both the accused and it is impossible to understand why one member of the Jury should have pronounced in favour of Asimoddi when convicting Naimoddi. It is clearly proved that these two men went to the office of the Muhammadan Registrar of Marriages in Dacca on 12th September 1917. That they had been there came to the notice of Mir Baksha, the complainant. He knew (as he has sworn) that Naimoddi had his sister Sabjan (the wife of Mir Baksha) in his house at that time and was reluctant to let her return to her husband. Mir Baksha also had reason to suppose that Naimoddi wanted a divorce to be brought about between the two in order that he might marry his sister to somebody else. Mir Baksha accordingly went to the Registrar's office and found that an entry had been made attested by the thumb impressions of two persons, one personating himself and one posing as Sk. Nimai to identify the husband. Nimai was found not to have been there and has given evidence to say that he never went. A complaint was lodged, and then attempts were made to bring about a compromise between the parties. A *baithak* was held at the house of the witness Nogendra but, as apparently Naimoddi did not carry out the terms of the arrangement then arrived at, these

proceedings were instituted. It was clear in the trial that the offence was one under section 465 and not under section 467, as the document was not in any sense "a valuable security." But that Naimoddi and Asimoddi both made a false document by putting their thumb impressions to the entry, Exhibit 8, admits of no doubt. The proof of it rests mainly, it is true, on the evidence of the expert who has been examined in this case, but there seems to be no reason whatever to discredit the expert's statements, or the conclusion which he drew. It is quite plain that the thumb impressions in Exhibit 8 are those of the two accused and not of Mir Baksha or Sk. Nimai. There can be no question whatever as to the intention of these two men in getting that document drawn up and signing it as they did. It was undoubtedly dishonest and a fraud upon Mir Baksha. That it was a false document under section 464, Indian Penal Code, cannot be disputed for a moment. If Naimoddi and Asimoddi put their thumb impressions on that document intending, as they did intend, that it should be taken as a signature by Mir Baksha and Sk. Nimais, their action would come directly within the first definition in section 464. We do not think that there is any distinction to be drawn in the guilt of the two men. We accordingly convict Asimoddi under section 465, Indian Penal Code, and sentence him also to one year's rigorous imprisonment. Asimoddi, if on bail, must surrender to his bail and serve out his sentence.

Accused convicted.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 891 OF 1917.

December 21, 1917.

Present:—Mr. Justice Scott-Smith and Mr. Justice Shadi Lal.

FEROZ AND ANOTHER—CONVICTS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Evidence Act (I of 1872), ss. 21, 24, 25, 26—Confession—Oral confession made to a Magistrate, whether admissible—Proof.

In order to make a confession admissible in evidence it is not necessary that it must be recorded. [p. 844, col. 2.]

An oral confession by an accused person not being open to exception under sections 24, 25 or 26 of the Evidence Act, is, as an admission by an accused person, a relevant fact and may be proved at his trial under section 21. Such a confession made to a Magistrate is relevant and may be proved by the evidence of the Magistrate. [p. 844, col. 2.]

Shere Singh v. *Empress*, 21 P. R. 1881 Cr., followed.

Where, therefore, the accused made a verbal confession of his guilt before an Honorary Magistrate:

Held, that the confession was admissible in evidence and could be proved by the evidence of the Magistrate. [p. 844, col. 2.]

Appeal from the order of the Sessions Judge, Jhelum, dated the 8th October 1917, convicting the appellants.

Mr. *Badr-ud-Din Kureshi*, for the Appellant.

Lala *Mul Chand*, R. S., Public Prosecutor, for the Respondent.

JUDGMENT.—Feroz, a Jat, and Gulab, a Tarkhan, have been convicted by the Sessions Judge of Jhelum of the murder of Nur Din, Pathal, at Dhok Kund Dakhli Padri, on the night between the 3rd and 4th July 1917 and have each been sentenced to death. They have filed a joint appeal to this Court through Mr. Kureshi, Advocate, and the case is also before us for confirmation of the capital sentences under section 374, Criminal Procedure Code.

That Feroz and his uncle Nur Din were not on good terms is clear from a perusal of the judgment of the learned Sessions Judge. In the days when the murder was committed Nur Din was grazing the flock of goats of Nawab (P. W. No. 3) and was living at Dhok Kund, which is about one *kos* from Padri where he and the appellant lived. On the morning of 4th July 1917 Nur Din was found to be missing from the Dhok though his clothes were lying there. This naturally aroused suspicion, and reports were made the same evening at Domeli Police station both by Feroz and by Nawab. Feroz in his report stated that Nur Din was suspected of having illicit intimacy with the wife of Niaz Ali. Nawab, on the other hand, said that if Nur Din had been murdered his murderer was Feroz, and that Feroz's two maternal uncles and Gulab were his accomplices. Upon this the Sub Inspector took both

Feroz and Nawab to Raja Momara Khan, (P. W. No. 6), Honorary Magistrate, Domeli, who had shortly before heard a case between Nur Din and Feroz. Raja Momara Khan expressed his desire to make enquiries from Feroz and took him aside privately and talked to him. Feroz then admitted that he and Gulab had murdered Nur Din the night before whilst he was sleeping on a *charpoy*, and that subsequently they had tied up the corpse in a blanket and buried it in a *band* which was under Feroz's cultivation.

Mr. Kureshi argues that this oral confession to the Honorary Magistrate is not admissible in evidence because it was not reduced into writing. In the first place he contends that Feroz was at that time in Police custody, and that the confession was not made to Raja Momara Khan in his capacity of Magistrate. It appears to us, however, clear that Nawab and Feroz were taken to Raja Momara Khan because he was a Magistrate and he questioned Feroz because he previously knew him, having heard a case to which Nur Din and Feroz were parties. Section 26 of the Evidence Act lays down that "no confession made by any person whilst he is in the custody of a Police Officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against the person."

Now, in the *first* place we see no reason to consider that Feroz was at the time when he made the confession in the custody of a Police Officer. He and Nawab had shortly before made inconsistent reports at the Police station, and the Police Officer accordingly took them to the Honorary Magistrate in order that the truth might be ascertained. *Secondly*, even if Feroz was in Police custody the confession was made to a Magistrate and is, therefore, not excluded from being given in evidence by anything contained in section 26 of the Evidence Act.

In regard to the contention that the confession should have been recorded in accordance with the provisions of section 164, Criminal Procedure Code, Mr. Kureshi has quoted, *inter alia*, *Queen-Empress* v. *Viran* (1) and *Empress* v. *Manoo Tumoolee* (2). Those, however, were cases in which the Magistrate had purported to act under section 164, Criminal Procedure Code, but had not followed the procedure laid down therein. There is nothing in those rulings in support of the proposition that in order to make the confession admissible in evidence it must be recorded.

In *Shere Singh* v. *Empress* (3) it was expressly held that an oral confession by an accused person not being open to exception under sections 24, 25 or 26 of the Evidence Act, is, as an admission by an accused person, a relevant fact, and may be proved at his trial under section 21, and, therefore, such a confession made to a Magistrate is relevant, and may be proved by the evidence of the Magistrate. Similarly, at page 141 of the Punjab Record (Criminal judgments) of 1887 [*Buta* v. *Empress* (4)], it is said that an extra-judicial confession to a Magis-trate is not a matter required by law to be reduced to writing within the meaning of section 91 of the Evidence Act; it is merely a matter which the Magistrate is authorised to reduce to writing.

We agree with the view expressed in these rulings of this Court, and we, therefore, hold that the confession of Feroz, which has been proved by the evidence of Raja Momara Khan, is admissible in evidence.

Now, this confession, though retracted before the Committing Magistrate, has been corroborated as regards Feroz by the fact that he pointed out the spot where the body of Nur Din was buried and from which it was recovered. Moreover, Feroz stated that the body was carried from Dhok Kund to the place where it was buried slung on the side pole of a *charpoy*. Feroz himself produced such a pole from his own house. It was sent to the Imperial Serologist, who detected on it human blood. Mr. Kureshi argues that it is extremely improbable that Feroz after murdering Nur Din at the Dhok would have carried the body and buried it in the field which he himself cultivated. The fact that the deceased's clothes were found in the Dhok and that his body was buried in a field at a distance of more than a

(1) 9 M. 224; 2 Weir 125; 3 Ind. Dec. (N. S.) 553.
(2) 4 C. 696; 4 C. L. R. 137; 2 Shome L. R. Cr. 19; 1 Ind. Dec. (N. S.) 442.
(3) 21 P R 1881 Cr.
(4) 52 P R. 1887 Cr.

mile from the Dhok make it *prima facie* probable that he was murdered at the Dhok and that his body was subsequently removed for purposes of burial. It may seem curious that Feroz should have buried the body in his own field, but murderers often do things which it is difficult to explain and after all Feroz probably thought that it would be easier for him to conceal the body in his own field than elsewhere. It appears that after the body was buried the ground was levelled and harrowed and Feroz could more easily do this in his own field without exciting suspicion than in some one else's.

In our opinion there is no reason to disbelieve the evidence of Raja Momara Khan, who is a gentleman of position. There is no reason also to suppose that the Police put any pressure upon Feroz to induce him to confess, as immediately after making his report he was taken to the Honorary Magistrate. The confession rings true and is corroborated in the manner we have already stated. We agree with the Sessions Judge that the evidence against Feroz is overwhelming, and there can be no doubt of his guilt.

As to Gulab an attempt was made to prove that he absconded from the village on the evening of the 4th of July. There is no doubt that he did leave the village and went to a neighbouring one. But he was found by Zaman Mehdi (P. W. No. 10) two days later near Jabli apparently returning to his home. He did not, it seems, make any real effort to abscond, and the explanation given by him of his movements may be true. The main point relied upon as corroborating the confession of Feroz as against him is that when he was found, he had some scratches on his neck and shoulder which were supposed to have been caused by carrying the pole on which the body was slung. No such marks were found on the person of Feroz, but he is a taller man than Gulab and might easily have escaped getting any bruises or scratches. A more important fact, however, is that marks were only found upon the *right* shoulder of Gulab. It is argued by Mr. Kureshi that a man carrying a weight slung on a pole for a distance of over a mile would certainly have shifted the pole from one shoulder to the other and if either shoulder had been injured both would have been. There is certainly a good deal of force in this argument. The explanation given by Gulab as to how he received these scratches was disbelieved by the assessors, but a perusal of the Police diaries shows that he gave this explanation from the very beginning and that he was supported by Ilam Din and Ismail, who also gave evidence at the trial. It is not shown that Feroz had any motive for naming Gulab falsely; but at the same time it would not be safe to rely upon his retracted oral confession without some material corroboration as regards Gulab. The condition of Gulab's neck and shoulder is not, in our opinion, a sufficient corroboration in a case of this sort.

We, therefore, accept Gulab's appeal and setting aside the conviction and sentence acquit him direct that he be forthwith released from custody. The appeal of Feroz is dismissed and the sentence of death passed upon him is confirmed.

Appeal dismissed.

CALCUTTA HIGH COURT.

CRIMINAL REVISION CASE No. 183 OF 1918.

March 18, 1918.

Present:—Mr. Justice Chitty and Mr. Justice Smither.

RADHAMOHAN RAI AND OTHERS
FIRST PARTY—PETITIONERS
versus
NAIMUDDI MOLLA AND OTHERS—
2ND AND 3RD PARTY—OPPOSITE PARTIES.

Criminal Procedure Code (Act V of 1898), s. 145, cls. (5), (6)—Jurisdiction of Magistrate to deal with lands not subject-matter of dispute—Order under cl. 6 in favour of persons who are not parties but who are directed to come in under cl. 5, validity of.

In a proceeding under section 145, Criminal Procedure Code, the Magistrate has no jurisdiction to deal with land which is not in dispute between the parties and to declare the same to be in the possession of persons who are not parties to the proceedings. [p. 846, col. 2.]

In such a proceeding the Magistrate exceeds his jurisdiction if he makes an order under section 145, clause (6), in favour of persons who are not parties to the proceeding and who have not filed any written statement or taken any part in the proceedings except to address the Court through their Pleader, and who were directed by the Magistrate to come in for a limited purpose, *viz.*, under section 145 clause 5. [p. 847, col. 1.]

RADHA MOHAN RAI v. NAIMUDDI MOLLA.

Mr. *Norton* (with him Babus *Manmatha Nath Mukherjee* and *Probodh Chandra Chatterji*), for the Petitioners.

Babus *Atulya Charan Bose*, *Satish Chandra Chowdhury* and *Rupendra Kumar Mitra*, for the Opposite Party.

JUDGMENT.—This Rule was issued at the instance of some of the 1st party to a proceeding under section 145, Criminal Procedure Code. The leader of this branch of the 1st party appears to be Baikuntha Chandra Roy. The Rule was issued on two grounds (1): that the Magistrate had no jurisdiction to declare plots I and J to be in possession of Sadar Ali's tenants, they being no parties to the proceeding and having made no application to be made parties, and (2) that the Magistrate had no jurisdiction to declare plots E and F to be in the possession of Baser Pramanik and his tenants, those persons being parties to the proceedings only for the purpose of section 145 (5). The proceedings were commenced on 1st September 1917 owing to a dispute between, and a likelihood of a breach of the peace by, the present petitioners (part of the 1st party) and Naimuddi Molla, the 2nd party. It appears from the order-sheet that on 8th October 1917 two sets of persons, one claiming to be tenants of Naimuddi Molla and the other to be tenants of one Bhola Molla, applied to be made parties. The order was: "They may proceed as under section 145 (5), Criminal Procedure Code." It does not appear that these persons ever came in any capacity. On 17th October 1917 Baser Pramanik and others, who have been described as the 3rd party, put in a petition claiming to be in possession of the disputed land, denying any likelihood of a breach of the peace and applying to be added as the 3rd party under section 145 (5). They conclude, "the case can be decided by accepting written statements and evidence from us." The order on that petition was: "They are to proceed under section 145 (5), Criminal, Procedure Code." At the hearing the contest was entirely between the present petitioners and Naimuddi Molla. Kanchan Mondal and other members of the 1st party took no part in it. Baser Pramanik and his tenants (3rd party) filed no written statements, nor did they adduce any evidence, either in support of their alleged possession or under section 145 (5), to show that no dispute existed. The Amin, however, in his local investigation found the houses and homesteads of the 3rd party on plots E and F. Plots E, F, I and J are all within the boundaries of the disputed land, the subject of these proceedings. As regards I and J which the Magistrate finds to be in the possession of Sadar Ali's tenants, no orders have been passed under section 145 (6), but the Magistrate has apparently released them from attachment. As to these two plots the effect of his order seems to be to exclude them from the present proceedings. The petitioners cannot in any way be prejudiced, so far as these proceedings are concerned, by the Magistrate's finding that these plots I and J are in the possession of persons who are not parties; at the same time the more correct mode of expression would be to say that he finds these plots not to be in the possession of any or either of the parties, and that in these circumstances they should be excluded from the present proceedings. He certainly had no jurisdiction to deal with these plots as if they were in dispute between the parties.

The case as to E and F is rather different, since with regard to them the Magistrate has passed an order under section 145 (6) in favour of the 3rd party. It is not disputed that the Magistrate might have added these persons, Baser Pramanik and others, as parties, but he does not appear to have done so. From the order-sheet it appears that he let them come in for a limited purpose, namely, under section 145 (5). It does not appear that they availed themselves even of that permission. They took no part in the proceedings except to address the Court through their Pleader. Though they alleged possession in their petition of 17th October 1917 they filed no written statement, and adduced no evidence in support of it. We are not prepared to say that it was absolutely necessary for them to do either of these things. Their object might be gained by the admission of or the evidence adduced by another party. But in the circumstances of this particular case we are of opinion that they cannot

be regarded as parties in whose favour an order could be passed under section 145 (6).

In this view of the case we must hold that the Magistrate exceeded his jurisdiction in passing such an order. We make the Rule absolute and set aside so much of the Magistrate's order as finds the possession of plots E and F and I and J in Baser Pramanik's tenants and Sadar Ali's tenants respectively, and also so much of his order as declares the 3rd party entitled to retain their possession until evicted in due course of law, and forbidding all disturbance of such possession until eviction. The result will be that these 4 plots E, F, I and J are excluded from the purview of the present proceedings.

Rule made absolute.

LOWER BURMA CHIEF COURT.

CRIMINAL APPEALS NOS. 173 and 874 of 1917.

December 7, 1917.

Present:—Mr. Justice Rigg.

PO NYEIN AND ANOTHER—ACCUSED

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), ss 75, 379—Criminal Procedure Code (Act V of 1898), s. 221—Boat theft—Sentence—Previous convict—Enhanced punishment, principles governing.

There is no hard and fast rule that a sentence of two years' rigorous imprisonment must be passed in all cattle and boat theft cases, without regard to the value and utility of the stolen property, the youth of the accused, his previous character, or any other circumstances that may justly be taken into consideration in passing sentence. Each case should be considered on its merits, and, if extenuating circumstances appear to exist, the sentence should be modified accordingly. A sentence should never be heavier than is necessary to deter the criminal from committing the offence again. [p. 847, col. 2; p. 848, col. 1.]

In the case of men with previous convictions, regard should be had to their career and to the time that has elapsed between the convictions passed upon them. Sections 75, Indian Penal Code, and 221, Criminal Procedure Code, were not intended for the purpose of automatically enhancing by a kind of geometrical progression the sentence to be passed after a previous conviction. The reason for passing a more severe sentence in the case of a criminal with a previous conviction is primarily to protect society from the predations and offences committed by an habitual rogue, who has shown no signs of repentance. A Magistrate or Judge should make some enquiry into the repute and antecedent behaviour of a man whom he proposes to sentence severely. [p. 848, col. 1.]

JUDGMENT.—The appellants have been rightly convicted of the theft of a *bauktu* boat, worth Rs. 8, on the 2nd August, and another similar boat, worth Rs. 15, on the 12th August.

Nga Po Gyein, who had a previous conviction proved against him, was sentenced to two consecutive terms of three and a half years' rigorous imprisonment or to seven years in all, whilst Po Tin who has no previous convictions was sentenced to consecutive sentences of two years' rigorous imprisonment, or to four years in all. The sentence passed on Po Tin for the theft of two boats of little value is an example of that want of discrimination and thought that is shown in some of the sentences passed in these cases. The Magistrate probably had in mind the ruling of *Queen-Empress* v. *Nga San* (1) in which Aston, J. C., said: "The reason why boat thefts and cattle thefts call ordinarily for a sentence of two years' imprisonment is two-fold. They for the most part are committed by professional thieves, or by persons ready to join the ranks of professional thieves, and the injury inflicted on the owner is not measured by the intrinsic value of the property stolen, but is usually far beyond that value when the owners are deprived of their means of livelihood by the loss of their cattle or boats."

The proper sentence to be passed in cattle theft cases was again considered in *Queen-Empress* v. *Nga Ni and Nga Shwe Pi* (2) in which Birks, J. C., said that where there are no extenuating circumstances, a sentence of two years' rigorous imprisonment is not unsuitable. These pronouncements have unfortunately been sometimes interpreted as laying down a hard and fast rule that a sentence of two years' rigorous imprisonment must be passed in all cattle and boat theft cases, without regard to the value and utility of the stolen property, the youth of the accused, his previous character, or any other circumstances that may justly be taken into consideration in passing sentence. When Mr. Aston spoke of cattle thefts being committed for the most part by professional thieves, he was probably thinking of the type prevalent in India, whereas in Burma many of the thefts are committed by young men who

(1) P. J. L. B. 198.
(2) P. J. L. B. 563.

are tempted to steal either by the careless way in which cattle are tended, or by motives of bravado. It is undesirable to send young men to jail if they can be suitably punished otherwise, and in many cases I think that a whipping would be a more appropriate sentence than imprisonment. Each case should be considered on its merits, and, if extenuating circumstances appear to exist, the sentence should be modified accordingly. A sentence should never be heavier than is necessary to deter the criminal from committing the offence again. In the case of men with previous convictions regard should be had to their career and to the time that has elapsed between the convictions passed upon them. Sections 75, Indian Penal Code, and 221, Criminal Procedure Code, were not intended for the purpose of automatically enhancing by a kind of geometrical progression the sentence to be passed after a previous conviction. The reason for passing a more severe sentence in the case of a criminal with a previous conviction is primarily to protect society from the predations and offences committed by an habitual rogue, who has shown no signs of repentance. But there is a large number of men who commit offences more than once, but do not seek to live by crime. These seem to me to stand on a different footing from the professional criminal. On the other hand, a man may have few if any previous convictions and may yet be a dangerous criminal whose powers of mischief need curtailment by a long sentence. I think that a Magistrate or Judge should make some enquiry into the repute and antecedent behaviour of a man whom he proposes to sentence severely. This could be done after the evidence has been heard and the Court has come to a decision about his guilt. The Police Officer in charge of the station within the jurisdiction of which the prisoner resides, or the headman of the village would be able to supply the necessary information.

Po Nyein must have had previous convictions before the one now set out against him, as he was sentenced to four years under section 379. He was released from jail in 1915, and has again committed two thefts in August 1917. His appeal is dismissed. The boats stolen by Po Tin were not of much value, but as it is in evidence that the countryside near the landing place from which they were removed, is one vast sheet of water, the thefts probably caused great inconvenience, if not loss to the owners. His sentence is reduced to one of six months' rigorous imprisonment on each charge to run consecutively.

Sentence reduced.

PATNA HIGH COURT.

CRIMINAL REVISION No. 29 OF 1918.

February 11, 1918.

Present:—Mr. Justice Roe and Mr. Justice Jwala Prasad.

JIBLAL MAHTO—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 145—*Dispute regarding right to tap tree—Jurisdiction.*

The right to tap a tree is a question which may be the subject of proceedings under section 145, Criminal Procedure Code.

Where on a Police report that there was an apprehension of a breach of the peace regarding the right to tap a tree, the Magistrate initiated proceedings under section 145 of the Criminal Procedure Code and directed that a passage may be left in a wall which was being built by the second party to enable the first party to tap the tree, the only way to cut the tree lying over the wall:

Held, that the order of the Magistrate was entirley without jurisdiction.

Criminal Revision against an order of the Sub Divisional Magistrate, Bihar, dated the 18th December 1917.

Mr. *Khurshed Hasnain*, for the Petitioner.

Mr. *Indu Bhusan Biswas*, for the Opposite Party.

JUDGMENT.—We have no doubt at all that the right to tap a tree is a question which may be the subject of proceedings under section 145. That part of the Magistrate's order which directs that a passage should be left for the purpose of such tapping seems to us to be entirely without jurisdiction. There is no evidence on the record, so far as we can see, that the only way to cut this tree lies over the wall which is being built. But even if this were so, we should doubt whether the matter could be settled otherwise than by an injunction from the Civil Court We, therefore, set aside the latter portion of the order of the learned Magistrate. The order declaring the tree to be in the possession of the first party should not be disturbed.

Order modified.

KHUNNU SINGH *v.* ABBAS BANDI.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 181 OF 1917.

December 21, 1917.

Present:—Mr. Lindsay, J. C.

KHUNNU SINGH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

Musammat ABBAS BANDI BIBI AND ANOTHER—PLAINTIFFS—RESPONDENTS

Landlord and tenant—Under-proprietary right, proof of—Sir, *land held as, effect of*—Res judicata—*Proprietary title, question of, decision as to*—*Mortgagee, decision against, whether binding on mortgagor.*

While there can be no doubt that under-proprietary rights may be acquired by long adverse possession extending over the necessary period, it is at the same time necessary that a person who claims to have acquired a title in this way, must give definite evidence to show that he asserted an under-proprietary title. [p. 852, col. 1.]

Where it was found that certain persons had escaped ejectment on the ground that they had been holding their land as *sir* and that they had been described as *sirdars* in the receipts for rent given to them by the landlord:

Held, that on the above finding they could not be held to be under-proprietors of the *sir* land. [p. 852, col. 1.]

A decision obtained against the mortgagee alone in respect of a question as to proprietary title is not binding on the mortgagor. [p. 853, col. 2.]

Sheikh Muhammad Alam v. *Raghbir Singh*, 9 O. C. 33, explained.

Appeal from the decree of the District Judge, Fyzabad, dated the 24th February 1917, reversing that of the Additional Subordinate Judge, Fyzabad, dated the 18th October 1916.

Mr. *A. P. Sen*, for the Appellants.

The Hon'ble Pandit *Gokaran Nath Misra* and Mr. *Niamat Ullah*, for the Respondents.

JUDGMENT.—The suit out of which this appeal has arisen was brought by two plaintiffs *Musammat* Abbas Bandi and *Musammat* Kasim Bandi, who are the owners of a *taluqa* named Samanpur. The defendants, who are the appellants here, were Khunnu Singh and *Musammat* Phulpati, widow of one Atbal Singh. The plaintiffs came into Court asking for a declaration that the defendants had no Zemindari rights, superior or inferior, in certain lands which were specified in the plaint and the area of which is described as being 14 *bighas* odd. The cause of action upon which the suit was based was that in ejectment proceedings taken by the plaintiffs in a Rent Court in respect of the plots in suit the defendants had set up their case that they were under-proprietors.

The defendants' case was that they were under-proprietors of the lands in suit. They alleged that they were old Zemindars of the village of Bahadurpur in which the property in dispute is situated, and they claimed that grants of "*sir* and *saer*" had been made to them by the previous *taluqdars*. The written statement filed by the defendants contained a history of certain claims and litigation between the *taluqdars* and the defendants with respect to these lands and it was claimed that even if a grant of under-proprietary rights in the lands in suit had not been established, the defendants had, by adverse possession, acquired a good title.

The Court of first instance dismissed the suit, being of opinion that the defendants had established an under-proprietary title by prescription. The lower Appellate Court has reversed the decree of the first Court and decreed the plaintiffs' claim.

Now the defendants come in second appeal and it has been argued on their behalf that their claim to under-proprietary rights in the lands in question was established. The first question which has been argued here is the question of adverse possession. The learned Counsel for the appellants contends that the decision of the Court below in this matter was erroneous. It may be as well to state here that it is now conceded that the defendants have not been able to establish any proof of a grant of under-proprietary rights in the lands in suit. Two documents were produced in the Court below, Exhibits A 15 and A 16, which were relied upon for the purpose of establishing a grant of these rights. As the learned Judge has correctly observed, even if these documents were proved to be genuine documents and even if it could be supposed that they purport to confer under-proprietary rights, nevertheless there is nothing in them to show that the lands to which they refer are the lands with which we are now concerned in this litigation. I may observe that there is evidence on the record that these documents were produced before a Settlement Court in the year 1878 and that on the strength of them under-proprietary rights were decreed with regard to certain lands situated in the village of Abbaspur. But Mr. Sen has had to admit that in those proceedings no claim

was made in respect of the lands with which we are now concerned, and consequently there is no reason to suppose that this decree passed in the year 1878 conferred any under-proprietary rights regarding the lands now in question.

To come to the point of adverse possession, it appears that in the year 1873 one Malik Hidayet Khan who was the *taluqdar* at that time issued notices of ejectment to Gopal Singh and others. Gopal Singh, it is said, was the brother of the present defendant-appellant Khunnu Singh. The persons to whom these notices were issued brought a suit in the Rent Court to contest the notices and it is admitted that the notices were set aside. Unfortunately all the record relating to this litigation in the Rent Court in the year 1873 has been destroyed and consequently we are not in a position at the present day to say on what grounds the notices were contested. All we have is that the notices were set aside by the Tahsildar in whose Court the suit was brought. In the year 1878 the *taluqdar* mortgaged his estate with possession to two persons, Lachman Prasad and Narotam Das, and these two mortgagees in the year 1886 issued notices of ejectment against the present defendant Khunnu Singh and Atbal Singh, who is now represented by the second defendant *Musammat* Phulpati who is his widow. Those notices were cancelled on a suit being brought to contest them by Khunnu Singh and Atbal Singh. Following on this there was a litigation in the Civil Court between these mortgagees and Khunnu Singh and Atbal Singh in the year 1888. We have it that a suit was filed by the mortgagees in the Court of the Subordinate Judge of Fyzabad in which a decree for ejectment of Khunnu Singh and Atbal Singh was asked for.

Pausing here, I may say that I am unable to understand how a suit of this kind was entertained by a Civil Court. The allegations in the plaint, a copy of which is Exhibit A8, indicate that the mortgagees asked for the ejectment of Khunnu Singh and Atbal Singh, alleging them to be mere tenants. I have always understood that a suit for the ejectment of a tenant lay only in the Rent Court.

However that may be, a defence was put forward by Khunnu Singh and Atbal Singh and the suit of the mortgagees was dismissed by the Subordinate Judge. A copy of his judgment is Exhibit A 11. The mortgagees went in appeal to the District Judge, who affirmed the decree of the Court below. This litigation in the Civil Court has been strongly relied upon by the defendants-appellants here in two ways. In the first place, certain statements contained in the judgments are appealed to for the purpose of showing that long before 1888, and in fact since the year 1873, the persons who were in possession of the lands now in question were setting up a claim to under-proprietary rights. Further it has been argued here, as it was in the Court below, that the decision of the Subordinate Judge, which was affirmed in appeal by the District Judge, operates as *res judicata* and prevents the present plaintiffs from asking the Court to declare that these defendants have no proprietary or under-proprietary rights. There was some discussion in the Court below, and there has been some discussion here, regarding the admissibility of the judgments of the Subordinate Judge, and the learned District Judge for the purpose of showing what sort of case had been set up in the Rent Court in the year 1873 by Gopal Singh. Even, however, if I assume in favour of the appellants that resort can be had to these judgments for the purpose of showing what were the pleas raised in the ejectment proceedings in 1873, it seems to me that they throw no light on the subject. It is well understood that a person to whom a notice of ejectment has been issued may contest the notice on a variety of grounds. He may, for example, plead that he is not an ordinary tenant and cannot, therefore, be ejected by notice. He may urge irregularities in the frame of, or in the manner of issuing, the notice and other grounds, any of which being established would lead to the notice being set aside.

Turning to the written statement which was filed in the civil suit in the year 1888 and reading it along with the plaint, a copy of which is Exhibit A 8, it seems that it was alleged in this suit brought by the mortgagees that in the year 1878 Gopal Singh had got the ejectment notice set aside on a plea that the land was his *sir* land. This allegation was admitted in the written statement, Exhibit A 9, filed by Khunnu Singh and Atbal Singh. They

alleged in the second paragraph of their further pleas that they were old Zemindars of Bahadurpur and that the lands in question were their *sir* lands ever since the time of native rule. At the most, therefore, all that we can say is that if we accept these statements as indicating the ground upon which the notice of ejectment was contested in the year 1873, a plea was raised that the lands in respect of which the notices were issued were *sir* lands. Now a man who sets up *sir* rights does not necessarily claim under-proprietary rights, for under section 5 of the Oudh Rent Act the person who is in possession of *sir* land under certain circumstances is deemed to be not an under-proprietor but an occupancy tenant; and it is also clear from the provisions of the Rent Act that an occupancy tenant cannot be ejected by an issue of notice. It seems to me, therefore, to be impossible to say definitely on this evidence, if it is admissible, that in the year 1873 the ejectment notice was contested by Gopal Singh on the ground that he was an under-proprietor.

Coming to the judgment of the Subordinate Judge, it appears to me that it does not help the case of the appellants very much. The first issue which the Subordinate Judge framed was whether the suit for possession brought by the mortgagees was or was not barred by limitation. The second issue was whether the lands in suit were the defendants' *sir* lands.

With regard to the first issue the Subordinate Judge referred to the fact that a notice of ejectment had been issued against Gopal Singh in respect of these lands and that the notice was cancelled on the 5th of June 1873 by order of the Tahsildar. The Subordinate Judge proceeds to observe that it was clear to him that the defendants' adverse possession commenced from the date of the cancellation of the notice. What is meant by this observation is not at all clear to me. I do not know what case of adverse possession in the ordinary sense could have been set up in the Rent Court. There is certainly nothing in the judgment to show that the Subordinate Judge had before him any evidence which would indicate that under-proprietary rights were claimed in the ejectment proceedings in the year 1873.

As regards the second issue the Subordinate Judge held that the lands were the defendants' *sir* and that they had been in possession of them as such for a long time. That finding, however, does not amount to a decision that Khunnu Singh and Atbal Singh were under-proprietors of the plots in question. The lands may have been their *sir* lands and yet under section 5 of the Oudh Rent Act they may have been nothing more than occupancy tenants.

Turning now to Exhibit A11, which is a copy of the judgment in appeal, here again we are left in the dark regarding what pleas were taken in the Rent Court litigation of the year 1873. The learned Judge observes that it is quite clear that in those proceedings the defendants' predecessor Gopal Singh set up an adverse title. The Judge, however, does not indicate what the nature of this adverse title was. He proceeds to remark that the defendants "had been in possession ever since and not as tenants." This remark too does not convey much. It may mean that they were not in possession as mere tenants as was the case alleged in the plaint, but were in possession as tenants with occupancy rights. As for the statement in the judgment, that the defendants had gained title by adverse possession, all that need be observed is that the nature of the title is not revealed by anything contained in this judgment. It may, for all I know, have been the opinion of the Court that the lessees were not entitled to eject these defendants, if it could be shown that they had any higher rights than those of ordinary tenants. Altogether it appears to me that the lower Appellate Court was quite right in holding that these proceedings in the year 1888 and the following years do not indicate with any certainty that a claim for under-proprietary rights in respect of these lands had been put forward in the year 1873.

It is admitted that after this litigation, which was determined by the appellate judgment of the District Judge of Fyzabad on the 23rd of September 1890, Khunnu Singh and Atbal Singh got their names recorded in the register of under-proprietors and it seems that their names have been recorded there ever since.

KHUNNU SINGH v. ABBAS BANDI.

To turn now to the plaintiffs: they redeemed the mortgage executed in favour of Lachhman Prasad and Narotam Das in the year 1908, and great stress has been laid by the learned Counsel for the appellants on the fact that since this time the plaintiffs have been taking rents from the defendants and giving them receipts in which they are described as *sirdars*. This evidence is, of course, available to the defendants as against the plaintiffs, but I cannot agree with the value which has been put upon it by the lower Appellate Court. The learned Judge observes that at the best they are records of admissions made—admissions which are not conclusive and which, as the Judge says, have not been proved to be in accordance with fact. I would hardly go so far as to say this, because it may be that these lands now in dispute are the *sir* lands of the defendants, that is to say, lands in which they hold a right of occupancy under the provisions of section 5 of the Oudh Rent Act. I am not, however, prepared to hold in the appellants' favour that a description of them as "*sirdars*" necessarily means that it was admitted that they were under-proprietors; and in any case it cannot be pleaded, as it was pleaded in the Courts below, that by granting these receipts the plaintiffs were estopped in the present proceedings from denying that the defendants are under-proprietors. While there can be no doubt that under-proprietary rights may be acquired by long adverse possession extending over the necessary period, it is at the same time to be observed that a person who claims to have acquired a title in this way must give definite evidence to show that he asserted an under-proprietary title; and I agree with the learned Judge of the Court below in thinking that no definite proof of this fact is forthcoming in the present case. This, I think, is all that is necessary to say with reference to the question of adverse possession. While it may be that Gopal Singh and after him Khunnu Singh and Atbal Singh managed to escape ejectment by notice, it has not been established that they achieved that end by putting forward a definite plea that they were under-proprietors and not tenants.

The next question is with regard to the legal effect of the judgments which were delivered in the litigation which took place in the years 1888 and 1890. It has been argued before me that the judgments of the Courts, that is to say of the Subordinate Judge and of the District Judge, operate as *res judicata* against the present plaintiffs. The case for the appellants is put in this way. It is said that when the mortgage with possession was given to Lachhman Prasad and Narotam Das the mortgagor assigned to them all powers of ejecting tenants, and consequently it is claimed that to this extent at least the mortgagees in the suit which was brought in the year 1888 were fully representing the estate of the mortgagor and consequently the mortgagor is bound by the decision. A plea of a nature similar to this was put forward in a case which is reported as *Soshi Bhusun Guha* v. *Gogan Chunder Shaha* (1). There the argument was that a judgment obtained against a mortgagor bound the mortgagee on the ground that the interest of the mortgagee was sufficiently represented by the mortgagor, so that a judgment which bound the latter ought to be binding on the former. It was contended that this view of the law was based upon principles of justice and expediency. Dealing with this argument, their Lordships make certain observations at page 371 of the report to which I now refer. They mentioned several cases in which it had been held expressly that the mortgagee was not bound by a decree passed against the mortgagor after the date of the mortgage. They then go on to say that the reasons urged on behalf of the appellants were not sufficient to induce the Court to dissent from the view which had been taken in the cases referred to. Their Lordships observe that the general rule is that a judgment *inter partes* binds only the parties and persons deriving title from them subsequent to the date of the judgment. There were, it was observed, many exceptions to this rule which were based upon grounds of justice and expediency, as for example, the cases in which judgments against a "Hindu widow or

(1) 22 C. 364; 11 Ind. Dec. (N. S.) 244.

Shebait" were held to be binding on the reversioner or the succeeding Shebait; or again cases in which by reason of express legislation decrees for rent against registered tenants were held to be binding on unregistered transferees of tenures; but their Lordships observe that the case before them did not fall under any of these descriptions. "A Hindu widow or a Shebait must be held to represent the estate completely, as otherwise there can be no one to represent such an estate. But the same thing cannot be said of the proprietor of an estate after he has mortgaged it. The mortgagee can always be ascertained; very often his interest in the estate may be much greater than that left in the mortgagor, and sometimes, as in the present case, where after a decree it was no part of the mortgagor's interest to protect the encumbrance, the interests of the two are not identical. While on the one hand to one who is anxious to acquire a safe title by *res judicata* the inconvenience in including the mortgagee as a party defendant is not very great, on the other hand the injustice of binding the mortgagee by a decree to which he was not party must be very considerable. The balance of justice and expediency is, in our opinion, decidedly in favour of the view taken by the Court below."

In the same way it appears to me that it is not possible to argue that a decree which binds a mortgagee is binding upon the mortgagor who is no party to the suit. The general principle is that a judgment *inter partes* binds only the parties and persons deriving title from them subsequent to the date of the judgment. I am not prepared to accept the view that a mortgagor who, after a decree has been passed in proceedings to which the mortgagee was a party, redeems the mortgagee is a person who derives title from the mortgagee subsequent to the date of the judgment. In other words, to use the language of section 11 of the Code of Civil Procedure, the mortgagor is not a person who claims under the mortgagee. It is well established, I think, and I need hardly cite any authority for the proposition, that while a lessee claims under his lessor and his successors-in-interest, the lessor cannot be said to claim under the lessee; and consequently he cannot be estopped by any decision obtained against the lessee. I need only refer for authority on this point to a Full Bench decision of the Calcutta High Court reported as *Brojo Behari Mitter* v. *Kedar Nath Mozumdar* (2). Further it is to be observed that the mortgagor, although he makes a mortgage even with possession, does not cease to be the proprietor of his property and consequently in a case like this, where the claim put forward on behalf of the defendants is of a proprietary nature and constitutes an attack upon the proprietary right of the *taluqdar* who was the mortgagor, it could not, I think, be held that any decision given in a suit between the present defendants and the mortgagees would be binding on the mortgagor, the reason being that in the earlier suit the mortgagees did not represent the proprietary right of the mortgagor. The learned Counsel for the appellants has drawn my attention to an observation to be found in the case reported as *Sheikh Muhammad Alam* v. *Raghbir Singh* (3). At page 34 of the report Mr. Chamier is quoted as having observed that a mortgagee may represent his mortgagor in suits fairly conducted for the ejectment of trespassers but the mortgagor cannot be bound by the dismissal of such a suit in consequence of the mortgagee's failure to prosecute the suit. The case before Mr. Chamier was one in which the mortgagee of a village had let some waste land to A to have it reclaimed and brought under cultivation. The defendants interfered with A and the mortgagee brought a suit for possession in which the mortgagor was impleaded as a defendant. The suit was dismissed because the mortgagee failed to put in an appearance. Subsequently the mortgagor brought a suit for possession of the waste land against the defendants. It was held that the decision in the former suit did not render the question *res judicata*. The remarks of Mr. Chamier at page 34 of the report appear to me to be *obiter*, and I can hardly think that his remarks amount to the enunciation of any general principle of law that a decision against the mortgagee

(2) 12 C. 580; 6 Ind. Dec. (N. S.) 394.
(3) 9 O. C. 33.

binds the mortgagor. It is possible that there may be cases in which it could be held, consistently with the principle of the doctrine of *res judicata*, that the mortgagor was bound. But for the reasons which I have given I am satisfied that in the case now before me it cannot be maintained that the decisions of the Civil Courts in the year 1888 and again in 1890 are binding upon the present plaintiffs. I hold, therefore, that it is not possible for the defendants-appellants to plead that the matter now in question between themselves and the plaintiffs has been decided finally so as to estop the plaintiffs from putting up their present claim.

I may refer here to another point which was argued in connection with this litigation of the years 1888 and 1890. The learned District Judge has observed in connection with the argument relating to the question of adverse possession that there was no evidence on the record to show that any adverse title, which was set up in this civil litigation, was ever brought to the notice of the present plaintiffs and consequently he was of opinion, and I think rightly, that nothing in these proceedings could help the defendants for the purpose of proving that they had established an adverse title by prescription against the present plaintiffs.

I have further to remark upon one point upon which some considerable stress was laid by the learned District Judge. It has been made clear that in the present suit Khunnu Singh has been relying upon assertions of adverse title made in the year 1873 by his brother Gopal Singh. When Khunnu Singh was being cross-examined in the Court of first instance, he stated as follows:—"Except myself and *Musammat* Phulpati no other person has a share in it (the land). Gopal's sons have no share in it. Gopal had also relinquished it in my favour in his lifetime, whether by his own will or through force of me (*zabardasti se*). I would say that it was my *zabardasti* that he gave up possession. I took possession after he obtained a *sir* decree in 1878." The learned Judge points out that in the face of this statement it was not open to Khunnu Singh to take advantage of Gopal Singh's success in the litigation in the Rent Court of 1873, because on his own showing he is not the representative in interest of Gopal Singh whom he says he ousted from possession. It has been argued here that this statement was made by Khunnu Singh mistakenly or by reason of some confusion. That, however, is not a matter which I can consider here in second appeal. It was certainly open to the learned Judge to make use of any statement of this kind made by Khunnu Singh when he was being examined as a witness and to use it as evidence in support of his conclusion that Khunnu Singh is not the legal representative of Gopal Singh and that he has not acquired title by continuous adverse possession.

I have now dealt with all the points which were raised in the memorandum of appeal and which were argued before me. Ground No. 5 of the memorandum was not pressed. With reference to what is stated in ground No. 6 of the memorandum of appeal, in which it is said that a judgment of the first Additional Judicial Commissioner in Second Civil Appeal No. 224 of 1913 lays down too broad a rule of law, it is necessary to say that that was a case in which Mr. Stuart held that a decree obtained against a mortgagee would not bind the mortgagor. It is true, as has been argued, that Mr. Stuart gives no reasons for his decision, but I have dealt sufficiently with this point in an earlier portion of the judgment and I think that the general principle laid down by Mr. Stuart is a correct one.

The result, therefore, is that the defendants-appellants failed in my opinion to adduce satisfactory proof that they are under-proprietors of the plots in suit. The appeal fails and is dismissed with costs.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 435 OF 1904.

April 17, 1905.

Present:—Sir Henry Drake-Brockman, Kt., A. J. C.

FAKIRA AND OTHERS—DEFENDANTS—APPELLANTS

versus

TULSIRAM AND OTHERS—PLAINTIFFS—AND JAGANNATH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Registration Act (XVI of 1908), s. 17 (c)—Receipt

SHEORAJ SINGH v. SRIPRAKASH SINGH.

for possession of land allotted in partition already effected, whether requires registration—Partition, whether requires to be in writing.

The law does not require writing to complete a partition which has already been effected by Panchas.

Gyannessa v. *Mobarakannessa*, 25 C. 210; 2 C. W. N. 91; 13 Ind. Dec. (N. S.) 142, followed.

A document, which is in terms merely a receipt for possession of some land allotted to one of the parties in a partition which has already been effected by Panchas, is not compulsorily registrable under section 17 (c) of the Registration Act.

Appeal from the decree of the Court of the District Judge, Chhindwara, dated the 19th August 1904.

Mr. *J. C. Mitra*, for the Appellants.

Mr. *M. B. Dadabhoy*, for the Respondents.

JUDGMENT.—The lower Appellate Court seems in this case to have taken an entirely wrong view as to the nature of the document Exhibit D 1. It was in terms merely a receipt for possession of certain *sir* and *khudkasht* land, which had first been allotted by Panchas to an 8-annas share of which Fakira, Gadi and Tukaram, the present appellants, are owners. The plaintiffs never alleged in the first Court that the document represented anything more than a receipt. It is certainly not a gift; for the executants do not in terms transfer anything to anybody, while an arrangement by way of partition can never be regarded as to any extent without consideration: each party gives up something and relinquishes something, and these things form the consideration for each other. Nor is there any exchange, the reason being that no transfer purports to be effected. The partition between the parties had already been effected by Panchas invited for the purpose and the law does not require writing to complete such a transaction. See *Gyannessa* v. *Mobarakannessa* (1). I would distinguish the Full Bench decision of the Madras High Court in the Stamp Reference reported as *Reference under Stamp Act, section* 46 (2), on the ground that there the co-sharers effected a partition themselves by lottery and that each co-sharer executed a document setting out his share. In the present case it was unmistakably the action of the Panchas which effected a partition. That the instrument, though in terms a receipt, was not intended to be more than a memorandum for the benefit of the executants themselves seems clear from the fact that they retained possession of it. For this reason I hold that section 17 (c) of the Registration Act has no application.

The decree of the lower Appellate Court allowing the first appeal by Jharia and dismissing that of Fakira are set aside, and the case is remanded to that Court with directions to re-admit both appeals under their original numbers on the register and to determine them afresh on the merits. The usual certificate for refund of Court-fees is granted: other costs incurred in this Court will follow the event.

Case remanded.

(1) 25 C. 210; 2 C. W. N. 91; 13 Ind. Dec. (N. S.) 142.

(2) 15 M. 164; 5 Ind. Dec. (N. S.) 463 (F. B).

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST RENT APPEAL No. 9 OF 1917.

May 9, 1917.

Present:—Pandit Kanhaiya Lal, A. J. C.

Bhaiya SHEORAJ SINGH—DEFENDANT—APPELLANT

versus

Kunwar SRIPRAKASH SINGH—PLAINTIFF—RESPONDENT.

Oudh Rent Act (XXII of 1886), ss. 52, 141—Grant for maintenance, interpretation of—Tenant under special agreement—Interest on arrears of rent.

Defendant held a village for his maintenance under a grant from the Taluqdar on condition (1) that he paid the revenue assessed on the same and 15 per cent. *malikana* and 7 per cent *sawai* to the Taluqdar, (2) that the grant was resumable if the grantee failed to maintain the members of his family, and (3) that while the grant was hereditary the grantee was debarred from selling or mortgaging the village:

Held, that the grantee was a tenant holding under special agreement within the meaning of section 52 of the Oudh Rent Act and was, therefore, liable to pay interest on the arrears of rent due from him under section 141 of that Act. [p. 856, col. 1.]

Appeal from the decree of the Deputy Commissioner, Kheri, dated the 17th November 1916.

Pandit *Kailash Nath Chak*, for the Appellant.

Babu *Bisheshwar Nath Srivastava*, for the Respondent.

JUDGMENT.—The plaintiff-respondent is the present proprietor of the Mallanpur Estate. The defendant-appellant represents one of the junior branches of the family of the former proprietors of that estate. It appears that six villages were granted by the ancestor of the plaintiff to the ancestor of the defendant for his maintenance, subject to the condition that he paid the revenue assessed on the same and 15 per cent. *malikana* and 7 per cent. *sawai* to the Taluqdar. The terms of the grant are embodied in the *wajib-ul-arz* of the villages granted, wherein it is stated that the grant shall be resumable, if the grantee fails to maintain the members of his family, and that while the grant will be hereditary, the grantee shall have no power to sell or mortgage the villages granted. The present suit was filed by the plaintiff for the recovery of the arrears of rent for 1322 and 1323 *Fasli* in respect of some of those villages with interest thereon at 1 per cent. per mensem. The learned Collector decreed the claim. The only question for determination in this appeal is whether the plaintiff was entitled to claim interest on the arrears and whether the defendant was entitled to a set-off of Rs. 1,124-4-6, which he claims to have paid in excess to the plaintiff in 1321 *Fasli*. It is clear from the terms of the grant that the defendant is not a transferee of a proprietary interest in the villages in question, for the right conferred was not transferable and the grant was resumable on the happening of a certain contingency. It is also clear that the defendant is not an under-proprietor within the meaning of section 3, clause 8, of the Oudh Rent Act (XXII of 1886), because the rights conferred by the grant were non-transferable. The items specified in the *wajib-ul-arz* as being payable by the grantee represent the measure of the *malikana* or rent payable by him on account of the right he holds in the land, and in the absence of anything to show a limited proprietary grant, he must be deemed to be a tenant, holding under a special agreement within the meaning of section 52 of the Oudh Rent Act, and, therefore, liable to pay interest under section 141 of the said Act. In regard to the set off claimed by the defendant, it appears that a decree was obtained by the plaintiff for arrears for 1319 and 1320 *Fasli* against the defendant, in execution of which Rs. 1,124-4-6, which had actually been paid by the defendant in excess in 1321 *Fasli*, were credited and an execution was taken out for the balance. This fact was not disputed in the Court below. The question of set-off, therefore, does not arise. The appeal accordingly fails and is dismissed with costs.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 57 OF 1917.

November 2, 1917.

Present:—Sir Henry Drake Brockman, KT., J. C.

HUKUMCHAND SON OF KANHAIYALAL, PROPRIETOR OF THE FIRM KANHAIYALAL HUKUMCHAND—PLAINTIFF—APPELLANT

versus

BENGAL NAGPUR RAILWAY COMPANY—DEFENDANT No. 3—RESPONDENT.

Principal and agent—Fraud of agent, liability of principal for—Station Master issuing receipt for non-existent goods, whether acting within scope of his authority—Railway Company, liability of.

A principal is liable for the fraud of his agent acting within the scope of his authority, whether the fraud is committed for the benefit of the principal or for the benefit of the agent. [p. 857, col. 2.]

Lloyd v. *Grace, Smith and Co.*, (1912) A. C. 716; 81 L. J. K. B. 1140; 107 L. T. 531; 56 S. J. 723; 28 T. L. R. 547, *Sher Jan Khan* v. *Alimuddi*, 34 Ind. Cas. 598; 43 C. 511; 20 C. W. N. 268; 23 C.L. J. 225, followed.

A railway employee, however, cannot be said to act within the scope of his authority or in the course of his employment when he treats as brought for despatch that which is non-existent. [p. 858, col. 2.]

A Station Master fraudulently issued a Railway receipt which purported to show that a certain consignment of rice had been delivered at a certain station for despatch to another station, whereas no such consignment had been delivered for despatch at all:

Held, that the Railway Company was not liable for the fraud of the Station Master, inasmuch as the latter could not be said to have been acting within the scope of his authority or in the course of his employment [p. 858, col. 2.]

(Case-law discussed.)

HUKUMCHAND v. BENGAL NAGPUR RAILWAY CO.

Appeal against the judgment of the District Judge, Jubbulpore, dated the 23rd April 1917.

Messrs. *M. Gupta* and *V. Bose*, for the Appellant.

Mr. *J. C. Ghosh*, for the Respondent.

JUDGMENT.—This is an appeal from a judgment and decree of the District Court, Jubbulpore, dismissing the plaintiff's claim against the Bengal Nagpur Railway Company while allowing it against the other defendants.

The plaintiff works as a commission agent at Saugor and used to do business with the defendant Matru Lal, who dealt in grain in Burhar in the Rewah State. The defendant Kesho Vinayak was the Station Master at Rupond near Burhar on the Katni Bilaspur branch of the Bengal Nagpur Railway. It has been found that in pursuance of a fraudulent conspiracy Kesho Vinayak delivered to Matru Lal two railway receipts which together purported to show that 1,100 bags of rice had been received at Rupond on the 16th February 1916 for consignment to Saugor. By means of these receipts Matru Lal obtained Rs. 8,873 from the plaintiff who eventually suffered a loss of Rs. 8,287, the rice never having been delivered at Rupond much less conveyed to Saugor. Matru Lal and Kesho Vinayak are both in jail having been convicted of cheating and abetment of cheating respectively.

It is common ground that as far back as 1913 instructions were issued by the Railway Company to all Station Masters in the following terms:—

"1. It has been brought to notice that certain stations are in the habit of issuing railway receipts to consignors before the whole of a consignment has been received for despatch and also before waggons are available for loading.

2. This practice is objectionable and can on no account be allowed.

Station Masters and staff concerned must note that in future any cases of this nature brought to notice will be very severely taken up."

Under the rules of the Railway Company when goods are brought to a station for despatch, they must be accompanied by a consignment note from which a receipt eventually given to the consignor to enable him to obtain delivery at destination is prepared.

The claim as against the Company was dismissed on two grounds, *first*, because the master was considered to be not liable for the result of his servant's criminal act committed in contravention of orders and, *secondly*, because the plaintiff was regarded merely as Matru Lal's agent and, therefore, unable to recover the sacks through him.

In this Court the principal point pressed on behalf of the plaintiff is that the Station Master must be regarded as having acted in the course of his employment as the Company's agent for the general purpose of issuing railway receipts and that the Company is, therefore, liable to make good the loss suffered by the plaintiff. Special reliance is placed upon the decision of the House of Lords in *Lloyd* v. *Grace, Smith and Co.* (1) and on *Sher Jan Khan* v. *Alimuddi* (2). The former case settles the doctrine that a principal is liable for the fraud of his agent acting within the scope of his authority, whether the fraud is committed for the benefit of the principal or for the benefit of the agent. It also overruled the *dictum* of Lord Davey in *Ruben* v. *Great Fingall Consolidated Ltd.* (3) to the effect that where an agent acts fraudulently for his own illegal purposes, no representation by him relating to the matter will bind his employers, but did not in any way dissent from the general decision in that case.

In the Calcutta case numerous authorities are quoted which support the proposition that the rule laid down by the House of Lords is based upon grounds of public policy, it being reasonable that where one of the two innocent persons must suffer from the wrongful act of a third person, the principal who has employed and retained a dishonest agent and has placed him in a position of trust and confidence should suffer for his misdeed rather than a stranger.

A number of cases have been cited on behalf of the appellant, among which are the following:—

(1) (1912) A. C. 716; 81 L. J. K. B. 1140; 107 L. T. 531; 56 S. J. 722; 28 T. L. R. 547.

(2) 34 Ind. Cas. 598; 43 C. 511; 20 C. W. N. 268; 23 C. L. J. 225.

(3) (1906) A. C. 439 at p. 446; 75 L. J., K. B. 843; 95 L. T. 214; 22 T. L. R. 712; 13 Manson 248.

Great Western Railway v. *Bunch* (4), *Pickering* v. *Busk* (5), *Limpus* v. *London General Omnibus Company* (6) and *Betts* v. *De Vitre* (7). In the first case a railway porter took charge of a passenger's luggage in contravention of orders to the contrary and the Company was held liable for the porter's negligence which led to part of the luggage being lost. The view taken seems to have been that so far as the passenger was concerned, the porter could not be regarded as having acted beyond the apparent scope of his authority.

In *Pickering* v. *Busk* (5) it was held that the sale impeached could not be rescinded inasmuch as it was effected under an implied authority in that behalf. There the real purchaser of hemp lying at a wharf had put the goods into the custody of a broker whose common business it was to sell for others concealing their names; the real purchaser not having limited the broker's authority had conferred on him an implied authority to sell the hemp.

In *Limpus* v. *London General Omnibus Company* (6) the driver of the defendants' omnibus drove it across the road in front of a rival omnibus belonging to the plaintiffs, which was thereby overturned. The defendants had given instructions to their driver not to obstruct any omnibus, but they were held liable for the damage done on the finding that their driver acted in the course of his service and in a manner which he considered advantageous to his employers. At the same time it was laid down that if the driver's act had been one of his own done to effect a purpose of his own the defendants would not have been responsible.

In *Betts* v. *De Vitre* (7) the Directors of the Company were held liable for the infringement of a patent in spite of the fact that the acts complained of were done by workmen employed by them but contrary to their orders. Chelmsford, L. C., said:—

"Now, I will assume that the orders not to work in a particular manner were given, and that the disobedience to those orders was secret, although the evidence hardly warrants this conclusion. But granting all this to be the case, I should still hold that the Directors would be liable. A master is responsible for all the acts of his servant which are done in the execution of his duty. If a coachman drives his master's carriage where he is ordered to go, and by negligent driving does an injury, the master is responsible; but if he takes a carriage without permission, and employs it for his own purpose, he alone is answerable for any injurious consequences which arise during his use of it. The alleged infringement of the plaintiff's patent took place in the Company's works, and in the course of the performance of the proper duties in which the workmen were engaged. Those who have the control of the working are responsible for the act of their subordinates, and it is not sufficient for them to order that the work shall be so done that no injury shall be occasioned to any third person. That, of course, must be avoided whether orders to that effect are given or not; but the Directors were bound to take care that their orders were obeyed; and if there was a violation of them, whether openly or secretly, they are liable for the consequences."

In none of these cases am I able to find any authority for the proposition that the employer should be held liable in a case like the present. A Railway Company is no doubt concerned to deal with goods brought to its stations for despatch, but I am clearly of opinion that no employee can be said to act within the scope of his authority or in the course of his employment who treats as brought for despatch that which is non-existent. Direct authority for this view is forthcoming in *Grant* v. *Norway* (8), where the master of a ship signing a bill of lading for goods which have never been shipped was considered not to be the agent of the owner in that behalf, so as to make the latter responsible to one who has made advances upon the faith of bills of lading so signed. Jervis, C. J., in delivering the judgment of the Court said:—

(4) (1888) 13 A. C. 31; 57 L. J. Q. B. 361; 58 L. T. 128; 36 W. R. 785; 52 J. P. 147.

(5) (1812) 13 R. R. 364; 15 East 38; 104 E. R 758.

(6) (1862) 130 R. R. 641; 1 H. & C. 526; 32 L. J. Ex. 34; 9 Jur. (N. S.) 333; 7 L. T. (N. S.) 641; 11 W. R. 149; 158 E. R. 993.

(7) (1868) 3 Ch. 429; 37 L. J. Ch. 325; 18 L. T. 165; 16 W. R. 529; 6 N. R. 165.

(8) (1851) 84 R. R. 747; 10 C. B. 665; 20 L. J. C. P. 93; 15 Jur. 296; 188 E. R. 263.

"It is not contended that the Captain had any real authority to sign bills of lading, unless the goods had been shipped, nor can we discover any ground upon which a party taking a bill of lading by endorsement would be justified in assuming that he had authority to sign such bills, whether the goods were on board or not.

If, then, from the usage of trade, and the general practice of ship-masters, it is generally known that the master derives no such authority from his position as master, the case may be considered as if the party taking the bill of lading had notice of an express limitation of the authority; and, in that case, undoubtedly, he could not claim to bind the owner by a bill of lading signed, when the goods therein mentioned were never shipped. It would resemble the case of goods or money taken up by the master under pretence that they were wanted for the ship, when in fact they were not."

Similarly in *Coleman* v. *Riches* (9), in which both *Pickering* v. *Busk* (5) and *Grant* v. *Norway* (8) were cited with approval, it was held that where the servant of a wharfinger fraudulently signed a receipt purporting to acknowledge receipt of goods delivered at its employer's wharf to be shipped to the order of a third party, no such wheat having in fact been delivered, and thereby wilfully induced the third party to pay the price to the pretended vendor, the wharfinger was not liable.

In *Lloyd* v. *Grace, Smith & Co.* (1) above cited, Lord Macnaghten at page 736 recognized the difficulty of defining with exactitude the expressions "acting within his authority," "acting in the course of his employment" and "acting within the scope of his agency," and went on to say that whichever expression is used it must be construed liberally and that probably the explanation given by Willes, J., in *Barwick* v. *English Joint Stock Bank* (10) is the best that can be given. The words of Willes J., were :—

"In all these cases it may be said, as it was said here, that the master has not authorized the act. It is true, he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in."

These words are relied upon for the appellant, but, in my opinion, it cannot be said that to issue a receipt in respect of non-existent goods is an act of the same class as issuing one for goods actually delivered for consignment.

This is no doubt a hard case, but it must be borne in mind that if the Company employed a rogue as its servant, the plaintiff dealt for his own advantage with another rogue. As between the plaintiff and the Company therefore the case is not really comparable with *Lloyd* v. *Grace, Smith & Co.*, (1), where the plaintiff doing business with the defendant firm was cheated by the latter's clerk who conducted the conveyancing business of the firm without supervision.

This finding suffices for the decision of the case. The appeal is dismissed with costs. Costs in the lower Court will be paid as already ordered.

Appeal dismissed.

(9) (1855) 100 R. R. 635; 16 C. B. 104; 3 C. L. R. 795; 24 L. J. C. P. 125; 1 Jur. (N. S.) 596; 3 W.R. 453; 139 E. R. 695.

(10) (1867) 2 Ex. 259; 36 L. J. Ex. 147; 16 L. T. 461; 15 W. R. 877.

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 20 OF 1916.

July 14, 1916.

Present:—Pandit Kanhaiya Lal, A. J. C., and Mr. Kendall, A. J. C.

NARINDRA BAHADUR SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

Babu RAM SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Specific Relief Act (I of 1877), s. 42, proviso—Declaration, suit for, maintainability of—Defendant in possession as mortgagee from Hindu father—Suit by sons for declaration that their share is not liable to attachment and sale in execution of money-decree against father, maintainability of.

The proviso appended to section 42 of the Specific Relief Act refers to the legal character or right to property which is set up in the plaint. In other

words, the further relief, referred to in that proviso, is a relief appropriate to, and consequent on, the right asserted.

Where the sons of a Hindu father sued merely for a declaration that their share in the family property was not liable to attachment and sale in execution of a money-decree obtained against their father, and it was found that the decree-holder defendant was in possession of the property under a mortgage effected by the plaintiff's father:

Held, that the suit was not barred by the proviso to section 42 of the Specific Relief Act, inasmuch as it arose quite independently of the mortgage.

Appeal from the decree of the Subordinate Judge, Rae Bareli, dated the 2nd February 1916.

Mr. *St. George Jackson*, for the Appellant.

The Hon'ble Mirza *Sami Ullah Beg*, for Respondent No. 2.

JUDGMENT.—The plaintiffs are the sons of Ram Singh and sue for a declaration that they are the owners of a two-thirds share in the disputed property, and that the said two-thirds share was not liable to attachment and sale in execution of the decrees obtained by defendant No. 2 against their father. Defendant No. 2 pleaded *inter alia* that he was in possession of the disputed property under a usufructuary mortgage, executed in his favour by Ram Singh on the 20th October 1913, and that the plaintiffs were not entitled to a mere declaratory decree.

The learned Subordinate Judge accepted that contention and dismissed the suit. It is admitted on behalf of the plaintiffs that they are not in physical possession of the disputed property. They state that they were not aware of the existence of the usufructuary mortgage set up by defendant No. 2, and that they cannot be compelled in this suit either to impugn or to redeem that mortgage, which was an independent transaction. The right to seek a declaratory relief, asserted by the plaintiffs, arises out of a threatened sale of their share in the disputed property in execution of certain decrees for money directed against that property. It does not arise out of the usufructuary mortgage under which defendant No. 2 claims to be in possession. The equity of redemption is still in the possession of the family, and Ram Singh continues to be in constructive possession through his mortgagee. The mortgage operates as a bar to a suit for possession, till it can be either displaced or redeemed in a suit properly framed for the purpose. To require the plaintiffs to sue for possession is to ask them to invite the operation of that bar, and to deny to them the relief, if any, to which they might be entitled in connection with the decrees now under execution, in case they fail to displace that bar. The proviso appended to section 42 of the Specific Relief Act (I of 1877) refers to the legal character or right to property, which is set up in the plaint, and as pointed out in *Mohabir Pershad Narain Singh* v. *Gungadhur Pershad Narain Singh* (1) and *Kannan* v. *Krishnan* (2), the further relief, referred to in that proviso, is a relief appropriate to and consequent on the right asserted. We do not consider that the plaintiffs were bound in this case to impugn the usufructuary mortgage under which defendant No. 2 claims to be in possession, or *qua* the decrees under execution to join a claim for possession in the present suit.

The appeal is, therefore, allowed and the suit remanded to the Court below, under Order XLI, rule 23 of the Code of Civil Procedure, with a direction to re admit it under its original number and to dispose of it in the manner provided by law. The costs of this appeal will abide the result.

Case remanded.

(1) 14 C. 599; 12 Ind. Jur. 26; 7 Ind. Dec. (N. S.) 357.

(2) 13 M. 324; 4 Ind. Dec. (N. S.) 938.

LOWER BURMA CHIEF COURT.

SPECIAL SECOND CIVIL APPEAL No. 223 OF 1916.

March 15, 1918.

Present:—Mr. Justice Maung Kin.

R. M. A. R. V. VENKATACHALLUM—PLAINTIFF—APPELLANT

versus

MG. TUN E—DEFENDANT—RESPONDENT.

Evidence Act (I of 1872), s. 92—Sale or mortgage—Consideration—Non-payment of purchase-money—Remedy of vendor—Oral evidence, admissibility of, to explain document—Sale of immoveable property—Delivery of possession, whether necessary.

In a sale of immoveable property the non-payment of the purchase-money does not prevent

VENKATACHALLUM v. MG TUN E.

the passing of the ownership of the purchased property from the vendor to the purchaser and the purchaser can notwithstanding such non-payment maintain a suit for possession of the property, and the only remedy of the vendor is a suit for the recovery of the purchase-money. [p. 861, col. 2; p. 862, col 1.]

Oral evidence is not admissible to show that a transaction which is *ex facie* a sale is really a mortgage, except to prove fraud on the part of the party taking benefit under the deed [p. 861, col. 1.]

Mr. *Anklesaria*, for the Appellant.

Mr. *Sin Hla Aung*, for the Respondent.

JUDGMENT.—The plaintiff-appellant sued for a declaration that a deed, which on the face of it is one of sale, is really one of mortgage. The appellant was made a party to the suit as 2nd defendant, as he has executed a decree against the 1st defendant Mg. Po Saing by attaching the property in suit. The deed in question purports to be between Mg. Po Saing as the vendee and the plaintiff as vendor.

The plaint is in effect one for the redemption of the property in suit. The question which arises is whether oral evidence is admissible to prove that the transaction which was *ex facie* a sale was really a mortgage. It is clear that such evidence is not admissible, except to prove fraud on the part of the party taking benefit under the deed. Both the lower Courts have found that the charge of fraud which the plaintiff made against the defendant was not maintainable. It, therefore, follows that the transaction must be treated as a sale. It has, however, been contended that oral evidence to show that it is really a mortgage is admissible, between plaintiff and the 2nd defendant, the present appellant. The contention is raised on the ground that the admissibility of oral evidence under section 92 applies only between parties to the transaction of their representatives-in-interest and that the appellant is not a representative-in-interest. I cannot accede to this view, because the only way he can claim the property is through the 1st defendant.

It is clear on the facts that the plaintiff after the execution of the conveyance continued in possession of the land and was still in possession when it was attached by the appellant. The learned Divisional Judge takes hold of this fact and deals with it in the following way: "If this is so, then the sale-deed has never become operative. There can be no valid transfer unless possession is given. Mere execution of the deed of sale and payment of consideration does not complete the transaction. The vendor has a lien on the land and may be entitled to obtain possession, but until possession is given the transfer is incomplete", and he then proceeded to frame the following issue: Has there been a valid transfer of the land in suit by Mg. Tun E to Mg. Po Saing? and remanded the issue to the lower Court for trial, and upon receipt of the lower Court's finding upon the issue proceeded to hold that as the conveyance had never been carried into effect by delivery of possession, there had been no valid transfer of the land and that the document under the circumstances clearly gave the plaintiff a lien on the land to the extent of the consideration paid with interest, and that the 2nd defendant, *i. e.*, the appellant, was not entitled to a re-conveyance of the property until the lien had been discharged, while on the other hand as there had been no valid transfer of the land, the appellant as decree-holder was not entitled to attach more than his judgment-debtor's interest in the land. The learned Judge gave a decree declaring that at the time of the filing of the suit the plaintiff had a charge on the land to the extent of Rs. 700 and that the charge would be extinguished upon payment of Rs. 700 together with such further interest as might accrue between the dates of the suit and payment. No authorities were cited for these views of the learned Judge, nor can I find any support for it either in any ruling or in any part of the Transfer of Property Act. But I have found authorities expressing a contrary view. In *Baijnath Singh* v. *Paltu* (1) it was held, following *Shib Lal* v. *Bhagwan Das* (2), *Umedmal Motiram* v. *Davu* (3) and *Sagaji* v. *Namdev* (4) that in a sale of immoveable property even non-payment of the purchase-money does not prevent the passing of the ownership of the purchased property from the vendor to the purchaser and the purchaser can,

(1) 30 A. 125; A. W. N. (1908) 38; 5 A. L. J. 96.

(2) 11 A. 244; A.W.N. (1889) 96; 6 Ind. Dec. (N. S.) 583.

(3) 2 B. 547; 3 Ind. Jur. 119; 1 Ind. Dec. (N. S.) 787.

(4) 23 B. 525; 1 Bom. L. R. 5; 12 Ind Dec. (N. S.) 49.

notwithstanding such non-payment, maintain a suit for possession of the property, and that the only remedy of the vendor was a suit for the recovery of the purchase-money. The learned Divisional Judge was, therefore, in error in considering that there can be no valid transfer of immoveable property unless possession is given.

I do not think there is any way out of the difficulty for the plaintiff. The decree of the Divisional Court is set aside and the suit is dismissed with costs throughout.

Suit dismissed.

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 1055 OF 1915.

February 1, 1918.

Present:—Sir Stanley Batchelor, KT., Acting Chief Justice, and Mr. Justice Shah.

TIMAJI KRISHNA POTDAR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RAMA PIRAJI BHATKHANDE AND ANOTHER—DEFENDANTS NOS. 2 & 3—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 82—Joint mortgage of several properties—Mortgagee, right of, to enforce debt against one property—Succession Act (X of 1865), s. 190—One of several heirs of deceased sued as his legal representative—Letters of Administration, whether necessary.

Section 82 of the Transfer of Property Act defines the relation of joint mortgagors *inter se*, and there is nothing in the language of the section which compels the conclusion that the mortgagee must distribute his debt in a certain manner or is unable to enforce it against each and every part of the property made security for the mortgage. Each of several mortgaged properties is, so far as the mortgagee is concerned, liable for the entirety of the mortgage-debt. [p. 862, col. 2; p. 863, col. 1.]

Where one of several heirs of a deceased who died intestate was impleaded as a defendant to a suit as the legal representative of the deceased:

Held, that section 190 of the Succession Act applied to the case and that no right to any part of the property of the deceased could be established in any Court unless Letters of Admini tration were granted by a Court of competent jurisdiction. [p. 863, col. 1.]

Second appeal from the decision of the District Judge, Belgaum, in Appeal No. 434 of 1914, confirming the decree passed by the Joint Subordinate Judge, Belgaum, in Civil Suit No. 184 of 1913.

Mr. *R. A. Jahagirdar*, for the Appellants.

Mr. *S. R. Bakhale*, for Respondent No. 1.

Mr. *Ratanlal Ranchhoddas*, for Respondent No. 2.

JUDGMENT.

BATCHELOR, A.C. J.—(*September* 25, 1917.)—The facts out of which this appeal arises are these. In 1871 one Koneri affected to mortgage to the plaintiff No. 1 three pieces of property, namely, Survey No. 1088, one-third of Survey No. 1058 and a house. It was afterwards discovered, and is now admitted, that in fact Koneri had no title whatever to Survey No. 1088. In 1877 the mortgagor Koneri sold the equity of redemption in the two mortgaged properties to one Britto, who was the father of the 3rd defendant, and Britto in his turn sold the equity of redemption in the house to the defendant No. 2's father. This last sale was in 1880. The suit was brought by the plaintiffs to recover their money by the sale of the mortgaged property. The 1st defendant was sued as the heir of Koneri, but he took no part in the proceedings, and admittedly has no interest in the litigation.

It was contended in the lower Courts on behalf of the 2nd defendant that he was entitled to the application of the principle of contribution, and the lower Court accepting that argument has awarded to the plaintiffs a portion only of their claim against the 2nd defendant. Moreover, in awarding that portion the lower Court has taken into its consideration the value of Survey No. 1088 which, as I have said, Koneri had no right to mortgage.

It appears to me that the lower Court was wrong in allowing the argument on behalf of the 2nd defendant upon this point. The property, the subject of the mortgage, remains to-day what it was when the mortgage was made, namely, one-third of No. 1058 and a house. Survey No. 1088, in spite of Koneri's pretence to mortgage it, was never validly mortgaged, that is, there was never any transfer of interest in this property from Koneri to the mortgagee. This being so, it cannot be said that there has ever been any severance of the security by the act of the mortgagee. In these circumstances, section 82 of the Transfer of Property Act cannot in my view be invokd so as to assist the 2nd defendant. That section provides that "where several properties are mortgaged to secure one debt, such properties are, in the absence of a contract to the contrary, liable to contribute rateably to the debt secured by the mortgage." This provision, however, defines the relation of the mortgagors *inter se*, and there is nothing in the language of the section which compels the conclusion

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Harlal Sadhu (1) and *Krishna Ayyar* v.
Muthukumaraswamiya Pillai (2). I conclude, therefore, that the mortgaged property in the hands of the 2nd defendant is liable for the entirety of the mortgage-debt.

In regard to the 3rd defendant, the position is one of some difficulty. The 3rd defendant is the son of that Britto who purchased from Koneri. It is admitted that the 3rd defendant is not the only heir of the deceased Britto, but that there are other heirs who are not brought upon this record. It must also, I think, be taken, since the contrary is not made to appear, that no Letters of Administration had been taken out to the deceased Britto's estate, and it is apparent that the 3rd defendant was brought upon the record as one of the heirs of the deceased, on the footing that the deceased Britto had died intestate. In this state of facts section 190 of the Indian Succession Act comes into operation, and no right to any part of the property of the deceased Britto can be established in any Court unless Letters of Administration have first been granted by a Court of competent jurisdiction. This appears to me to be at present decisive against the plaintiff's claim against the present 3rd defendant, and the decision in *Virchand Vajekaran Shet* v. *Kondu Kasam Atar* (3) cannot remove the difficulty created by section 190 of the Indian Succession Act. It would, however, be unsatisfactory to leave matters in this condition, since the result would be to throw the whole burden upon the 2nd defendant, leaving him to prefer a separate suit in order to recover contribution from the 3rd defendant. The less roundabout method of securing justice will be to obtain, if possible, adequate representation to the deceased Britto's estate, and Mr. Jahagirdar on the plaintiffs' behalf has applied for a stay of the final orders in this appeal so as to enable Letters of Administration to be taken out. In the view which I

(1) 18 C. 320; 9 Ind. Dec. (N. S.) 213.
(2) 29 M. 217.
(3) 31 Ind. Cas. 180; 17 Bom. L. R. 685; 39 B. 729.

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SHAH, J.—
FINAL JUD
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determination of this appe
to allow Mr. Jahagirdar, the
on behalf of the plaintiffs,
Letters of Administration to the
the deceased Britto, who upon the pr
record is represented only by one son
the 3rd defendant. The learned Pleader, however, now draws our attention to the fact, which is not contested, that Britto was a Native Christian, so that the law applicable to his case is Act VII of 1901, by section 3 of which it is provided that sections 190 and 239 of the Indian Succession Act do not apply to any part of the property in question. It follows, therefore, that even without Letters of Administration the mortgaged property in the hands of the 3rd defendant must be liable for the mortgage-debt. We must, therefore, make the usual decree for sale. That decree will declare that the amount due to the plaintiffs on account of the principal, interest and costs, calculated up to this day, is Rs. 500, and that such amount shall carry interest at the rate of 6 per cent. per annum from this date until realization; that if the defendants pay into Court the amount so declared due within six months from this date the plaintiffs should deliver up to the defendants, or to such persons as they appoint, all documents in their possession or power relating to the mortgaged property, and shall, if so required, re-transfer the property to the defendants free from the mortgage; in the event of the money not being paid within the limited period of 6 months, then under section 15B (2) of the Deccan Act, there will be a sale of such portion of the property in the hands of the defendants Nos. 2 and 3, *viz.*, Revision Survey No. 1058 and the house in Belgaum, as may be necessary for the realization of the sum due. The plaint-

.OURT.

DECREE No. 1214

1915.

arch 5, 1918.

.. Justice Richardson and Mr. Justice Beachcroft.

.ACHI PRASAD MUKHERJEE—DEFENDANT—APPELLANT

versus

AMAR NATH RAI CHOWDHURY AND OTHERS—P. AINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, r. 32—Injunction, suit to enforce, whether lies—O. XXI, r. 32, cl. (5), whether applies to mandatory and prohibitory injunctions—Limitation, whether applicable to application for enforcement of injunction—Limitation Act (IX of 1908), Sch. I, Art. 181.

The enforcement of an injunction is a question relating to the execution, discharge or satisfaction of the decree by which the injunction was granted; therefore, a separate suit for enforcement of an injunction is prohibited by section 47, Civil Procedure Code.[p. 865, col. 2; p. 866, col. 1.]

The plaintiff brought a suit against the defendants for the demolition of a wall in so far as it was above the height limited by a permanent injunction awarded against the defendant by a decree made in the plaintiff's favour:

Held, that the suit was not maintainable and that the remedy of the plaintiff was by an application for execution of the decree under rule 32, clause (5) of Order XXI, Civil Procedure Code. [p. 866, col. 1.]

The expression "the act required to be done" in clause (5) of rule 32, Order XXI, Civil Procedure Code, means what has to be done to enforce the injunction. [p. 866, col. 1.]

The power given by clause (2) of section 47, Civil Procedure Code, is a discretionary power which may not be exercised by the High Court in certain cases. [p 866, col. 1.]

Per *Richardson, J. (Beachcroft, J. dubitante)*—Clause (5) of rule 32, Order XXI, Civil Procedure Code, clearly applies to injunctions, both mandatory and prohibitory. [p. 866, col. 1.]

Quære.—Whether Article 181 of the Limitation Act applies to an application to enforce an injunction or whether such an application is exempt from the operation of the Limitation Act.

Appeal against the decree of the Subordinate Judge, 2nd Court, Hooghly, dated the 14th April 1915, reversing that of the Munsif, Additional Court, Serampur, dated the 18th August 1913.

.om the judgment.

.ehari Ghose (with him Babu .andra Chakrabarty), for the .nt, referred to Order XXI, rule 32, .l Procedure Code. Clause (5) of rule 32 is a new provision. *Vide* section 260 of the Code of 1882. It supplies a gap in the Code of 1882. Refers to *Durga Das Nandi* v. *Dewraj Agarwala* (1).

[RICHARDSON, J.—See *Sakarlal Jaswantrai* v. *Bai Parvatibai* (2).]

Clause (1) of rule 32 applies to injunctions, both mandatory and prohibitory. In the present Code the words "for an injunction" take the place in the old Code of the words "for the performance or abstention from any other particular act." The expression "the act required to be done" means, "what has to be done to enforce the injunction." Refers to *Venkatachallam Chetty* v. *Veerappa Pillai* (3). With regard to the wall, as the suit has not been brought within 3 years from the breach complained of, the plaintiff's remedy is barred. Refers to Article 181 of the Limitation Act.

As to the cook-shed the decree of 1895 does not affect it.

As to the privy, the suit in essence is a suit for ejectment to which Article 142 of the Limitation Act applies. The plaintiffs' claim to the land is barred by limitation.

Babu *Jogesh Chandra Roy* (with him Babus *Surendra Nath Roy* and *Satyendra Nath Roy*), for the Respondents.—The title to the land in question has been found to be in favour of my clients by the lower Appellate Court. The appellant cannot question this in this Court, as it is a finding of fact.

As to the privy the plaintiffs were not aware of its existence.

[RICHARDSON, J.—The observation of the learned Sub-Judge on this point is irrelevant.]

See *Framji Cursetji* v. *Goculdas Madkowji* (4) and *Chokalinga Naicken* v. *Muthusami Naickan* (5).

With regard to injunction, it is a continuing wrong. Refers to section 23 of the Limitation Act. The plaintiffs are entitled under clause (2) of section 47 of the Civil

(1) 33 C. 306; 3 C. L. J. 112; 10 C. W. N. 297.
(2) 26 B. 283; 4 Bom. L. R. 14.
(3) 29 M. 314.
(4) 16 B. 338; 8 Ind. Dec. (N. S.) 703.
(5) 21 M. 53; 7 Ind. Dec. (N. S.) 394.

Procedure Code to ask that the suit may be treated as an application for execution and that if Article 181 applies, it is governed by section 23 of the Limitation Act. Refers to *Bhaiaji Thakur* v. *Jharula Das* (6), *Rajrup Koer* v. *Abul Hossein* (7).

Distinguishes *Venkatachallam Chetty* v. *Veerappa Pillai* (3). *Vide, Ram Saran* v. *Chatar Singh* (8) and *Bhagwan Das* v. *Sukhdei* (9). I submit that a suit for injunction can be brought under the present circumstances. *Vide Dahyabhai* v. *Bapalal* (10) and *Jamsetji Manekji* v. *Hari Dayal* (11).

Babu *Kshitish Chandra Chakrabarti* in reply. —As to the title to the strip of land I see the difficulty as to the finding of fact by the lower Appellate Court. But I submit that in a case like this the lower Appellate Court ought not to have disturbed the findings of the Trial Judge, *vide Rivers Steam Navigation Co.* v. *Huthor Steamship Co. Ltd.* (12). With regard to the land on which the privy stands the plaintiffs' claim is barred by Article 142 of the Limitation Act.

Distinguishes *Framji Cursetji* v. *Gokuldas Madhowji* (4) and *Chokalinga Naicken* v. *Muthusami Naickan* (5). As to the reading of Article 181 with section 23 of the Limitation Act by my friend on the other side and as to treating the plaint as an application for execution, this anomaly would arise, *viz.*, that the plaint would have to be regarded as partly a plaint and partly an application for execution.

Distinguishes *Ram Saran* v. *Chatar Singh* (8) and *Bhagwan Das* v. *Sukhdei* (9). The case of *Venkatachallam Chetty* v. *Veerappa Pillai* (3) is in point.

The suit for injunction is not maintainable.

Distinguishes *Dahyabhai* v. *Bapalal* (10) and *Jamsetji Manekji* v. *Hari Dayal* (11).

JUDGMENT.

RICHARDSON, J.—In this suit the plaintiffs complain:—

(1) that the defendant by raising the north wall of his house has disobeyed a permanent injunction embodied in a decree between the parties, dated September 1895;

(2) that the defendant by building a cook-shed has interfered with the plaintiffs' ancient lights;

(3) that the defendant has encroached on a narrow strip of land between the two premises, which belongs to them, by building a privy on the eastern end of it.

As to (1) the plaintiffs ask for the demolition of the wall so far as it is above the height limited by the permanent injunction. The defence made is that the plaintiffs should not have brought a fresh suit but should have applied for the execution of the decree of 1895 under Order XXI, rule 32, clause (1) or clause (5), and that an application for execution at the date of the suit would have been barred by limitation under Article 181 of the Schedule of the Limitation Act of 1908, corresponding with Article 178 of Schedule II of the Limitation Act of 1877.

The learned Munsif in the Trial Court upheld this plea, relying upon the decision of the Madras High Court in *Venkatachallam* v. *Veerappa Pillai* (3), which is clearly in point. In the lower Appellate Court, the learned Subordinate Judge has taken a different view. He is of opinion that clause (5) of rule 32 only applies to a mandatory injunction as distinguished from a prohibitory injunction, such as we have here, that the plaintiffs are entitled to enforce the injunction by suit, that the wrong done by disobeying the injunction is a continuing wrong within the meaning of section 23 of the Limitation Act, and that the suit is within time. He has, therefore, made a decree awarding the relief claimed, and the defendant has appealed.

I agree, in the result, with the Munsif. Clause (5) of rule 32 is a new provision. It supplies a gap in the Code of 1882, to which attention was drawn by the cases of *Sakarlal* v. *Bai Parvatibai* (2) and *Durga Das Nandi* v. *Dewraj Agarwala* (1). These cases and others illustrate the practice, and the practice is in accordance with the Code. Rule 32 gives a remedy by execution and the enforcement of an injunction being a question relating to the execution, discharge

(6) 24 Ind. Cas. 501; 42 C. 244; 18 C. W. N. 1020; 27 M. L. J. 100; 1 L. W. 549; 16 M. L. T. 210; (1914) M. W. N. 636; 12 A. L. J. 1176; 20 C. L. J. 360; 16 Bom. L. R. 845.

(7) 6 C. 394; 7 C. L. R. 529; 7 I. A. 240; 4 Shome L. R. 7; 4 Sar. P. C. J. 199; 3 Suth. P. C. J. 816; 4 Ind. Jur. 530; 3 Ind. Dec. (N. S.) 257 (P. C.).

(8) 23 A. 465; A. W. N. (1901) 142.

(9) 28 A. 300; A. W. N. (1906) 10; 3 A. L. J. 836.

(10) 26 B. 149; 3 Bom. L. R. 564.

(11) 32 B. 181; 10 Bom. L. R. 18.

(12) 35 Ind. Cas. 193; 20 C. W. N. 1022; (1916) 1 M. W. N. 446; 31 M. L. J. 159; 4 L. W. 176 (P. C.).

or satisfaction of the decree by which it is awarded, a separate suit is prohibited by section 47 [*Cf. Jamsetji Manekji* v. *Hari Dayal* (11).]

Clause (1) of rule 32 clearly applies to injunctions, both mandatory and prohibitory. In the present Code the words "for an injunction" take the place in the old Code of the words "for the performance or abstention from any other particular act." I can see no reason why clause (5) should be limited to mandatory injunctions. The clause gives a discretionary power to the Court to direct that "the act required to be done may be done so far as practicable by the decree-holder or some other person appointed by the Court at the cost of the decree-holder." The expression "the act required to be done" means what has to be done to enforce the injunction. In the present case it is the part demolition of the defendant's wall. In my opinion on an application for execution of the decree of 1895, the Court might have proceeded either under clause (1) or clause (5).

The question of limitation, if it were necessary to decide it, is perhaps more difficult. It is contended for the plaintiffs that if the suit in respect of this wall is not competent, they are entitled under clause (2) of section 47 of the Code to ask that the suit may be treated as an application, that if Article 181 applies, that Article is governed by section 23 and that on this footing the suit or application is in time.

The answer seems to be that assuming that a suit upon a decree which has never been carried into the execution department at all, can be treated under clause (2) as an application to execute that decree, nevertheless the power given by the clause is a discretionary power and the present case is not one in which it ought to be exercised. The flaw in the plaintiffs' procedure was pointed out by the Munsif, but nothing has since been done to put the case on a proper footing. If the concession were allowed, the plaint would have to be regarded as partly a plaint and partly an application for execution. The plaintiffs, moreover, appear to have been very dilatory in asserting their rights.

It may be well, however, to add as to Article 181, that the view of the Madras High Court that under that Article, an application to enforce an injunction must be made within three years of the particular breach or disobedience which is the occasion for the application, differs somewhat from the view taken by the Allahabad High Court. In *Ram Saran* v. *Chatar Singh* (8) the learned Judges observe that disobedience of an injunction is a contempt of Court. They hold that an application to enforce the injunction is not governed by Article 179 (now Article 182) and apparently that no period of limitation is prescribed, but made no reference to Article 178 (now Article 181). This case was followed in *Bhagwan Das* v. *Sukhdei* (9). Both Courts, it will be observed, agree that the terms of Article 182 put it out of the question. For the present purpose the subject need not be further discussed.

In my opinion, in regard to the wall of the house, the decree of the Subordinate Judge should be discharged and the decree of the Munsif restored.

(2) As to the cook-shed, it was conceded in the argument before us that the decree of 1895 does not affect it. The cook shed appears to be a new building and its north wall is to the south of the line of the north wall of the house produced westwards. The Subordinate Judge is clearly wrong in treating the cook-shed as if the permanent injunction applied to it. That, however, is how the claim is put in the plaint. Obviously on that footing the suit must fail, apart from the admission in the plaint that the cook-shed has been in existence for more than four years, an admission which, as the Munsif observes, would, in any case, preclude the plaintiffs from claiming as an easement under section 26 of the Limitation Act.

The plaintiffs' claim in this respect should also, in my opinion, be dismissed.

(3) As to the privy, the suit is in essence a suit in ejectment to which Article 142 of the Limitation Act applies. That is the view of the learned Munsif and here again I agree with him. The privy has brick walls and was built more than twelve years ago. The observation of the learned Subordinate Judge that the plaintiffs only came to know of its existence within twelve years of the suit is irrelevant. In a case falling under Article 142 they were

bound to prove possession within twelve years.

In this Court reference was made for the plaintiffs to *Framji Carsetji* v *Goculdas Madhowji* (4) and *Chokkalinga* v. *Muthusami* (5), but the circumstances of the present case are very different. Here we have a masonry structure built on land close to the plaintiffs' house. Possession so taken cannot be whittled away.

The possession, however, of the land on which the privy stands does not entitle the defendant to the remainder of the strip of land between the two houses. As to that remainder the decree of the Subordinate Judge will stand.

The result is that the whole suit must be dismissed, save and except so far as it relates to the strip of land. The declaration made by the Subordinate Judge in respect thereto will be affirmed, except as regards the land on which the privy stands. The parties will receive and pay costs throughout in proportion to their success and failure.

BEACHCROFT, J.—I agree in making the order proposed by my learned brother substantially for the reasons given by him. But I express no opinion whether Order XXI, rule 32 (5), applies to prohibitory as well as to mandatory injunctions.

Decree modified.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1 OF 1917.

February 12, 1918.

Present:—Mr. Justice Oldfield and Mr. Justice Sadasiva Aiyar.

MURAJALLI MUNIA GOUNDAN—DEFENDANT No. 3—APPELLANT

versus

RAMASAMI CHETTI AND OTHERS—PLAINTIFFS AND DEFENDANTS NOS. 1, 2 AND 4 TO 10—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Arts. 126, 144, 148—Hindu Law—Joint family—Sale by father of equity of redemption of family property as his acquisition—Redemption by vendee and possession thereafter as absolute owner—Redemption, suit for, by son's alienee—Limitation, commencement of.

First defendant and his father *G.* mortgaged family property to nd defendant. *G.* subsequently sold the equity of redemption as if the property was his self-acquisition to rd defendant. Third defendant redeemed 2nd defendant and obtained possession of the property After *G.*'s death 1st defendant sold his share in the property to the plaintiff. In a suit by the plaintiff for possession of 1st defendant's share on payment of a proportionate portion of the mortgage amount:

Held, that Article 126 of the Limitation Act was applicable to the suit and that time commenced to run from the date of 3rd defendant's entering into possession [p. 869, col. 1; p. 871, col. 1.]

Per *Sadasiva Aiyar, J.*—Article 126, which speaks of a suit "to set aside" the father's alienation of ancestral property, includes a suit in which possession is claimed and does not only contemplate a mere declaratory suit. [p. 870, cols. 1 & 2.]

An alienation under Article 126 need *not* be for consideration. The Article applies alike to an alienee with and to an alienee without notice. [p. 871, col. 1.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Salem, in Appeal Suit No. 99 of 1915, preferred against that of the Court of the District Munsif, Dharmapuri, in Original Suit No. 702 of 1912.

FACTS appear from the judgment.

Mr. *G. S. Ramachandra Aiyar*, for the Appellant, argued that the adverse possession of the 3rd defendant commenced from the date when he got possession as an absolute owner. The proper Article to apply is Article 126. There is no room for the residuary Article 144 as the case is covered by the terms of Article 126, the present suit being by the son's alienee to recover the son's share. Article 148 applies only to suits for redemption against the mortgagee and not to suits against a person who obtains a charge by paying up the mortgage. The prayers here are to set aside the sale so far as 1st defendant's share is concerned, with the consequential relief for possession.

Mr. *T. R. Ramachandra Aiyar*, for the Respondents, argued that Article 148 was the appropriate Article. The property was mortgaged by both father and son. The son's alienee virtually seeks to redeem that mortgage to the extent of the son's interest from the person who discharged the mortgage and was in possession. Article 126 can apply only where the father sold the property as ancestral property. It was not so in the present case. The adverse

possession, moreover, will commence only when the alienee takes possession by virtue of the father's alienation and not where he redeems a subsisting mortgage and gets possession from the mortgagee.

JUDGMENT.

OLDFIELD, J.—The facts admitted or found are that 1st defendant and his father Gopal Row mortgaged their property to 2nd defendant with possession under Exhibit 1. Gopal Row afterwards sold the equity of redemption, as though the property were his self-acquisition, to 3rd defendant by Exhibit II. The lower Appellate Court has found, and we accept its findings, that the property belonged to the family and the sale does not bind 1st defendant. After Gopal Row's death, 1st defendant sold to plaintiff by Exhibit A and plaintiff now sues for possession of 1st defendant's share on payment of the appropriate proportion of the mortgage amount, which 3rd defendant has paid. The question is whether the suit filed on 26th August 1912 is in time. It will be if the Article of Schedule I, Limitation Act, applicable is No. 148. It may be, if the Article is No. 144 and 3rd defendant's possession, which, it is not disputed, began in 1898, was not adverse to 1st defendant and plaintiff. It will not be if the Article is No. 126.

It is simplest to disregard for the present the distinction between Articles Nos. 144 and 126. The substantial question is then whether the suit is for redemption or for possession, subject no doubt to the satisfaction of 3rd defendant's lien. It is brought in effect by one co-owner, represented by plaintiff, for recovery of mortgaged property redeemed by another co-owner and now in possession of his transferee, 3rd defendant; and argument has turned on whether Article No. 148 or 134 would apply to the case thus simplified. The question has not been dealt with by this Court. But the conclusion reached in Allahabad and Bombay is in favour of the latter. It was no doubt held in *Ashfaq Ahmad* v. *Wazir Ali* (1) that when one co-heir of a mortgagor had redeemed the whole mortgage, the suit against his representative was subject to Article No. 148. But recently, when that decision was considered in *Jai Kishen Joshi* v. *Budhanand Joshi* (2), the question being whether Article 134 should be applied against a transferee from a redeeming co-owner on the assumption that the latter had the equivalent of a mortgage right, one learned Judge held, with reference to the principle stated in section 95, Transfer of Property Act, that he was only a charge-holder and applied Article No. 144 whilst the other concurred, observing with reference to the earlier decision that the possession of the charge-holder need not be regarded as in all respects equivalent to that of a mortgagee. The view taken in *Ashfaq Ahmad* v. *Wazir Ali* (1) was not adopted in *Vasudev* v. *Balaji* (3) or in other cases decided by the Bombay High Court and referred to therein or in *Bhaiji Shamrao* v. *Hajimiya Mahamad* (4). The objections made to the reasoning in these authorities are that the Transfer of Property Act was not applicable to the facts, the mortgage in the later Allahabad case having been executed before it and the Act not being applicable to the Bombay Presidency at the time, and that the distinction between the positions of a mortgagee and a charge holder or, as he is called in the Bombay cases, alienor has been abrogated since the decision of the Privy Council in *Vasudeva Mudaliar* v. *Srinivasa Pillai* (5). The first is unsubstantial, the principle involved not depending on the Act for its validity. The second was, no doubt, not noticed in the judgments in question. But it cannot affect the conclusion. For the Privy Council held only that a simple mortgage was to be treated as equivalent to a charge for the purpose of Article No. 132, not that every charge was a mortgage for the purpose of Article No 134. And the argument is unsustainable, because 3rd defendant's right, being equivalent only to that of Gopal Row, is, as the cases referred to show, not based on the principle of subrogation recognised in section 101,

(1) 14 A 1; A. W. N. (1891) 211; 11 A. 423; 7 Ind. Dec. (N. S.) 373.

(2) 34 Ind. Cas. 244; 38 A. 138; 14 A. L. J. 41.
(3) 26 B. 500; 4 Bom. L. R. 178.
(4) 15 Ind. Cas. 500; 14 Bom. L. R. 314.
(5) 30 M. 426; 9 Bom. L. R. 1104; 4 A. L. J. 625; 11 C. W. N. 1005; 6 C. L. J. 379; 2 M. L. T. 333; 17 M. L. J. 444; 34 I. A. 186 (P. C.).

Transfer of Property Act. For neither Gopal Row nor 3rd defendant became or could have become absolutely entitled to the property so far as 1st defendant's share was concerned. As *Danappa* v. *Yamnappa* (6) and other cases referred to in *Raushan Ali Khan Chowdury* v. *Kali Mohan Moitra* (7) show, the right is to contribution and is secured only by a lien. These considerations applied to the present case, and the decision must be that plaintiff's suit is not for redemption and is not subject to Article No. 148.

The question is then between Articles Nos. 126 and 144, the contention in connection with the latter being that enquiry must be held to ascertain the date, at which 3rd defendant's possession became adverse to 1st defendant and plaintiff. It is urged that the lower Appellate Court has already dealt completely with the matter in its reference to 1st defendant's alleged acquiescence; but that is only one aspect of it. The decision in *Bhavrao* v. *Rakhmin* (8) has been referred to as negativing 3rd defendant's right to an enquiry; but it is not clear that it can be applied to the facts in the case before us. To these facts Article No. 126 is exactly applicable; and it was applied to similar facts in *Ramasawmy Aiyar* v. *Vanamamalai Aiyar* (9), the supperfluity of any enquiry as to the character of defendant's possession being pointed out. The suit, being subject to Article No. 126 and having been filed over thirteen years after the possession of 3rd defendant began, is out of time and must be dismissed with costs throughout, the District Munsif's decree being restored and the appeal being allowed.

SADASIVA AIYAR, J.—The 3rd defendant is the appellant. The suit was for redemption of ¼th share in a certain property half of which was mortgaged for Rs. 700 in 1892 to the 2nd defendant by the 1st defendant and his father who owned the said half share in equal moieties of ¼th and ¼th. The plaintiff is the purchaser of the 1st defendant's ¼th share. The other half share in the property belonged to one Narasayya but we are not concerned with that half share in this suit.

The 1st defendant's father and Narasayya sold the entire property to the 3rd defendant and to another person (who transferred his rights afterwards to the 3rd defendant) for Rs. 2,000. As regards Narasayya's half share which was sold for Rs. 1,000, there is no dispute in this suit. As regards the other half share which the 1st defendant's father sold for the remaining Rs. 1,000, the 1st defendant's father is found to have had no right to sell the 1st defendant's ¼th share out of that half share. Thus the 3rd defendant, so far as title is concerned, has the same only to the extent of ¾th share. As there was a mortgage for Rs. 700 in 1892 on both the quarter shares which belonged to the 1st defendant and to his father in favour of the 2nd defendant and as half of that Rs. 700 or Rs. 350 is binding on the 1st defendant's ¼th share now vested in the plaintiff, the plaintiff offers in the plaint to pay Rs. 350 and seeks to redeem the said ¼th share on payment of the said Rs. 350.

As I said already, the 1st defendant's father sold away both the ¼th shares in 1897. Though the 2nd defendant was the original mortgagee under the mortgage of 1892, as the 3rd defendant after his purchase in 1897 paid up in April 1898 the Rs. 700, mortgaging to the 2nd defendant out of the sum of Rs. 1,000 (the price he paid to the 1st defendant's father for the half share) and is in possession of the half share from April 1898, this suit for redemption of ¼th share is really directed against the 3rd defendant.

Several defences to the suit were raised by the 3rd defendant (the appellant before us), but I think it is necessary to consider only the defence of limitation. The plea of bar by limitation is based on the fact that from April 1898 the 3rd defendant has been in adverse possession (claiming as full owner) till the date of suit (August 1912), that is, for more than 14 years. Articles 126 and 144 of the Limitation Act are relied upon.

The District Munsif upheld the plea of limitation without mentioning in his judgment the Article of the Limitation Act on which he relied. The Subordinate Judge on appeal held that the suit was not barred by

(6) 26 B. 379; 4 Bom. L. R. 61.
(7) 4 C. L J. 79.
(8) 21 B. 137 at p. 142; 12 Ind. Dec. (N. S.) 91.
(9) 26 Ind. Cas. 873.

limitation because the mortgage of 1892 for Rs. 700 was payable only in June 1902, which was within 12 years of the date of the plaint (August 1912). His judgment also does not refer to any of the Articles of the Limitation Act. He gave a decree for redemption in favour of the plaintiff on payment of Rs. 350 and of half of the value of the impovements. (The claim for improvements, even if the plaintiff was entitled to redeem, was put forward by the 3rd defendant on the ground that the plaintiff's vendors knew of the sale of 1897, that the 3rd defendant redeemed and got into possession in April 1898 and that 3rd defendant made improvements of large value to plaintiff's knowledge without objection on plaintiff's part.) The Subordinate Judge quotes from the District Munsif's judgment without dissent as follows:—"He" (the plaintiff) "stood by when these," that is the improvements, "were made. He knew of the sale and of the 3rd defendant's possession." Then the learned Subordinate Judge says: "*there is no dispute to the claim for compensation.* But the claim" (that is, the amount due for the value of the improvements) "should be proved by the best evidence." The Subordinate Judge, therefore, refused to accept the amount of Rs. 4,000 claimed by the 3rd defendant as the value of the improvements and directed the issue of a commission by the lower Court to exactly ascertain such value before passing the final decree for the redemption of the ⅓th share.

As I said, it is necessary for the disposal of this appeal to consider only the question of limitation. I am clear in my opinion that Article 126 of the Limitation Act applies to this case. That Article provides a limitation period of 12 years for a suit by a Hindu governed by the Mitakshara Law "to set aside his father's alienation of ancestral property," the period being calculated from "when the alienee takes possession of the property." It has been held under the analogous Article 44 relating to a suit by a minor whose property was alienated by his guardian that the expression "suit to set aside a transfer of property" includes a suit in which there is a prayer for consequential relief of possession [see *Annamalay Chettiar* v. *Vitchu Ayyar* (10)]. I am also clear that the Article 126, which speaks of a suit "to set aside" the father's alienation of ancestral property, denotes also a suit in which possession is claimed and does not only contemplate a mere declaratory suit [see Rustomjee's Limitation Act, page 326, quoting *Dev Rai* v. *Shiv Ram* (11)]. The present suit is by a person claiming from a Hindu (the 1st defendant) governed by the Law of the Mitakshara to set aside the said Hindu's (1st defendant's) father's alienation of ancestral property to the extent of the 1st defendant's share and for consequential relief of possession by redemption. The alienee (the 3rd defendant) took possession of the property in April 1898 and, as more than 12 years had elapsed from that date before the date of suit, the suit is barred under this Article. Mr. T. R. Ramachandra Aiyar for the respondent contended that the Article 126 (first column), when it uses the words "to set aside his father's alienation of ancestral property 'means' to set aside his father's alienation of ancestral property, *provided the alienation was made by the father alleging that it was ancestral property or at least without alleging that it was not ancestral property.*" I see no reason whatever to add any such words as those italicized by me to the first column of the Article. Mr. Ramachandra Aiyar relied upon the decision of their Lordships of the Privy Council in the case reported as *Balwant Singh* v. *Rev. Rockwell Clancy* (12) to the effect that when an elder brother mortgages a property as if he was the sole owner and not as the manager of the family consisting of himself and his younger brother, the creditor is not entitled to prove that the younger brother's share was also bound by the mortgage as executed by the *de facto* manager for necessary family purposes. In the first place, it is not easy to see what the above observation has to do with the interpretation of the Article 126. Further, their Lordships clearly make a distinction between an alienation by an elder brother and an alienation by a father. They state at page 303*: "It need hardly be said that Sheoraj

(10) 28 M. 122; 15 M. L. J. 28.

(11) 25 Ind. Cas. 463; 0 P. R. 1914; 260 P. L. R. 1914; 165 P. W. R. 1914.

(12) 14 Ind. Cas. 629; 34 A. 296; (1912) M. W. N. 46"; 11 M. L. T. 344; 16 C. W. N. 577; 5 C. L. J. 475; 14 Bom. L. R. 422; 23 M. L. J. 18; 39 I. A. 109; 9 A. L. J. 509 (P. C).

*Page of 34 A.—*Ed.*

Singh" (the alienor elder brother) "was not an ancestor or a predecessor of Maharaj Singh" (the younger brother). The Legislature and the Hindu Law do make a distinction between an alienation by a father of ancestral property and that by any other person who was a mere manager.

The doctrine of right by birth in the son is wholly antiquated and inconvenient for modern times. The Privy Council have taken advantage of the texts relating to the father's power of alienation for antecedent debts to mitigate the inconvenience of that doctrine and the Legislature has provided by a special Article 126 for the perfection of the title of an alienee from the father, when a Hindu son who wants to take advantage of the antiquated Mitakshara Law seeks to set aside such an alienation. It is significant that the alienation under Article 126 need *not* be for consideration. It is also significant that Article 126 applies alike to an alienee with and to an alienee without notice. See *Bhavrao* v. *Rakhmin* (8). The Legislature has clearly fixed an overt and patent fact, namely, the taking of possession of the property by the alienee, as the event from which the period has to be calculated so as to avoid as far as possible difficult questions as to notice.

Mr. Ramachandra Aiyar further argued that the words in the third column of Article 126 "when the alienee takes possession of the property" mean "when the alienee takes possession of the property *by the sole and unaided virtue and effect of the father's alienation*" and that where the alienee gets possession by redeeming a previous usufructuary mortgage, the date of such possession given by mortgagee will not form the starting point under the third column and so apply Article 126. Here again I see no reason whatever to add to the plain language of the Article. Supposing for instance the alienation by the father is made one year after a trespasser had deprived the father of his possession of the property and the alienee after his alienation sues the trespasser and gets into possession, can it be argued that the son can come in more than 12 years afterwards treating the alienee's possession as that of a mere co-sharer and treating Article 126 as not applicable because the alienee had to sue the trespasser in order to get possession.

Assuming, however, that Article 126 is not applicable, I think that the suit is barred also under Article 144. In *Vasudev* v. *Balaji* (3) the facts were as follows:—

V. and *G*, co-owners of a land, mortgaged it in 1872. *V.* alone redeemed it in 1882 and obtained possession and he and his heirs asserted adverse and exclusive title to the whole and continued in possession till 1898. Then *G.*'s heirs brought a suit in 1898 for redemption of their half share. Jenkins, C.J., and Crowe, J., held that the co-owner who redeemed the whole of the mortgage was not a mortgagee, and did not stand in the shoes of the mortgagee, that he was a mere charge-holder, that a charge holder can assert and claim adverse possession and that after 12 years the charge could not be redeemed by the other co sharer as the title by adverse possession became perfected. The learned Judges held that Article 148 applied only to a suit against a mortgagee, and not to a suit against a person who obtained a charge by paying up the mortgagee. In this connection, it might be remarked that, under section 95 of the Transfer of Property Act, one of several co-mortgagors who redeems the mortgaged propery and obtains possession thereof does not himself become the mortgagee but is given only a charge on the share of the other co-sharers for the proportion of the expenses of redemption and of obtaining possession. In this case, it is clear on the proved documents and the facts found by the lower Appellate Court that the 3rd defendant, when he purchased in 1897, had the animus to claim title as the sole owner of the equity of redemption and not merely to claim title to the first defendant's father's $\frac{1}{4}$th share, and that he took possession in April 1895 with the animus to hold the whole half share against all the world and not as a mere co-sharer with the first defendant in that half share. That possession of immoveable property is notice to the whole world of the title under which possession is held, and that possession is *prima facie* adverse and exclusive are well known principles of law. See *Magu Brahma* v. *Bholi Das* (13). Of course, a mortgagee or a co-sharer or a tenant who first obtains possession *as such*, cannot without notice to the mortgagor or to the other co-sharers or to the landlord

(13) 20 Ind. Cas. 195; 19 C. L. J. 252; 18 C. W. N. 657.

(as the case may be) claim to hold adversely, that is, by mere unilateral declaration of intention he could not convert his original possession into the adverse possession, but in this case the possession was obtained from the very beginning under an assertion of exclusive title.

The date fixed for the redemption in the mortgage of 1892 has no relevancy on the question of adverse possession, as it is not a mortgagee who sets up adverse possession but a purchaser from one of the co mortgagors (see Freeman on Co-tenancy, section 224, at pages 296 and 207).

In the result, I hold that the suit is clearly barred by limitation under Article 126, and even if Article 126 does not apply, under the general Article 144 and I would, therefore, set aside the decree of the lower Appellate Court and restore that of the District Munsif with costs payable by the plaintiff to the 3rd defendant throughout.

Appeal allowed.

M. C. P.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 776 OF 1916.

March 14, 1918.

Present:—Mr. Justice Fletcher and Justice Sir Syed Shamsul Huda, Kt.

MOHANANDA DUTTA CHOWDHURY—DEFENDANT—APPELLANT

versus

BAIKANTHA NATH DUTTA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Widow, surrender by, of part of estate, validity of.

A surrender in favour of her husband's reversioners made by a Hindu widow otherwise than for consideration to meet legal necessities, in order to be valid, must be of the whole of her interest in the estate. [p. 873, col. 1.]

Appeal against the decree of the Additional District Judge, Sylhet, dated the 17th December 1915, affirming that of the Munsif, 3rd Court, Habiganj, dated the 23rd November 1914.

Babus *Mohindra Nath Roy* and *Gobinda Chander De Roy*, for the Appellant.

Babu *Sasadhar Roy* (Senior), for the Respondents.

JUDGMENT.

FLETCHER, J.—This is an appeal by the defendant No. 2 against the judgment of the learned District Judge, Sylhet, affirming the decision of the Munsif of Habigunge. The suit was brought to recover possession of an one-anna share as against the defendants Nos. 1 and 2 on a declaration of title by purchase. The admitted facts are these. The original owner of the property was one Gopinath. He had three sons; the defendant No. 1, the father of the defendant No. 2 and one Chandranath. Chandranath died leaving a widow, Tripura Sundari, a daughter who married one Protab and the son of that daughter named Jnanendra. The title in this case is made in this way. On the 19th July 1901 Tripura Sundari executed a document (Exhibit 4) in favour of Jnanendra who was then a minor. The document, after the ordinary recital that she was in want, stated as follows: "If I make you absolute owner of an one-anna share out of my share of the properties mentioned below by transfering the same to you by a deed of release and if your father sells that share by a *kobala* accompanied by an *ekrar* to compensate loss in your behalf, some persons are ready to purchase that share." That does not purport to be a sale by the widow for the purpose of meeting her necessities. It simply states that it would be a convenient way of selling the property if it is made over to the grandson Jnanendra. Then, the deed states: "I on relinquishing whatever right I have of enjoyment and possession of an one-anna share out of my share of the undermentioned properties worth Rs. 300, etc., make you absolute onwer in respect of the said share. From this day, whatever right of enjoyment and possession I have in the lands proportionate to that share being extinguished, you become absolute owner." It is said that that document is a sale by the widow or may be treated as a sale by the widow for the purpose of meeting her present necessities. That cannot be anything of the sort. The document purports to be a release by the widow of an one-anna share of her life-interest and the purpose for which the release was made

was thus stated in the deed, namely, that the release having been made to Jnanendra, Jnanendra's father Protap by executing an *ekrarnama* might be able to get some person to purchase the property. The cases of the Privy Council and of this Court are quite clear that a release by a widow to the reversioner cannot be made of less than the whole of her interest. The reason is to prevent these continual releases to the reversioner for the time being and large portions of the property from being withdrawn from the person who ultimately turns out to be, in fact, the reversioner on the widow's death and also that if a widow has got to give up the whole of her interest she would be very careful before parting with the whole of the property at the same time. It is said in this case that when this man Protap sold the property seven months after, that transaction along with Exhibit 4 formed one and the same transaction. I do not agree. The plaintiffs did not allege that it was so and obviously it cannot be so. Moreover, the fact found by the learned Judge is that the consideration money obtained by Protap at the sale is not traced beyond the hands of Protab. It is not shown that it went to Jnanendra or to somebody else. I think a case like this is clearly opposed to the decision of the Full Bench of this Court that a surrender by a Hindu widow made otherwise than for consideration to meet legal necessities must be of the whole of her interest. This case was an attempt to surrender a small portion and Exhibit 4 did not, in my opinion, operate to pass that one-anna share to Jnanendra which was subsequently purported to be sold to the plaintiffs by Protap. That being so, we ought to set aside the decision of the learned District Judge and allow the present appeal and dismiss the plaintiffs' suit with costs both in this Court and in the lower Court.

SHAMSUL HUDA, J.—I agree.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 363 OF 1916.

December 5, 1917.

Present:—Mr. Lindsay, J. C.

DEOKI NANDAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KALI SHANKAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Jurisdiction of Civil and Revenue Courts—Partition case before Revenue Court—Title, question of, raised by applicants themselves—Civil suit, maintainability of—U. P. Land Revenue Act (III of 1901), s. 111.

Where in a partition case filed in a Revenue Court, before any notices were issued to the recorded co-sharers or at any rate before any objections could be filed by them to the application for partition, the applicants themselves asked the Court to postpone the case until they could have the question of their title cleared up in a Civil Court and the Revenue Court granted the required postponement and the applicants then instituted the proposed suit in the Civil Court:

Held, that the Civil Court had jurisdiction to entertain the suit. [p. 874, col. 2.]

Mukhtar Ahmad v. Barati Lal, 25 Ind. Cas. 316; 17 O. C. 224; 1 O. L. J. 335, distinguished from.

Appeal from the decree of the Subordinate Judge, Unao, dated 10th July 1916, confirming that of the Munsif, Purwa, dated 26th February 1916.

The Hon'ble Pandit *Gokaran Nath Misra*, for the Appellants.

Pandit *Tara Sharnkar Sharma*, for Respondent No. 2.

JUDGMENT.—The only question which arises for determination of this second appeal is whether or not the Civil Court had jurisdiction to entertain a declaratory suit which was brought by the plaintiffs-appellants against the defendants-respondents. The case has alredy been before this Court on a question of limitation. It was decided here in second appeal that the suit was not barred by time, and this Court refused to interfere with a remand order which had been made by the lower Appellate Court directing the case to be returned for investigation on the merits. After the case went back to the Court of first instance this question of jurisdiction arose. The defence was taken that the suit was not cognizable by a Civil Court. This plea was given effect to by the Munsif, who dismissed the suit. His order dismissing the suit has been upheld in appeal by the lower Appellate Court. In my opinion the decision

of the Courts below was wrong. In order to elucidate the matter in question it is necessary to set out the following facts.

The parties are co-sharers in a village called Dubepur in the Unao district. This village is held in imperfect partition and is divided into two *pattis*, one of which is called Patti Auseri representing a share of 13 annas 4 pies. The owner of this *patti* is the defendant-respondent, Gaya Prasad, No. 8. The other Patti Sri Kishan which consists of 2 annas 8 pies is held by three sets of owners. The plaintiffs between them own a 1 anna and 16 *kraats* share in this *patti*. The first and second defendants who are the sons of one Ambika Prasad own a 1 anna 4 pies share, and the other defendants Nos. 3 to 7 own the rest, namely, 3 and 4 *kraats*. Ambika Prasad, whose name has just been mentioned, made an application to the Revenue Court for an imperfect partition of this Patti Sri Kishan. The present plaintiffs Deoki Nandan and others objected to an imperfect partition taking place, the main ground being that it was not proper that imperfect partition should be allowed because the whole Mauza was joint (*b.l ijmal*) and that until all the co sharers of both the *pattis* were joined in the proceedings it would not be possible to arrive at a correct division of the shares. This objection filed by Deoki Nandan and others was, however, rejected in June 1913 as being beyond time. The imperfect partition case proceeded and these plaintiffs again objected ; but their objection was overruled. Finally in order to attain their purpose the plaintiffs on the 1st of September 1913 put in an application to the Revenue Court asking for a perfect partition of their share and demanding that all the co-sharers in the village including Gaya Prasad, the owner of Patti Auseri, should be made parties. The object clearly was that the plaintiffs might obtain a total separation of their share in the entire Mauza. On the 9th of September the plaintiffs came before the Revenue Court and presented a petition in which they referred to the application made on the 1st of September. They went on to say that they desired this application for perfect partition to be postponed until they went to the Civil Court in order to obtain a decision regarding the proper extent of their share. This application having been put in the Assistant Collector passed the following order:—

" The petion of the applicants for adjournment is granted. Let the case be put up again on the 15th December. "

After this the plaintiffs came to the Civil Court and brought the suit out of which this appeal has arisen.

It must be admitted that the plaint has been very badly drafted and that the plaintiffs could not be given relief in the form in which it is sought in paragraph 9 of the plaint. At the same time it appears to me that if the Court has jurisdiction to entertain the suit, there is a case for a declaratory relief if the facts can be established as they are represented by the plaintiffs. I will deal first, however, with the question of jurisdiction.

The Courts below have relied upon a Bench decision of this Court which is reported as *Mukhtar Ahmad* v. *Barati Lal* (1). But in my opinion the present case is one of a different kind and the law as laid down in this Bench decision cannot be applied to the facts before me. Section 111 of the U. P. Land Revenue Act shows the manner in which questions of title arising in partition proceedings can be brought before a Civil Court, and it was held in the Bench case to which I have referred that the question whether the Civil Court has jurisdiction in such cases must be determined with reference to the provisions of this section. It will be seen on a reference to section 110 that the circumstances which are contemplated in section 111 arise only after a notice has been issued to the recorded co-sharers of the village calling upon them to file objections. Section 111 provides that if on or before the date fixed for the proclamation any of the recorded co-sharers to whom notice has issued files an objection relating to a question of proprietary title, then the Revenue Court can deal with the matter in one of the three ways set out in section 111. What is clear, however, in the present case is that this suit with which we are now dealing did not come into the Civil Court in consequence of any of the events described in sections 110 and 111. It appears that before any notices were issued or at any rate before any objections could be filed to the application for perfect partition

(1) 25 Ind. Cas. 316; 17 O. C. 224; 1 O. L. J. 335.

which the plaintiffs-appellants put before the Revenue Court, they themselves went to the Assistant Collector and asked him to stay his hand while they went to the Civil Court in order to have the question of their title cleared up It is manifest, therefore, that the Assistant Collector had not before him any objection of a recorded co-sharer such as is described in section 111 of the Act, and it is further clear that the Assistant Collector did not decline to grant the application for partition until the question in dispute had been determined by a competent Court. All he did was to stay proceedings and to direct that no action should be taken upon the application until the plaintiffs who had made that application had done something which was necessary for them to do by means of a suit in the Civil Court. In these circumstances I am unable to see how it can be said that the jurisdiction of the Civil Court to entertain this suit was in any way ousted. In my opinion it was not, and the decision that the suit was not entertainable must be set aside as erroneous. The case must now go back for investigation on the merits.

The frame of the plaint has occasioned a certain amount of difficulty and it has been conceded that the plaintiffs cannot ask for relief in the form in which it is sought in paragraph 9 (*a*) of the plaint. To me it seems that the question which will have to be investigated is the following. The plaintiffs say that in the present state of affairs in which the whole village is divided by imperfect partition into two Pattis Anseri and Sri Kishna, they, the plaintiffs, are not in possession of the full area of the village to which they are entitled as being owners of a 1 anna and 16 *krants* share. In other words, the suggestion is that as the village is divided at present, Patti Sri Kishan does not contain the full area which it ought to, having regard to the ratio which 2 annas 8 pies bears to 13 annas 4 pies. The plaintiffs say that taking the area of the whole village their 1 anna and 16 *krants* share represents an area of 51 *bighas* 12 1/15 *biswansis*, while if partition were effected only in respect of the Patti Sri Kishan they would get possession of an area of 43 *bighas* 13 *biswas* 16 4/5 *biswansis* only, which is a good deal less than the area to which they are entitled. It was this circumstance which led the plaintiffs to object to the application for an imperfect partition of Patti Sri Kishan only, for they objected that if that partition be carried out the result would be to give them a great deal less than they are entitled to. What they now want to be made clear is that as owners of a 1 anna and 16 *krants* share they are entitled at the time of the division of the whole of the village lands to a share of the area of the village which bears the proportion of 1 anna and 16 *krants* to 16 annas, and it seems to me that this is a declaration which if the necessary facts are established, the Civil Courts are competent to grant them. Once this matter has been settled, the plaintiffs will be in a position to ask the Revenue Court to go on with the application for partition and to have partition made in accordance with the declaration made by the Civil Court.

I allow this appeal, set aside the order of both the Courts below and send the case back to the Court of first instance for decision on the merits. Costs here and hitherto will abide the result.

Cause remanded.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1496 OF 1916.

April 24, 1918.

Present:—Mr. Justice Fletcher and Justice Sir Syed Shamsul Huda, KT.

Raja KISHORE LAL GOSWAMI—PLAINTIFF—APPELLANT

versus

TARAPADA BHATTACHARJEE—DEFENDANT—RESPONDENT.

Landlord and tenant - Lease, construction of Toll, payment of, in respect of goods sold on boat or road.

The defendant took a lease of a certain property, to which the provisions of the Transfer of Property Act applied, for the purpose of carrying on a shop. The lease provided for the payment of a certain amount of rent and also for the payment of a *toll*

KISHORE LAL GOSWAMI v. TARAPADA BAHTTACHARJEE.

over the stipulated rent as part of the rent in respect of goods that should be sold in the shop or on boat or on road on certain terms:

Held, that on a reasonable construction of the lease the defendant was liable to pay the *toll* not only in respect of goods sold in the shop but also in respect of goods which, having been taken from the shop to the nearest boat or road, would be sold there, but that his liability did not extend to the case of goods sold on boats and roads far away from the shop. [p. 876, col. 2; p. 877, col. 1.]

Appeal against the decree of the Subordinate Judge, 2nd Court, Hooghly, dated the 4th of April 1916, modifying that of the Munsif, 2nd Court, Serampore, dated the 23rd of November 1914.

FACTS appear from the judgment.

Dr. *Sarat Chunder Basak*, (with him Babu *Bepin Chunder Bose*), for the Appellant.—The plaintiff is the appellant, and the appeal arises out of a suit for rent which the plaintiff claims under a *mourasi mokarari* lease. The lease provides a fixed rent as well as certain commission payable to the landlord upon the amount of the goods sold in the shop, that is, standing on the land or on boat or road as *aratdar*. The first Court allowed the claim in full, but on appeal the lower Appellate Court disallowed the commission upon the amount of the goods sold, on the ground that there is no consideration for such a contract and that if the commission, which is described in the lease as * * (*dan*) or * * (*kor*), is allowed, the plaintiff would be a share-holder of the defendant's firm. I submit the lower Appellate Court has erred. When the payment of the commission is expressly stipulated in the lease, the defendant cannot get out of the contract to pay the same. On a proper construction of the lease the Court of Appeal below should have allowed the claim for commission.

Dr. *Jadunath Kanjilal*, (with him Babu *Hemendra Chunder Sen*), for the Respondent. —The condition in the lease as regards the payment of *toll* upon the goods bought and sold in the shop or on boat is not valid and operative in law. Refers to section 23 of the Contract Act. There is certainly no consideration for the contract for the payment of the *toll* upon the amount of the goods sold in the public road or on boat plying on a public river.

Dr. *Sarat Chunder Basak* replied.

JUDGMENT.

FLETCHER, J.—This is an appeal by the plaintiff against the decision of the learned Subordinate Judge of Hughly, dated the 4th April 1916, modifying the decision of the Munsif at Serampore. The defendant took a lease of certain property to which the provisions of the Transfer of Property Act apply for the purpose of carrying on a shop—for the purpose of his *aratdari* business amongst other things. The lease provided for the payment of a certain amount of rent. It also provides that the lessee should pay *dan* or *kor* over the stipulated rent as part of the rent in respect of goods that should be sold in his *arat* or on boat or shop or road as *aratdar* on certain terms. Dr. Kanjilal at the conclusion of his argument was driven to admit that the judgment of the lower Appellate Court, in so far as it refused to decree the commission in respect of goods sold in the shop as *aratdar*, could not be supported. That is obvious. The only question is with reference to the goods sold on boat or road. Dr. Kanjilal's view is that it would be extremely hard that the plaintiff, who is apparently a Pleader, should be permitted to overreach the ignorant *aratdar* by having stipulated that whenever he should sell on any road in any country he should be liable to pay a commission to the plaintiff. That is not what the lease means, you must put a reasonable construction on the lease. What the plaintiff meant to provide against is this: Perhaps he knew the ways of the *aratdars*. He meant to provide that the *aratdar* should not be entitled to anchor a boat in the stream opposite or close to the shop and by taking the goods from the shop to the boat sell them there and say that that is not a sale within the meaning of the lease. Similarly, he should not be entitled to take the goods out of the shop on the road and instead of selling them in the *arat* sell them on the road and say that he is not liable to pay commission in respect of the goods sold on the road adjoining the shop. Such cases were intended to be covered by the lease. In respect of the goods so sold, there was nothing to prevent the lessee to stipulate that he should be liable to pay a commission. Nobody can ever likely

suggest that this *aratdar*, when he is in his boat far away from his place of business and sells a maund of potatoes there, he is liable to pay to his landlord at Serampore a commission of one rupee per one hundred maunds in respect of goods sold at that distance. The lease has got a perfectly clear and reasonable meaning. The case must be remitted to the Court of first instance to find out what amount of additional rent by way of commission on things sold by the defendant as *aratdar* in the shop or on boat or on road, as I have already mentioned, is payable to the plaintiff. Costs of this appeal will be paid by the respondent.

SHAMSUL HUDA, J.—I agree.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 344 OF 1916.

May 14, 1917.

Present:—Pandit Kanhaiya Lal, A. J. C.

BHAIRON PRASAD—DEFENDANT—APPELLANT

versus

SHEO DARSHAN—PLAINTIFF, *Musammat* INDRANA AND OTHERS—DEFENDANTS—RESPONDENTS.

Execution—Sale—Mortgage prior to attachment, whether binding on auction-purchaser.

A person who purchases property, which has already been mortgaged, in execution of a decree, cannot acquire larger rights than those which his judgment-debtor possessed on the date of the sale. [p. 877, col. 2.]

An auction-purchaser of a property mortgaged to a person under a registered deed, executed prior to the attachment of the property, is bound by the mortgage even if he had no notice of the mortgage and the mortgagee failed to have his lien notified at the time of the sale. [p. 878, col. 1.]

Appeal from the decree of the District Judge, Rae Bareli, dated the 30th June 1916, reversing the order of the Officiating Munsif, Rae Bareli, dated the 31st March 1916.

Babu *Surendro Nath Roy*, for the Appellant.

Syed *Zahur Ahmad*, for Respondent No. 1.

Babu *Lachhman Prasad*, for Respondent No. 3.

JUDGMENT.—Ganga Bakhsh Singh held a decree for arrears of rent against *Musammat* Indrana, in execution of which he brought to sale certain trees in a grove situated in the village Manjhgawan belonging to the latter. Prior to the sale Lodheshwar made an application on behalf of his brother Sheo Darshan the plaintiff to the Revenue Court, stating that his brother held a mortgage of the said grove for Rs. 48 and that the money due on that mortgage should be notified at the time of the sale. The Revenue Court refused to recognize Lodheshwar as having any authority to present the application on behalf of his brother Sheo Darshan and rejected the application. In the order rejecting the application the Revenue Court further observed that the time fixed for payment in the mortgage was four years and that it was noticeable that the mortgagee had not brought a suit for the recovery of his money in spite of the expiry of that period. What the relevancy of that observation was to the order which was passed on that application is not quite apparent. The trees were purchased at the auction-sale by Bhairon Prased. Subsequently Sheo Darshan filed the present suit for recovery of the money due on the mortgage, praying in addition that the sale effected in favour of Bhairon Prasad should be set aside. The Court of first instance dismissed the claim on the ground that the plaintiff was estopped by reason of his failure to notify his lien in the manner provided by law. The lower Appellate Court, however, came to the conclusion that the plaintiff was not guilty of any act or omission, such as would operate as an estoppel against him. It, therefore, decreed the claim for the sale of the mortgaged property.

The learned Counsel who appears for the defendant-appellant contends that his client was a *bona fide* purchaser for value and that the plaintiff was not consequently entitled to bring the mortgaged property to sale in satisfaction of his mortgage. A person who purchases property subject to a prior mortgage in execution of a decree for arrears of rent cannot, however, acquire larger rights than those which his judgment-debtor possessed on the date of the sale. The mort-

gage held by the plaintiff was registered, and the defendant-appellant, as the purchaser of the rights of the judgment-debtor, is bound by the mortgage, which was effected prior to the attachment, which gave rise to the sale. The mere fact that the appellant had no notice of the mortgage or that application made by the brother of the plaintiff for notification of his lien was disallowed is of no avail to him, because if it be assumed that Lodheswar had any authority to file the application on behalf of the plaintiff, the fact that the suit has been filed within one year from the date of the order passed by the Revenue Court is sufficient to render it maintainable. As a matter of fact no application for the notification of the lien was made by the plaintiff himself, and no act of his or omission on his part can be relied on in proof of the plea, which the defendant-appellant has pressed in this appeal. It has also been argued on behalf of the defendant-appellant that the mortgage held by the plaintiff was collusive and without consideration. But no such plea was set forth in the grounds of appeal or appears to have been urged at the time of the hearing of the appeal in the lower Appellate Court. The finding of the learned Munsif was that the mortgage was made for consideration. The appeal is, therefore, dismissed with costs.

Appeal dimissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1685 OF 1916.

April 25, 1918.

Present:—Mr. Justice Fletcher and Justice Sir Syed Shamsul Huda, Kr.

NAJA MIA—PLAINTIFF—APPELLANT

versus

ABDUL KADAR AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. VIII, r. 5—Pleadings, standard of, in India—Written statement—Omission to deny allegation of title in plaint, effect of.

In this country a very high standard of pleadings cannot be expected. [p. 879, col. 1.]

Where, in a suit for possession of land, the defendant in his written statement did not specifically deny the allegation made by the plaintiff in his plaint that the property sued for formed a portion of a certain *taluq* and the Munsif, holding that there was a constructive admission by the defendant of the plaintiff's title as alleged in the plaint, decreed the suit without considering the evidence adduced on both sides on the question of title:

Held, that the lower Appellate Court was justified in reversing the decision of the Munsif on the ground that there was no such admission on the part of the defendant as would warrant a decision in favour of the plaintiff's title, specially as the trial Court had required proof of the plaintiff's title in spite of the so-called admission by the defendant. [p. 879, col. 1.]

Appeal against the decree of the District Judge, Chittagong, dated the 8th April 1916, reversing that of the Additional Munsif, Chittagong, dated the 24th June 1915.

FACTS appear from the judgment.

Babu *Kshitish Chandra Sen*, for the Appellant.—This is an appeal on behalf of the plaintiff. The appeal arises out of a suit for possession of certain lands. Plaintiff claims the land on the basis of a Settlement granted to him in 1909 by defendant No. 2. Defendant No. 2 purchased the disputed land which appertains to the Taluk of one Mobarak Ali in 1901. The defence of defendent No. 1, the only contesting defendant in this suit, is that he purchased the land from Mobarak Ali's daughters. The Court of first instance did not enter into any evidence, but found the land to appertain to the Taluk of Mobarak Ali simply on the admission of defendant No. 1. In this country under Order VIII, rule 5 of the Civil Procedure Code, the Court may in its discretion require additional evidence even where there is an admission in the pleadings and the Court generally does so, but the Court is not bound to do so.

[FLETCHER, J.—The admissions in this case are constructive admissions.]

There is no specific denial in the written statement that the Taluk appertained to the Taluk of Mobarak Ali and this is constructive admission. We specifically stated in the plaint that the lands appertained to the Taluk Mobarak Ali. Hence in order to refute that there must be specific denial in the written statement.

[FLETCHER, J.—The lower Appellate Court did not accept the admission of defendant

No. 1 because there was evidence in support of defendant No. 1's case.]

When the plaintiff makes out a *prima facie* case, under the Patni Regulations the defendant has got to prove his case also. On his failure or omission to do so, the plaintiff's suit must be decreed.

Babu *Probodh Kumar Dass*, for the Respondents, was not called upon.

JUDGMENT.

FLETCHER, J.—This is an appeal preferred by the plaintiff against the judgment of the learned District Judge of Chittagong, dated the 8th April 1916, reversing the decision of the Additional Munsif of the same place. The suit was one brought for recovery of possession of land. The plaintiff claimed that he had got a settlement from the defendant No. 2, who had purchased the Taluk that had formerly belonged to one Mobarak Ali and which had been sold for arrears of revenue under the Patni Regulation. The defendant No. 1 said that he was a purchaser of the property from Mobarak Ali's daughter. The appeal is preferred substantially on this ground. It is said that the defendant No. 1 in his written statement failed to deny the allegation made by the plaintiff that the property sued for formed a portion of Mobarak Ali's Taluk and that, therefore, there was a constructive admission and no proof was required of that. There are many answers to this - *first* of all, proof was required by the Court. Evidence was given on both sides as to whether this land was or was not within the limits of Mobarak Ali's Taluk. From this it is quite clear that the Judge in the Court of first instance did not act on this supposed admission. *Secondly*, in these written statements filed before the Munsif, one cannot expect a very high standard of pleadings. The defendant No. 1 in this case says that he denied everything: he denied the title of the plaintiff and denied all the allegations contained in the plaint. Of course, that may not be a very scientific way of drafting a written statement. But what is clear from that is that this defendant intended to put every fact in issue and all the facts being in issue and the Judge having required proof of the title of the plaintiff, in coming to the conclusion that the learned Judge did come to, he simply dealt with the case on the footing that there was no supposed admission made by the defendant No. 1. The learned Judge was not bound by the view that the learned Munsif took. That seems to be quite obvious.

The other point raised, namely, whether the plaintiff's lessor has got a title under the Patni Regulation which must override any title that the defendant No. 1 has, has absolutely no force in it at all, because the first thing and the essential thing for the plaintiff to prove is that the property sued for forms a portion of the Taluk brought to sale under the Patni Regulation and this he has failed to prove.

The appeal fails and is dismissed with costs.

SHAMSUL HUDA, J.—I agree.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1711 OF 1916.

February 7, 1918.

Present:—Mr. Justice Richardson and Mr. Justice Beachcroft.

MRS. E. J. DELAUNEY, EXECUTRIX TO THE ESTATE OF LATE J. P DELAUNEY—DEFENDANT No. 4—APPELLANT

versus

PRANHARI GUHA—PLAINTIFF AND CHANDRA KUMAR GUHA AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Bengal school—Yautuka *and* ayautuka *property—Burden of proof—Succession—Ejectment, suit for—Mesne profits, claim for, against trespasser, maintainability of.*

The burden of proving that the property which a Hindu lady purchased long after her marriage was her *yautuka* property, because the purchase was made from a special fund obtained during her nuptial ceremony, is on the person who asserts it. [p. 880, col 2]

To the *ayautuka* property left by a Hindu female the sons and the maiden daughters may be entitled in equal shares, but the married daughters are postponed to the sons. [p. 880, col. 2.]

Defendant No. 1, under colour of title from defendant No. 4 to whom he attorned, dispossessed the plaintiff's tenants who thereupon surrendered. Defendant No 4 realised rents from the defendant No. 1 for some years In a suit by the plaintiff for ejectment of defendants Nos 1 and 4:

Held that whatever the relation might be between defendant No. 1 and defendant No. 4, the possession

DELAUNEY v. PRANHARI GUHA.

of the defendant No. 1 as against the plaintiff was that of a trespasser, and the plaintiff was entitled to mesne profits as against him [p. 882, col. 1.]

Appeal against the decree of the Subordinate Judge, Noakhali, dated the 25th April 1916, reversing that of the Munsif, Sandip, dated the 29th of August 1914.

Babus *Tarak Chandra Chakraburtty*, *Dhirendra Lal Kastgir* and *Tarakeswar Nath Mitter*, for the Appellant.

Babu *Bhagirath Chandra Das*, for Defendant No. 1, Respondent.

JUDGMENT.

RICHARDSON, J.—This is an appeal from the judgment and decree of the Subordinate Judge of Noakhali, dated the 25th April 1916. The suit is a suit in ejectment and it was brought by the plaintiff against various defendants. The suit was dismissed in the trial Court but decreed in the lower Appellate Court. The appellant before us is the defendant No. 4 and there are also cross-objection by defendant No. 1. The plaintiff traces his title to a lady named Nanda Kumari wife of Sarat Chandra Guha. Sarat Chandra died in 1299 (B. S.) and Nanda Kumari in 1300 (B. S). The case made is that the land in dispute is included in the land purchased by Nanda Kumari from one Gourhari Guha under a conveyance, dated the 17th *Sraban* 1296. On Nanda Kumari's death her rights in this property are said to have devolved upon her son Mohini, and on his death the property is said to have passed to the son of his sister Ganga Monee. That son died an infant and the property is then said to have devolved on his father, the defendant No. 5, from whom the plaintiff obtained it under a *shikmi taluki* lease, dated the 10th *Aswin* 1317. The learned Subordinate Judge has found that this title is established.

It is contended in this appeal, firstly, that the Subordinate Judge has erred in law in the way in which he has dealt with the burden of proof on the question whether the property in the hands of Nanda Kumari was what is known as Yautuka or what is known as Ayautuka. The learned Subordinate Judge says this: "There is no evidence that Nanda Kumari had any Yautuk property or she purchased e property of Exhibit 3 with the proceeds of any Yautuk property. Hence if the disputed land belonged to Nanda Kumari it was her Yautuk property. Ayautuk property of a Hindu female governed by the Dayabhaga School is inherited by her son in preference to her daughter. Hence Mohini was the legal heir of Nanda Kumari." It is argued that the learned Subordinate Judge has wrongly thrown the onus of proving that the property was Yautuka on the appellant. The 'Yautuka" of a Hindu wife consists of the gifts made to her during the nuptial ceremonies. The particular property in question was purchased 17 or 18 years after the lady's marriage. If the purchase was made from any special fund, it would seem that the burden of proving that should fall upon the person who asserts it. But apart from that the Judge in another part of this judgment has found that the property did in fact descend from Nanda Kumari to Mohini and though apparently at the time Mohini had two married sisters alive, no objection was taken by them and no claim was made by them to the whole or any part of the property. In the circumstances, therefore, it cannot, in my opinion, be said that the learned Subordinate Judge has erred in the mode in which he has dealt with this part of the case. In this connection, it is further suggested that the learned Subordinate Judge was not entitled to say that the Ayautuka property of a Hindu female is inherited by her sons in preference to her daughters. The learned Pleader has referred to a text the meaning of which he says is doubtful or ambiguous. But the proposition laid down by the Subordinate Judge, who is himself a Hindu, appears to represent the commonly accepted view of the order of succession to Ayautuka property. To such property the sons and the maiden daughters may be entitled in equal shares but the married daughters are postponed to the sons (Shastri's Hindu Law, 3rd Edition, page 415).

The second contention of the learned Pleader is that the Subordinate Judge has not found that at the date of Mohini's death Ganga Monee's son was in existence. But the fact was not disputed. "There is no dispute" says the Subordinate Judge, "that the infant son of Ganga Monee and the defendant No. 5 inherited the pro-

perty of Mohini or, in other words, the son of Ganga Moni was the heir of Mohini and the defendant No. 5 was the heir of the aforesaid son." It is impossible to go behind a positive statement of this kind made by the Subordinate Judge in the course of a long and careful judgment.

The third point taken is that the learned Subordinate Judge has in some way neglected to deal with the case as put for the plaintiff in the first paragraph of the plaint. That paragraph refers to a partition or exchange of properties which took place between Nanda Kumari and her husband. The first paragraph of the plaint, however, cannot be read by itself. It must be read with the rest of the plaint. There is no definite statement there that the property now in dispute was property obtained by Nanda Kumari in exchange for some property of her which went to her husband. A definite statement on the subject will be found in paragraph 5 of the plaint. That paragraph states:— "That the aforementioned Nanda Kumari Guha was owner in possession of the land of Schedule (*Ka*) by virtue of the aforesaid purchase under a deed of private sale and in right by adverse possession." The plaint, therefore, specifically affirms that the land specified in the first schedule or the land in dispute was purchased by Nanda Kumari from Gourhari; and there is the further assertion of a right by adverse possession to that land. Moreover, there is a clear finding in the judgment of the Subordinate Judge that the conveyance executed by Gourhari in favour of Nanda Kumari does include the disputed land. There is, therefore, in an appeal confined to questions of law no substance in this contention.

Then as to limitation, that turns on the question of possession. It is suggested that the learned Subordinate Judge has not sufficiently dealt with this question. What is it that the Subordinate Judge has found? He has found that this property descended from Nanda Kumari to Mohini. He has found that by the *pattah* of the 22nd Chaitra 1899 the property was leased by Mohini to Biseswar Guha, the father of defendants Nos. 2 and 3. These defendants are the first cousins of defendant No. 1. In the year 1307 a portion of the land covered by the lease of 1893 was surrendered by or on behalf of defendants Nos. 2 and 3. The portion so surrendered was settled by Mohini with Nabin Chandra Guha, the brother of defendant No. 1, and apparently is now in the undisputed possession of Nabin. As I read the judgment of the Subordinate Judge, he has further found that the land in dispute continued in possession of defendants Nos. 2 and 3 as tenants of Mohini till the year 1908. In that year a Record of Rights was published. The Subordinate Judge's view, stated, if not expressly at any rate with sufficient clearness, is that subsequent to the publication of the Record of Rights the defendant No. 1, under colour of a title from the defendant No. 4, somehow continued to dispossess defendants Nos. 2 and 3 and that the possession of defendant No. 1 does not go back beyond the year 1908. The plaintiff had some difficulty in realising his rent from defendants Nos. 2 and 3 and he brought a rent suit against them and secured a decree. Thereafter they paid rent for one year, but finally surrendered the land to the plaintiff. The plaintiff says that he attempted to obtain possession after this second surrender, which occurred at the end of 1911 or beginning of 1912, and was unsuccessful and he dates his cause of action from the year 1913. On the facts as found by the Subordinate Judge it is quite clear that this suit is within the time allowed by the law of limitation.

Another objection taken by the learned Pleader is that the Subordinate Judge has not dealt with defendant's title. The defendant No. 4 is the owner of a 4-anna share of the Zemindari right, but that is not the title under which she claims in the present suit. She claims as a purchaser at a Court sale. The sale certificate is dated the 5th December 1908 and it purports to pass the Taluki title. This title, however, is the very title which Nanda Kumari is said to have purchased long before from Gourhari, in whom according to the Subordinate Judge the title vested. Nither the plaintiff nor her predecessor-in-interest was a party to the rent suit in execution of the decree in which the sale was held. Therefore, neither the decree itself in the rent suit nor the sale in execution of that decree can bind the plaintiff. As to this title

set up by defendant No. 4 and defendant No. 1 under him, the Subordinate Judge's view is perfectly clear. He has found that defendant No. 1's settlement is a fictitious one; and he adds that before 1308 he had no right in the land. He adds that "defendant No. 4 was never in *khas* possession of the disputed land. She did not take delivery of possession of the disputed land through Court. She did not take amicably. The defendant No. 1, who either dispossessed the defendants Nos. 2 and 3 during their minority or was in collusion with them, attorned to defendant No. 4 who simply got rent for 1316 and 1317 (B. S.) for the disputed land from the defendant No. 1 in 1909 and 1910. She as a Talukdar had no concern with the disputed land other than the receipt of this rent." It is obvious that, whether rightly or wrongly, the Subordinate Judge is of opinion on the merits that the title of defendant No. 1 as also of defendant No. 4 was purely a paper and fictitious title.

Coming to the cross-objections filed on behalf of defendant No. 1, the first objection on his behalf is that he has been made liable for mesne profits. He says that mesne profits ought to be paid not by him but by defendant No. 4. Whatever the relation may be between defendant No. 1 and defendant No. 4 the possession of the defendant No. 1 as against the plaintiff is that of a trespasser and the plaintiff is entitled to mesne profits as against him. The next objection raises the question of the possession of defendant No. 1 over again. That I have already dealt with and I need not repeat what I have said. It has also been argued for the defendant No. 1 that the Subordinate Judge has not definitely found that the lands in suit are identical with the land leased to the plaintiff by the document of the year 1317. That document is Exhibit No. 1 on the record. The two plots of land to which the first schedule of the plaint refers are both found by the Subordinate Judge to be included in that document. He says that plot No. 2 of Exhibit No. 1 includes the plaint land. There is no substance, in my opinion, in the cross-objections urged on behalf of defendant No. 1. The plaintiff not being the appellant, I guard myself from being understood to express any opinion on the question whether it was open to the defendant No. 1 to take any of these cross-objections except the first.

The result is that the appeal and the cross-objections must be dismissed. The plaintiff is entitled to his costs of the appeal and the cross-objections from defendant No. 4 and defendant No. 1 respectively.

BEACHCROFT, J.—I agree.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 45 OF 1917.

February 23, 1918.

Present:—Mr. Batten, Offg. J. C.

VITHOBA AND OTHERS—DEFENDANTS—APPELLANTS

versus

SEGO AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Minor, decree against—Negligence of guardian ad litem in conduct of suit—Bad management of suit—Failure to raise money by encumbering property in order to prevent final decree from being passed, whether gross negligence—Non-service of summons on minor's guardian, whether sufficient ground for setting aside decree by suit—Civil Procedure Code (Act V of 1908), O. IX, r. 13, O. XVII, r. 2—Audi alteram partem, applicability of.

Gross negligence on the part of a guardian or next friend in conducting a suit on behalf of a minor is a good ground for the minor to bring a suit for setting aside the decree. [p. 884, col. 2.]

But mere bad management of a suit by the guardian or an omission to raise money on behalf of the minor by further encumbering the estate, in order to prevent a final decree in a mortgage suit from being passed, is not a sufficient ground for setting aside a mortgage decree unless the conduct of the guardian amounts to fraud or gross negligence. [p. 884, col. 2.]

Daulat Singh v. *Raghubir Singh*, A. W. N. (1894) 141, followed.

There is no exception to the rule *audi alteram partem*, unless such an exception is made by legislation. [p. 885, col. 2.]

The mere non-service of summons on a party to a suit is not a sufficient ground for setting aside the decree in a fresh suit unless it is part of a scheme of fraud. [p. 886, cols. 1 & 2.]

If an *ex parte* decree is passed against a minor under Order XVII, rule 2 of the Civil Procedure Code, the remedy of the minor acting through his guardian lies in the provisions of Order IX, rule 13 of the Code, and he cannot obtain relief in a separate suit unless

the absence of the guardian has resulted in such an injustice to the minor as would amount to gross negligence on the part of the guardian. [p. 886, col. 2.]

A minor once represented by a guardian does not cease to be so represented merely because an *ex parte* decree is passed against him owing to the absence of his guardian. [p. 886, col. 2.]

Appeal against the judgment of the District Judge, Bhandara, in Civil Suit No. 33 of 1915, dated the 31st January 1917.

Messrs. *M. Gupta, S. Ramdas* and *R. B. Wyawahare*, for the Appellants.

The Hon'ble Sir *B. K. Bose* and Mr. *V. Bose*, for Respondent No. 1.

Messrs. *V. M. Jakatdar* and *Bhawani Shankar*, for Respondent No. 2.

JUDGMENT.—This appeal arises out of a suit filed as a sequel to the case disposed of in Miscellaneous Appeal No. 30 of 1913 disposed of on 6th February 1915. The minor defendants in Suit No. 50 of 1908 Sego and Jagan have now brought a suit for a declaration that the decree final in that suit is null and void and for possession of the mortgaged property, alleging that the mortgage-debt has been fully satisfied by the usufruct of the property since it has been in the decree-holder's possession. In the alternative they ask to be allowed to redeem in case any balance of the mortgage debt remains unsatisfied. The District Judge has granted a decree that the final decree passed against the plaintiffs in Suit No. 50 of 1908 does not bind them and is null and void as against them. He has not, however, granted a decree for possession or redemption but has relegated the parties to the position they were in before the decree final was passed. It is admitted by both sides that if the District Judge is right in holding that the decree final does not bind the plaintiffs, the form of the decree in this suit is a correct one.

The plaintiffs claim that relief should be granted on three grounds. The *first* is fraud on the part of the decree-holders ; the *second* is negligence on the part of Budhu the guardian *ad litem* of the plaintiffs in the former suit; *thirdly*, it is said that the decree final is void against the plaintiffs as they were not properly represented by a guardian *ad litem* when the decree was passed.

The learned District Judge has held that none of the allegations of fraud made against the decree-holders have been proved, and this finding has not been challenged in argument by the learned Counsel for the respondents. The nature of the fraud alleged is, however, closely bound up with the charge of negligence directed at Budhu.

The facts of the case as regards the circumstances in which the decree was made final have been fully set out in the former judgment of this Court and the judgment appealed against and need not be repeated fully here. It is sufficient to say that Budhu is the full brother of one appellant and step brother of the other appellant and was their guardian *ad litem*. When the decree-holders applied for a final decree for foreclosure, a notice was issued to the minors in which they were described as minors by guardian Sakharam, Sakharam being their father. Sakharam was not their guardian *ad litem*, but it has been found that the notice was drawn up incorrectly not through anybody's fraud but by a pure mistake, Sakharam having been nominated as guardian *ad litem* by the plaintiffs in that suit at the commencement of the proceedings. He declined to act as guardian of his sons and then Budhu was appointed guardian *ad litem*. Even Sakharam was not served as guardian of the minors but the notice was served on the minors personally. Subsequently on the 25th September 1910 service was made on Sakharam and Budhu, the first and second defendants in the case, in their own names and not as guardians of the minor defendants. The notice was to appear on 8th October 1910, but they did not appear, and the notices were held to have been duly served on them. What happened was, and this is the version adopted by the plaintiffs in this suit, that Sakharam and Budhu, when they saw the proces-server appear, concealed themselves inside the house and the notices were affixed to the house.

In the lower Court the charges of fraud made against the decree-holders have broken down and no attempt is made to sustain them in this Court. The specific acts of negligence alleged against Budhu are, (1) that he made no attempt to raise the mortgage money before 15th April 1910, the date named for payment in the pre-

liminary decree; (2) that he did not apply on the minors' behalf to set aside the *ex parte* final decree against the minors; and (3) that he did not appeal against the final decree on behalf of the minors on the ground that it had been passed behind their backs. In estimating the negligence, if any, on the part of Budhu we must see what the allegations made by the plaintiffs are, and these are contained in the main charge of fraud against the decree-holders. The plaintiffs allege that on 25th September 1910, when Budhu and Sakharam concealed themselves within the house from the process-server, a compromise was effected inside the house between the parties, and the defendants stated to the mothers of the plaintiffs that they would not get the decree made final for the full 5 annas 4 pies mortgaged but would give up the minors' share of the property and accept the other half of the property in full satisfaction of the decree. According to the plaintiffs' case, therefore, what they would have urged, if they had appeared through their guardian *ad litem* on 8th October 1910, is that the decree-holders had released their share of the property. The story about the alleged compromise on 25th September 1910 has on very good grounds been found to be a tissue of falsehoods and this finding is accepted in this Court. I do not understand how the plaintiffs can complain that their guardian did not appear for them and tell a story which has now been found to be absolutely false. There can be no negligence in omitting to come forward and tell a false story. It is nowhere alleged in the plaintiffs' pleadings that if they had appeared through a diligent guardian they would have asked for an extension of time. According to their case what they would have pleaded would have been something perfectly different. Presumably any appeal made on behalf of the plaintiffs would have put forward the story that has now been put forward and is found to be false. I do not see how we can ignore the plaintiffs' pleas in the present case and suppose that a different case might have been put forward for them than the one they have advanced now. But even if we ignore the specific allegations made by the plaintiffs, it remains to be seen whether Budhu can be said to have been negligent in not raising the money, in not applying to have the *ex parte* decree set aside on the ground that the minors have not been served and in not appealing against the decree on the same ground. As to the alleged negligence in not raising the money the plaintiffs' plea is that the other co-sharer of Mouza Paldongari was willing to advance the money on easy terms, that is to say, that the money might have been raised by further encumbering the property. Budhu and Sakharam did not raise the money in their own interest, and an omission to raise the money on behalf of the minors by further encumbering the estate is not such an act of gross negligence as would entitle the plaintiffs to treat the decree as a nullity. It is not alleged that the money was available on the 8th October, the date on which the decree was made final, and in these circumstances it cannot be imputed as an act of gross negligence that Budhu failed to appeal or failed to take steps to set aside the *ex parte* decree. No money was deposited on account of the plaintiffs until 24th August 1912. No doubt gross negligence on the part of a guardian or next friend in conducting a suit on behalf of a minor is a good ground for the minor setting aside the decree; *vide Lalla Sheo Churn Lal* v. *Ramnandan Dobey* (1), *Ram Sarup Lal* v. *Shah Latafat Hossein* (2), *Gottepati Subbana* v. *Gottepati Narasamma* (3). But mere bad management of a suit by the guardian is not a sufficient ground for setting aside a decree unless it amounts to fraud or gross negligence; *vide Daulat Singh* v. *Raghubir Singh* (4). The time for payment expired on 15th April 1910, and the decree was made final on 8th October 1910. The minors through their guardian could have asked for an extension of time quite independently of any application by the decree-holders for making the decree final. No such application was ever made on their behalf. In the circumstances of the case it was not gross negligence on the part of the guardian to abstain from seeking to set aside or appealing against a final decree merely on the ground that the minors had not been noticed. It was an omission on his part which may well have

(1) 22 C. 8; 11 Ind. Dec. (N. S.) 7.
(2) 29 C. 735.
(3) 26 Ind. Cas. 16; 27 M. L. J. 480.
(4) A. W. N. (1894) 141.

been the wisest course in the circumstances of the case. It would have been gross negligence not to appeal or apply for restoration if the money had been paid or if the alleged compromise had really taken place, but it was not necessarily negligence to abstain from doing so when all that could be hoped was that the Court might possibly grant an extension of time. which had not been asked for up to the date of the hearing of the application to make the decree absolute.

We next come to the most important question in the case, namely, whether the final decree is a nullity against the minors because they were not noticed when the decree-holders applied to have the decree made final. The District Judge seems to think that this point has been settled by my remarks in the former case. This is not so. I held and I still hold that the minors' guardian was not noticed, and, therefore, the minors were not represented at the hearing when the decree was made final. I did not intend to say, nor could I say, that the minors were entirely unrepresented so that the proceedings against them were void. Nothing I said in the former appeal can possibly make this question *res judicata*. I will first dispose of three arguments raised on behalf of the appellants. It is first of all urged that on an application being made for an order under Order XXXIV, rule 3 (2), for a final decree the non-applicant party concerned is not entitled to notice thereof or to appear and be heard in answer thereto. It is urged that the ruling in *Seth Bagwandas* v. *Shridhar* (5) is no longer to the point, since under the present Civil Procedure Code all proceedings up to the granting of a final decree are proceedings in the suit. I am of opinion, however, that the principles of that ruling are still in force. The proceedings started by an application to make a foreclosure decree final are no doubt proceedings in the suit, but they are a fresh stage in the proceedings which are opened by the application. The mere mentioning of a date for payment in the preliminary decree cannot possibly be a notice of the re-opening of the fresh stage of the proceedings beginning with an application to make the decree final. Where there is no possibility of giving the parties a date for further hearing, then the other side must be given a notice when the proceedings are re-opened by one party or the other. To ignore this rule would be to neglect the maxim *audi alteram partem*. Under Order XXI, rule 22, it is provided that in execution cases notice to the judgment-debtor need be given only if the application is made more than a year after the date of the decree. This seems at first sight to be an exception to the rule laid down by the maxim, but it is not really so. If nothing at all were said about noticing the other side then a notice would have to issue. What rule 22 really means is that the rule is that the other side should be noticed, but that rule need not be observed if the application is made less than a year after the date of the decree. This is not an execution case, but I have mentioned the point in order to show that there is no exception to the rule *audi alteram partem*, unless such an exception is made by legislation.

It is next urged for the appellants that the service on the minors personally was a valid service. No serious argument has been addressed in support of this contention, which I consider to be unsustainable. This plea certainly does not obtain adequate support in some remarks of Wilson, J., in *Suresh Chunder Wum Chowdhry* v. *Jagut Chunaer Deb* (6).

It is also suggested that the fact that Budhu was personally served was a sufficient service on the minors of whom he was the guardian, though he was not served as their guardian. I am not prepared to say that the service on a guardian personally as a party to the suit can never be a good service on the minors of whom he is the guardian, but I adhere to my opinion that in this case the service on Budhu cannot be regarded as a proper service of the notice to the minors through their guardian inasmuch as Budhu never subsequently acted in the capacity of the minors' guardian. When he applied in Exhibit P-10 to set aside the *ex parte* decree, he did so on his own behalf and not on behalf of the minors.

(5) 3 N. L. R. 55.

(6) 14 C. 204 at p. 215 (F. B.); 7 Ind. Dec. (N. S.) 135.

VITHOBA v. SEGO.

The main contention on behalf of the appellants is that the final decree is merely an *ex parte* decree in the ordinary sense of that term, liable to be set aside in the prescribed manner, and not a mere nullity not requiring to be set aside or liable to be set aside only by a separate suit. On the one hand we have a class of cases dealt with in *Rashid-un-nisa* v. *Muhammad Ismail Khan* (7), *Sham Lal* v. *Ghasita* (8), *Hanuman Prasad* v. *Muhammad Ishaq* (9), *Khairaj Mal* v. *Daim* (10) and *Purna Chandra Kumar* v. *Bejoy Chand* (11). These were all cases in which either no guardian at all was appointed at any stage of the suit or in which the guardian appointed was not legally competent to be a guardian or next friend. On the other hand we have a class of cases instanced by *Raghubar Dyal Sahu* v. *Bhikya Lal Misser* (12), where throughout the suit the infant has been duly represented by his guardian. In such a case where the infant after attaining majority seeks to set aside that decree by a separate suit, he can succeed only on proof of fraud or collusion on the part of his guardian. In the present case the plaintiffs were duly represented by their guardian and that representation undoubtedly extended until the termination of the suit by the passing of the final decree. After studying the cases *Narsing Das* v. *Bibi Rafikan* (13), *Pran Nath Roy* v. *Mohesh Chandra Moitra* (14), *Radha Raman Shaha* v. *Pran Nath Roy* (15), *Khagendra Nath Mahata* v. *Pran Nath Roy* (16) and *Puran Chand* v. *Sheo Dat Rai* (17), it seems to me clear that the mere non-service of summons on a party to the suit is not a sufficient ground to set aside the decree in a fresh suit, though where the non-service is a part of a scheme of fraud the decree might be set aside. There are no rulings exactly on all fours with the present case. The first question that arises is whether a minor who is duly represented by a guardian is in a better position than an adult. He would certainly be in a better position if he was not served because no guardian was appointed for him. If an *ex parte* decree is passed against a minor under Order XVII, rule 2, it appears to me that the remedy of the minor acting through his guardian lies in the provisions of Order IX, rule 13, and he cannot obtain relief in a separate suit unless the absence of the guardian has resulted in such injustice to the minor as would amount to gross negligence on the part of the guardian. In other words, a minor once represented by a guardian does not cease to be so represented merely because an *ex parte* decree is passed against him owing to the absence of his guardian.

The further question remains whether the minors in the present case can be said not to have been represented because no notice was served on their guardian at the opening of the fresh stage of the suit. After some consideration I am of opinion that the minors cannot be said not to have been represented by a guardian. They were represented, but an *ex parte* order was passed against them in circumstances which would have entitled their guardian to apply to have the *ex parte* decree set aside under Order IX, rule 13. The Court took steps to have the minors served but owing to a mistake of procedure they were not served. It appears to me that they are exactly in the same position as if their guardian had been served but had been unavoidably prevented from attending in circumstances which entitled him to have the *ex parte* decree set aside. In such circumstances I do not think it can be said that the minors were not represented at all.

The lower Court has held that there was no fraud, and I have held that there was no gross negligence on the part of the guardian, and I am of opinion in the special circumstances of the case that while the minors could have applied to set aside the *ex parte* decree under Order IX, rule 13, they cannot set aside the decree under a

(7) 3 Ind. Cas. 864; 31 A. 572; 13 C. W. N. 1182; 10 C. L. J. 318; 6 A. L. J. 822; 11 Bom. L. R. 1225; 6 M. L. T. 279; 19 M. L. J. 631; 36 I. A. 168 (P. C.).

(8) 23 A. 459.

(9) 28 A. 137; 2 A. L. J. 615; A. W. N. (1905) 229.

(10) 32 C. 296; 9 C. W. N. 201; 2 A. L. J. 71; 7 Bom. L. R. 1; 1 C. L. J. 584; 32 I. A. 23; 8 Sar. P. C. J. 734 (P. C.).

(11) 18 Ind. Cas. 859; 17 C. W. N. 549; 18 C. L. J. 18.

(12) 12 C. 69; 6 Ind. Dec. (N. S.) 48.

(13) 5 Ind. Cas. 198; 37 C. 197; 11 C. L. J. 250; 14 C. W. N. 507.

(14) 24 C. 546; 12 Ind. Dec. (N. S.) 1032.

(15) 28 C. 475; 5 C. W. N. 757.

(16) 29 C. 395; 29 I. A. 99; 6 C. W. N. 473; 4 Bom. L. R. 363; 8 Sar. P. C. J. 266 (P. C.).

(17) 29 A. 212; 4 A. L. J. 51; A. W. N. (1907) 31.

fresh suit since the decree was not a nullity but an *ex parte* decree within the ordinary meaning of that term. To hold otherwise would, in my opinion, be to hold that when a defendant is entitled to get a decree set aside under Order IX, rule 13, he is always as a matter of course entitled to set aside the decree by a separate suit if he is a minor. I do not find anything in the circumstances of this case to entitle the plaintiffs to any special consideration.

For the above reasons I set aside the decree of the District Judge and dismiss the suit with costs in both Courts.

Decree set aside.

PUNJAB CHIEF COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No. 2757 OF 1916.

January 22, 1918.

Present:—Mr. Justice Chevis.

SALAMAT RAI—DEFENDANT—APPELLANT

versus

KANSHI RAM—PLAINTIFF, AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption—Land on outskirt of town included in Municipal limits for certain purposes, whether becomes part of town—"Owner", who is.

The mere fact that for certain reasons the Local Government has seen fit to include a part of the Premgarh estate within the Municipal limits of Hoshiarpur city, does not necessarily mean that the locality in question has become a part of the town for purposes of pre-emption. Although the site in dispute is situate between the Hoshiarpur city and the railway station, and shops have sprung up in the vicinity, it cannot be said that the town has extended so far. [p. 887, col. 2.]

Where a person buys agricultural land assessed to revenue and becomes one of the *khewatdars*, he must be regarded as an owner of the estate for purposes of pre-emption, no matter whether the area he buys is small and whether he pays only a few annas as revenue: and he does not cease to be such owner merely because he walls off the land and stores iron thereon. [p. 887, col. 2; p. 888, col. 1.]

Miscellaneous second appeal from the order of the District Judge, Hoshiarpur, dated the 16th July 1916, reversing that of the Munsif, 1st Class, Hoshiarpur, dated the 7th December 1915, dismissing the claim and remanding the case for trial and decision of the remaining two issues.

Bakshi *Tek Chand* and Lala *Balwant Rai*, for the Appellant.

Mr. *Mukand Lal Puri*, for the Respondents.

JUDGMENT.—This is an appeal from an order of remand under Order XLI, rule 23. The facts are given in the judgments of the lower Courts.

It is first argued before me that the land in suit is in a town. It is true that it is now within Municipal limits, but it still remains a part of the estate known as Premgarh village. It is between Hoshiarpur city and the railway station and, though shops have sprung up in the vicinity, I do not think it can be said that the town itself has extended so far and I do not see that the mere fact that for certain reasons the Local Government has seen fit to include a part of the Premgarh estate within Municipal limits necessarily means that the locality in question has become a part of the town.

The next question urged is, that plaintiff by his purchase of a small plot of land, 1 *kanal* 14 *marlas* in area, for building purposes has not become an "owner of the estate," or that if he did become such an owner by his purchase, he has ceased to be such an owner by his purchase, having walled the land which he bought and turned it into a store. Here several well-known rulings are cited. In some it has been held that an owner of a site in the *abadi*, or an owner of a share in a well, or a purchaser of a share in a pond does not become an owner in the estate. But in most at least of the rulings one of the main tests seems to be whether the claimant's purchase is assessed to land revenue. The term "owners of the estate" has generally been interpreted as meaning the *khewatdars* or body of men who pay the land revenue. Here plaintiff has bought agricultural land assessed to revenue, and has become one of the *khewatdars*. It is true that the area is small and that he only pays a few annas as revenue, but still he is a *khewatdar* and so I think he must be regarded as an owner of the estate. I can see no good reason for holding that he did not become such an owner because of his purpose in buying, *i.e.*, to build a house or that he has ceased to be such an owner

by the fact that he has walled off his land and stores iron there.

This appeal is dismissed with costs.

Appeal dismissed.

PATNA HIGH COURT.

FIRST CIVIL APPEALS NOS. 527 AND 538 OF 1915.

August 14, 1917.

Present:—Sir Edward Chamier, KT., Chief Justice, and Mr. Justice Sharfuddin.

RAMESWAR LAL BHAGAT—PLAINTIFF—APPELLANT

versus

Raj Kumar GIRWAR PRASAD SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Jagir, *transfers of portions of, nature and effect of—Resumption, right of—Burden of proof*

A *jagirdar* sold all his rights in certain villages to certain Chowdhris, who in turn sold all their rights in those villages to the ancestor of the plaintiff. The defendants, who were the descendants of the original *jagirdar*, contended that the transfer to the Chowdhris was not a sale, but merely a grant of *baidari* tenure according to which only heirs male of the grantee could succeed, and that as the last holder of the tenure had left no male issue, the plaintiff being his daughter's son, they were entitled to resume the villages. It was found that the ancestors of the plaintiff had been in possession of the villages for generations and that the words used in respect of the transfers of the villages were *bikri* and *farokht*:

Held, that the burden was on the defendants to prove their right to resume both as against the Chowdhris and as against the ancestors of the plaintiff. [p. 890, col. 1.]

Appeal from a decision of the Subordinate Judge, Palamau, dated the 24th August 1915.

Messrs. *Khurshed Hasnain* and *Jamini Mohan Mukherji*, for the Appellant.

Messrs. *Pugh*, *Mritunjay Lal* and *R. L. Dutt*, for the Respondents.

JUDGMENT.

CHAMIER, C. J.—These appeals arise out of suits brought by the appellant to establish his right to three villages Gurturi, Kolhua and Gorgo lying in Parganah and District Palamau. The defendants to the two suits are different but the questions for decision are the same. The two suits were tried together in the Court below and they may be disposed of by one judgment.

At the beginning of the 19th century Gurturi and Kolhua were part of the Jagir of Sheo Prasad Singh in the Zemindari or Raj of Raja Churaman Rai of Palamau. In 1800 Sheo Prasad Singh transferred them to some Chowdhris, who in 1806 transferred them to Manog Bhagat. Similarly, Gorgo was part of the Jagir of Pati Singh in the same Raj. In 1800 he transferred it to the above-mentioned Chowdhris, who in 1807 transferred it to Manog Bhagat. From 1807 the history of all three villages is the same. Manog was succeeded first by his widows Ram Kuer and Phool Kuer and subsequently by Sheo Prasad Bhagat who claimed to have been adopted by him. Sheo Prasad was succeeded by his three sons of whom the survivor Janki Charan Bhagat died in 1901. Sonkali Koer his widow took possession. The defendants in each of these cases disputed her right and there were compromises whereby she was allowed to retain 10 annas in two villages and 12 annas in the third. The plaintiff, however, maintains that she in fact retained possession of the whole of the three villages. Sonkali died in 1907. The plaintiff, who is son of a daughter of Janki Charan, took possession but his right was disputed and these suits were brought in 1913. The defendants are descendants of the original Jagirdars.

Both parties have quoted freely from the District Gazetteer and Sir W. Hunter's Statistical Account of Bengal, Volume 16. These publications shew that the British took possession of the Parganah in 1773 and settled it with the Raja for 5 years. In 1776, a second settlement was made with Raja Churaman Rai, who was a minor. In 1789 a third settlement was made by a Mr. Leslie who drew up a list of Jagirdars and fixed the revenue due from them to the Raja. Churaman Rai on attaining majority assumed the management of his estate, but he fell into arrears with the revenue and the estate was sold to the Government in 1814. Government granted it to another Raja in 1816, but resumed it two years later and has held it ever since. In 1818 the amount payable by the Jagirdars was re-fixed. In 1839 and 1872 other settlements were made. Lastly, in 1894, the settlement was made which is now in force. Prior to the British conquest, the Chero rulers had created a number of Jagirs and other tenures resumable on failure of male heirs of the grantees, retaining the remainder

of the Parganah as their *khalsa* or personal property. When Government came into possession, the Jagirdars were allowed to retain their Jagirs, the *khalsa* villages alone remaining in the direct possession of Government, and it is these which now form what is known as the Palamau Government estate.

The following proviso was published as one of the conditions of the sale at which the Government purchased in 1814, "Whereas there are several tenants in the Parganah Palamau, commonly termed Jagirdars, who have for a long period held their lands at a fixed and easy rent, it is hereby notified that the abovementioned persons are to be continued in possession by the purchaser and his heirs or by whatever person the estate may be hereafter possessed in consequence of private or public sale or any other kind of transfer, on their agreeing to such an equitable *jama* as may be determined by the Assistant Collector at Ramgarh; should the proprietor of the estate and the Jagirdars disagree as to the term of settlement, subject to an appeal to the Court of Justice." Government succeeded to the rights of the old rulers and did not resume the Jagirs but proceeded to assess them to rent. No distinction was made between the different classes of Jagirs and in practice they were recognized as both heritable and permanent. In 1894 it was found that they had been freely transferred either in whole or in part by sale; in every case but one, male heirs of the original grantee were in existence, and while in the case of the larger fiefs the custom of primogeniture had been followed, in the smaller ones, which form the majority, the tenures had been freely divided amongst members of the family like any ordinary property. This being the state of affairs it was decided in 1895 that the transferability of all such tenures should be recognized and the right of resumption on failure of male heirs abandoned once for all, that all transferees should be admitted to registration and that the tenures should thenceforth be raised to the position of revenue paying estates.

The plaintiff's case is that the original Jagirdars sold all their rights in the 3 villages to the Chowdhris who in turn sold all their rights to Manog Bhagat, and that the (plaintiff) as the heir of Janki Charan, grandson of Manog, is consequently entitled to the villages.

The defendants pleaded that they knew nothing of the alleged sale by their ancestors to the Chowdhris or of the alleged sale by the Chowdhris to Manog Bhagat and that the truth was that their ancestors, who originally held the villages as Jagirdars with rights heritable by heirs male only, had granted them to Manog Bhagat in *baidari* tenure according to which only heirs male could succeed and as Janki Charan Bhagat had left no male issue, they, the defendants, were entitled to resume the villages. The greater part of this defence is obviously false and has been abandoned. There is, as will be seen later, overwhelming evidence that the original Jagirdar transferred the villages to the Chowdhris, that the Chowdhris transferred them to Manog Bhagat, and that the defendants' ancestors merely recognized the transfer to him.

The defendants admit that their ancestors recognized the right of Sheo Prasad Bhagat to succeed Manog Bhagat. It is common ground that the defendants' ancestors held the villages subject to the Raja's right of resumption on failure of male heirs. If the defendants' ancestors transferred *all* their rights to the Chowdhris and the latter transferred *all* their rights to Manog Bhagat, it would appear that the defendants are not entitled to resume the villages. As descendants of the original Jagirdars they could have no such right and as successors to the Government or the Raja by reason of the action taken in 1895 the defendants are in no better position in this respect.

It appears to me that these appeals might be allowed and the claim of the plaintiff decreed on the short ground that the defendants have not shewn that they have any right to resume against the Chowdhris. The Bhagats have been in possession of the villages for generations under a transfer from the Chowdhris, who in turn obtained the villages from the defendants' ancestors. It appears to me that it is for the defendants to prove their right to resume both as against the Chowdhris and as against the Bhagats. If the burden of proof is on them, they have certainly failed to discharge it. The fourth issue in the case was, "Had the Chowdhris an absolute saleable title to the property in suit or

only a limited right to it subject to resumption on failure of male heirs?" I do not understand the passage at the close of the Subordinate Judge's judgment to the effect that it is not open to the plaintiff to prove that there is a descendant of the Chowdhris still living.

However, as the case may go before a higher Tribunal and is one of considerable interest in the District, I propose to examine the evidence with a view to determining, as if the burden of proof was on the plaintiff, what was the nature and what was the effect of the transfers by the Jagirdars to the Chowdhris and by the Chowdhris to Manog Bhagat.

The plaintiff alleges that his predecessors lost a number of valuable documents relating to these villages in 1877 and he asked the Subordinate Judge to admit secondary evidence of them. The Subordinate Judge, for reasons which seem to me to be wholly insufficient, ruled that the loss of the documents had not been proved. I am aware that it has been held that the question whether a case has been made out for the reception of secondary evidence is primarily one for the Trial Court. But in the present instance I am of opinion that there has been a clear miscarriage. On May 17th, 1877, Thakur Sahai, General Agent of Jasodanund Bhagat, reported at the Patna Police Station that a large number of documents and some other property had been stolen from him two days before at Gurturi, a village in the interior. He gave a list of the documents and property with full details and stated that two of them had been subsequently recovered. No reason can be suggested why the Bhagats should have decided to make away with a mass of important documents. The present plaintiff is not responsible for the report. He gave evidence himself and all that he could say was that such a report was made and that he had not been able to find the documents although he had searched for them. I see no reason whatever for rejecting his statement and none has been given by the Subordinate Judge. I am clearly of opinion that secondary evidence of the contents of the lost deeds is admissible. The Subordinate Judge makes a point of the non-production of the *waguzasht* in favour of Manog Bhagat, but that document must have been executed a great many years ago, probably about 80 years ago, and it is not surprising that it is not forthcoming. Nor, I may note, did the defendants call upon the plaintiff to produce it or cross-examine the plaintiff about it.

The earliest documents in order of date are copies of petitions presented by an agent of Manog Bhagat in September 1810 (Exibits 9 and 10). They recite the sale of the villages by the Thakurs to the Chowdhris and by the Chowdhris to Manog, state that Manog has been paying the revenue of the villages (Rs. 19-4-0 and Rs. 36) and pray that the villages may be exempted from the then impending sale of the Raj. These petitions refer to the transfers as out-and-out sales. At that time there can have been no object in misrepresenting the nature of the transfers. Moreover, the deeds were produced for inspection. In 1840 the Chowdhris sued Sheo Prasad Bhagat for possession of the villages on the allegation that they had only mortgaged them to Manog (Exhibit 11). The suit was dismissed in January 1843. A re-trial was ordered and took place in 1856 with the same result (Exhibits 12 and 13). The judgment of 1843 is important, not only because Sheo Prasad succeeded in shewing that there had been an out-and-out sale to Manog but because it shews that the deeds by which the Thakurs transferred to the Chowdhris were before the Court and were regarded by the Court as deeds of sale. It also recites a *waguzasht* granted by the Thakurs to Manog recognizing the sale to him. The words used are *bikri* and *farokht*, which mean sale and nothing else. The *waguzasht*, as its name shews, cannot be regarded as a fresh grant to Manog. In 1886 we find the Jagirdar saying in answer to a question regarding the sale or mortgage of portions of his Jagir that 12 villages had been sold, and in the details he says that Gurturi is in possession of Sheo Prasad Bhagat [see Exhibits 4 (*b*) and 4 (*c*)]. In 1893 the statement is repeated by the Jagirdar's agent, who said that Gurturi had been sold to Sheo Prasad Bhagat by his predecessor [Exhibits 4 and 4 (*a*)]. In the Jagirdari registers [Exhibits 14 and 14 (*a*) Gurturi and Kolhua appear as Nos. 5 and 6 in one list and Gongo as No. 6, in another, and it is stated that they are held by Janki Prasad Bhagat

by purchase. All these documents point unmistakably to the transfers by the Thakurs and Chowdhris having been sales out-and-out. There is no hint at any thing in the shape of a sub-Jagir. There appears to have been out-and-out sales for a stated and large consideration. The plaintiff produced a large number of receipts for payments made by his predecessors [Exhibits 1 (*a*), (*ab*), (*ap*), (*aq*), (*b*), (*c*), (*d*), (*e*), (*g*), (*h*), (*k*), (*n*), (*o*), (*r*), (*z*)] to show that they were described as purchasers. The word used is *kharidar*. We also find the words *bai* and *kharidigi* in these documents. All these words imply a sale. The defendants seek to discount the value of these documents by pointing out that the sums acknowledged were usually described as rent. I do not consider that the word rent militates against the view that the transfers were out-and-out sales. The holders of the villages were in the position of tenure-holders and in earlier years at all events they were paying to a person in the position of a Zemindar. Defendants' Exhibit G, a letter from the Commissioner of Chota Nagpur, explains the position clearly. Much stress was laid by the defendants on the fact that their predecessors paid the road cess [Exhibits 5 and 5 (*a*)], but it is difficult to see who else could have paid it in the first instance. The Jagirdars had sold portions only of their Jagirs, Government seems to have recovered from the Jagirdars whom they treated in recent years almost as Zemindars (as shown by the Gazetteer quoted above) and the Jagirdars recovered from each of the transferees his *quota* of the revenue or whatever he was bound to pay under the terms of his purchase. Attention was also drawn to the fact that whereas in 1812 the plaintiff's predecessor paid Rs. 19-4-0 for Gurturi and Kolhua and Rs. 36 for Gongo (Exhibits 9 and 10), he paid Rs. 27-9-0 and Rs. 42-6-0 in 1896. This does not appear to be a matter of any great importance. Exhibit 1 (*ap*) shows that the amount of the payments for Gurturi and Kolhua must have been constant for over half a century at all events. The additional amount may have been due to one of many readjustments of the revenue by the Government. Nor can one attach great importance to the fact that on one occasion some kind of *abwab* (*ruqumat*) was paid, for the defendants have for a long time been in the position of superior Zemindars *qua* the plaintiff in fact, if not in law.

The defendants rely on some litigation between Sheo Prasad Bhagat and the Government regarding a village called Kesmar, which was purchased from Raja Churaman Rai by the Chowdhris and sold by them to Manog Bhagat. On the death of Manog the Government refused to recognize Sheo Prasad as his adopted son and Sheo Prasad brought a suit for a declaration of his title (Exhibits H, I and J). Sheo Prasad failed to prove his adoption against the Government and his suit was dismissed. One of the points taken in the case was that Government had no right to resume unless and until it was shown that there was no heir of the Chowdhris alive. This plea was brushed aside on the ground that after the purchase by Government the Chowdhris had not been recognized at all. That case appears to have no bearing whatever on the present case.

Both sides have filed copies of judgments in other cases as precedents which they wish us to apply or follow. Exhibits F, L, M, N, P and R filed by the defendants show that grants by Rajas in Palamau and elsewhere in Chota Nagpur are ordinarily resumable on failure of male lineal descendants. This is not disputed by the plaintiff, whose case is that he is entitled to retain his villages because there are still in existence male lineal descendants of the Jagirdar.

The judgment, Exhibit S, is produced to show that the word *bai* (which ordinarily means sale) is often used in Palamau to denote a *mukarrrari*. This does not assist the defendants. Lastly, defendants rely upon the case of *Parkash Lal* v. *Rameshwar Nath Singh* (1) as shewing that the words *al aulad* in a Chota Nagpur grant should be interpreted to mean male lineal descendants only. These words appear from Exhibit 11 to have been used in the endorsement on the sale deed by which the villages were transferred to Manog Bhagat, but they are accompanied by the words *naslan bad naslan* (generation after generation) and we have no direct evidence as to the language used in the transfer by the Thakurs to the Chowdhris.

(1) 31 C. 561.

The plaintiff, on the other hand, relies upon Exhibit 19, a judgment of the Calcutta High Court in a case in which a Jagirdar had sold his rights to some Mahtons by a *baipatr*. The Mahtons sold their rights to the Bengal Coal Company. After that the Government abandoned their rights and converted the Jagirdari into *milkiat* or ownership. I do not think that that case has any bearing on the present cases and I do not feel at all satisfied that the decision was correct. It seems to have been held that the subsequent acquisition of the proprietary title operated to change the character of the right acquired by the Mahtons.

After a careful consideration of the evidence in these cases I have come to the conclusion that the decision of the Subordinate Judge cannot be supported.

In the documentary evidence which covers a period of over 80 years, the Chowdhris and the Bhagats are referred to invariably as purchasers. I am unable to believe that such words as *bai*, *farokht* and *kharid*, which mean sale and purchase, would have been used if the Chowdhris and the Bhagats had been only sub-Jagirdars. The circumstance that the widows of Manog Bhagat were allowed to take possession of villages shows that Manog's interest was not descendible to male heirs only. Assuming that the burden of proof was on the plaintiff, I hold that he has proved that the Chowdhris purchased the rights of the Jagirdars and that Manog purchased the rights of the Chowdhris I hold that the defendants have entirely failed to prove that the Chowdhris or the Bhagats were sub-Jagirdars of the original Jagirdars. The attempt to establish the existence of a *baidari* tenure as a kind of sub-Jagir has signally failed. The word *bai* may be used loosely for a *mukarrari* as was said in one case, but that is a very different thing from using the word *bai* to indicate a sub-Jagir.

I would allow these appeals and give the plaintiff a decree for possession in each case with mesne profits from the date of dispossession to the date of delivery of possession in execution or the expiry of three years from the date of this decision, whichever event first occurs, the amount to be determined by the Court below. I would also in each case give the plaintiff his costs in both Courts.

If this case is taken before a higher Tribunal the translation of the *rubakars* in the litigation which began in 1840 should be carefully revised. It is extremely inaccurate in some places.

SHARFUDDIN, J.—I agree.

Appeals allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 2883 OF 1915.

April 26, 1918.

Present:—Sir Charles William Chitty, KT., and Mr. Justice Smither.

SRISTIDHAR GHOSE AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KEDARESWAR BISWAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Land Revenue Sales Act (XI of 1859), s. 52—Permanent tenure sold at revenue sale—Howla, *whether affected by sale.*

Within a resumed *khas mahal* there was a *nim-osat taluk* (*i. e.*, permanent tenure), of which the last settlement had taken place in 1908. Under this *nim-osat taluk* there had existed a *howla* from 1853. The *nim-osat taluk* was sold in 1912 at a revenue sale under Act XI of 1859:

Held, that the sale of the *nim-osat taluk* did not affect the *howla* which had been in existence from before the last settlement of the *nim-osat taluk*. [p. 893, col. 1.]

Appeal against the decree of the Subordinate Judge, Khulna, dated the 2nd August 1915, reversing that of the Munsif at Bagirhat, dated the 28th July 1914.

Dr. *Sarat Chandra Basak* (with him Babu *Bepin Chandra Bose*), for the Appellants.

Dr. *Jadu Nath Kanjilal*, for the Respondents.

JUDGMENT.—This appeal is preferred by the plaintiffs and arises out of a suit brought by them to recover rent from the defendants Nos. 1 to 11 as *osat howladars*. The plaintiffs claimed as purchasers at a revenue sale of a 9-pie share in a *nim-osat taluk*, within a resumed *khas mahal* bearing Touzi No. 856. The revenue sale took place on 20th March 1912 (1318). The tenant defend-

ants pleaded that they were not liable to pay rent direct to the plaintiffs inasmuch as there was in existence a *howla* created long ago by the outgoing owners of the *nim-osat taluk* in favour of themselves.

When the case first came on for hearing before us on 7th March last, we were of opinion that a remand would be necessary for the determination of several questions of fact. On further consideration, however, we came to the conclusion that all we required to know was when the *nim-oats taluk* was last re-settled. It was argued before us on behalf of the plaintiffs-appellants that the *howla*, if it existed, was annulled by the revenue sale in 1912. The date, therefore, of the last Settlement of the *nim-osat taluk* was clearly of the highest importance. We accordingly adjourned the case for the Vakils to obtain the necessary information from their clients. It is now conceded for the appellants that the last Settlement of the *nim-osat taluk* took place in 1908. The learned Subordinate Judge has found that the *howla* existed from 1290 (1883) and that rent was paid in respect of it down to 1316, two years after the final publication of the Record of Rights in *Chait* 1314. He further finds that it had an existence altogether separate from and independent of the *nim osat taluk*. It follows that it could not be affected by the sale of the *nim-osat taluk* in 1912 (1318) (see section 52 of Act XI of 1859). In these circumstances it is clear that the plaintiffs cannot recover rent directly from the tenant defendants, and that their suit was rightly dismissed.

This appeal fails and is dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1744 OF 1917.

April 10, 1918.

Present:—Mr. Justice Scott-Smith.

Musammat NAWAB BIBI—PLAINTIFF—APPELLANT

versus

MUHAMMAD DIN—DEFENDANT—RESPONDENT.

Muhammadan Law—Dower, prompt, right to, accrual of—Dower, whether can be made conditional upon restitution of conjugal rights—Consummation, absence of, whether bars recovery of prompt dower.

The fact that a Court can make a decree for restitution of conjugal rights conditional on payment of prompt dower does not show that a wife's decree for prompt dower can be made conditional upon her living with her husband. [p. 894, col. 1.]

Prompt dower can be demanded by a wife at any time after the right thereto has vested in her whether before or after consummation and she can refuse all conjugal rights on the part of the husband until it is paid. [p. 894, col. 1.]

The right to prompt dower vests at marriage and it can be claimed by the wife at any time thereafter. It is a debt due by the husband to the wife and its payment cannot be made conditional on the wife living with her husband. [p. 894, col. 1.]

Second appeal from the decree of the District Judge, Gujranwala, dated the 21st March 1917, varying that of the Munsif, 1st Class, Gujrat, dated the 30th May 1916, decreeing plaintiff's claim.

Mr. *Mukand Lal Puri*, for the Appellant.

Sheikh *Niaz Ali*, for the Respondent.

JUDGMENT.—*Musammat* Nawab Bibi, plaintiff-appellant, sued her husband, Muhammad Din, defendant-respondent, for Rs. 250 on account of her prompt dower. Muhammad Din brought a cross suit against *Musammat* Nawab Bibi in which he claimed restitution of conjugal rights. Both the parties have been given decrees in their respective suits; but the lower Appellate Court has made the decree of *Musammat* Nawab Bibi conditional on her appearing in Court and agreeing to return with Muhammad Din to his house. The Court also made Muhammad Din's decree for restitution of conjugal rights conditional on his paying Rs. 250 for his wife into Court.

Musammat Nawab Bibi in second appeal asks that the condition attached to her decree should be struck out. In arguing the case on behalf of the appellant Mr. Mukand Lal Puri refers to Article 204 of Mulla's Muhammadan Law,

to Wilson's Anglo-Muhammadan Law, 4th edition, page 122, paragraph 41, and to Muhammadan Law by Amir Ali, Volume II, page 503. In the last named book the following remarks occur:—

"When the right to the dower has once vested in the woman, it is not defeated or lost by any conduct on her part. For example when the marriage has been consummated, or a 'valid retirement' has taken place, the woman's right to her dower is not lost by her subsequent apostacy or adultery. * * * * * *

The prompt portion of the *mahr* may be realized by the wife at any time before or after consummation * * * * * The great difference between prompt and deferred dower is this, the portion of the dower specified in the contract as prompt is payable and realizable at once, and the wife can refuse all conjugal rights on the part of the husband until it is paid."

These extracts show that prompt dower can be demanded by a wife at any time after the right thereto has vested in her. The right vests at marriage and can be claimed by the wife at any time thereafter. It is a debt due by the husband to the wife, and no authority has been referred to which lays down that the payment of it can be made conditional on the wife living with her husband. Mr. Niaz Ali on behalf of the respondent has referred to *Bai Hansa* v. *Abdulla Mustaffa* (1), in which it was held that after consummation of marriage non-payment of dower, even though proved, cannot be pleaded in defence of an action for restitution of conjugal rights. This and other rulings of a similar nature do not, however, help the respondent. Nor does the fact that a Court can make a decree for restitution of conjugal rights conditional on payment of prompt dower show that a wife's decree for prompt dower can be made conditional upon her living with her husband.

It should further be noted that the respondent never pleaded that the payment should be made conditional. His defence was that the amount of dower agreed upon was only Rs. 32 and he expressed his willingness to pay half of that on account of prompt dower. The only question at issue in the case was, whether the dower was Rs. 32 or Rs. 500 as alleged by the plaintiff.

I, therefore, accept the appeal and modifying the order of the lower Appellate Court grant the plaintiff unconditional decree for Rs. 250 on account of her prompt dower. I further direct that the respondent shall pay the appellant's costs in this Court.

Appeal accepted.

(1) 30 B. 122; 7 Bom. L. R. 684.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No 256 OF 1917.

April 8, 1918.

Present:—Mr. Prideaux, A. J.C.

CHAINU—PLAINTIFF—APPELLANT

versus

MANBODH—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. VI, r. 17—Amendment of pleadings—Case closed for judgment—Public path—Encroachment, suit for removal of, by private person—Special damage, proof of.

Plaintiff brought a suit for possession of a site on the ground of his having been the owner of the same. The case was closed for judgment for 30th November 1916. The plaintiff applied to the Court on 25th November 1916, praying that a right of way six cubits broad should be given to him. The Trial Court held that the plaintiff was not the owner of the site, but it directed the defendant to remove his hut so as to allow a right of way as claimed by the plaintiff: [p. 895, col. 2.]

Held, that the plaintiff should not have been allowed to amend the plaint after the case had closed for judgment.

Special damage for obstruction of a highway has to be established in a case for the removal of an encroachment on the highway. [p. 895, col. 2.]

Bansilal Abirchand v. *Atmaram Bapuji*, 7 C. P. L. R. 97, followed.

Appeal against the decision of the Court of the District Judge, Raipur, in Civil Appeal No. 6 of 1917, dated the 5th March 1917, preferred against the decision of the Munsif, Dhamtari, in Civil Suit No. 537 of 1916, dated the 30th November 1916.

Mr. *M. Chuckerbutty*, for the Appellant.

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

JUDGMENT.—The plaintiff's case as stated in the plaint was that he was the

owner of a site situated at Mouza Soonl-Kalan, Tahsil Dhamtari, that he had lent it to the defendant to keep his husking machine on and that in 1916 defendant took exclusive possession of the site and built himself a new hut on it. Plaintiff's story as regards the ownership of this particular plot has been held not to be proved by both Courts. The case was closed for judgment in the Trial Court on the 23rd November 1916, it being then fixed for the 30th November 1916. On the 25th November 1916 the plaintiff appeared with his Pleader, defendant being in person, and the Pleader presented an application saying that if plaintiff's possession over the site and hut were not proved, he prays that "the way of six cubits in breadth, as it was previously, may be given to me so that I may not be put to any inconvenience in going and coming." On this the defendant was examined; he denied having encroached on the lane which he admitted was used by the plaintiff. He further said: "I do not want to produce any fresh evidence on this point." The Munsif thereupon framed the additional issue, 'Whether defendant had encroached upon the lane in question; if so, to what extent.' He found that there had been encroachment to the extent of three feet and decreed that defendant should remove his new hut so as to restore the lane to its former breadth. On appeal the District Judge, Raipur, finds that there had been no proper amendment of the plaint and that the relief given could not have been granted and looking to the time when the relief granted was asked for, finds that the first Court should have refused it and not allowed the plaintiff at the last stage of his case to make out a fresh case. He, therefore, allowed the appeal.

Here it is contended that the Trial Court's decree as to the lane should be restored. It seems to me that the plaintiff should not have been allowed to ask for this further relief after the case had been closed for judgment. The defendant on that day was not represented by a Pleader and it is doubtful if he understood exactly what the effect of his calling no further evidence meant. Various questions would have to be gone into, for instance, whether the lane was a public or a private one and if the former, what particular damage had been suffered by the plaintiff, *i. e.*, damage beyond what was suffered by others entitled to use the same lane. Special damages for obstruction of a highway have to be established in a case of this nature: see *Bansilal Abirchand* v. *Atmaram Bapuji* (1). This matter must be fought out in a separate suit, for I decline to allow, the plaintiff to pitchfork this claim into the case at the stage he did. I, therefore, uphold the decision of the District Judge dismissing the appeal.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 7 C. P. L. R. 97.

PATNA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 194 OF 1914.

January 25, 1918.

Present:—Mr. Justice Chapman and Mr. Justice Atkinson.

DEBI SARAN SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

RAJBANS NATH DUBEY AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 54—Bengal Estates Partition Act (V B. C. of 1897), ss. 10, 11, 12—Partition of revenue-paying estate—Civil Court decree for partition, execution of—Collector, power of—Partition, whether can be re-opened.

A Civil Court has jurisdiction to execute a decree for partition of a revenue-paying estate, provided that it does not assume jurisdiction to partition the liability for the land revenue. In the event of a party applying to the Collector for a partition of the land revenue after partition has been effected by the Civil Court, it would be open to the Collector to re-consider the allotment of the shares granted in the Civil Court proceeding. [p. 896, col. 2.]

There is no principle of law which enables a Civil Court to re-open a partition properly made under a Civil Court decree otherwise than by proceedings by way of review. The effect of the final decree of a Civil Court for partition is to put an end to the co-tenancy and to vest in each person or group a sole estate in a specific property or allotment. The law does not provide for a suit in the Civil Courts under which these separated estates can be divested and a co-tenancy re-created for the purpose of making a fresh partition. [p. 896, col. 2; p. 897, col. 1.]

Appeal against the decision of the Subordinate Judge, 1st Court, Gaya, dated the 30th March 1914.

DEBI SARAN SINGH v. RAJBANS NATH DUBEY.

Messrs. *Lachhmi Narain Singh* and *Jal Gobind Singh*, for the Appellants.

Mr. *Khurshed Hasnain*, for the Respondents.

JUDGMENT.

CHAPMAN, J.—This appeal arises out of a suit for partition and for possession of a 2-annas 3 *dams* odd share in an estate purchased at a sale for arrears of revenue on the 5th June 1901. The plaintiff alleges that he was dispossessed in 1912. The share that was purchased by the plaintiff is an Ijmali or residuary share, that is to say, the share remaining after the creation of separate accounts in respect of other shares in the estate under the Revenue Sales Act. The defendants Nos. 17 to 22 who did not contest the suit represented, according to the finding of the learned Subordinate Judge against which there has been no appeal, a share of 5 *dams* only. The plaintiff claimed a partition of the entire estate. The remainder of the share-holders who contested the suit pleaded that the plaintiff was not entitled to a partition of the entire estate, inasmuch as there had been a previous partition on the 27th September 1893 under a decree of the Civil Court. Under that decree the estate had been divided into 12 separate shares. The residuary share purchased by the plaintiff fell within certain of the separated shares or *pattis*. The defendants' contention was that the plaintiff was entitled only to have his share carved out of these *pattis*. Their case was that the remaining 7 separated *pattis* should not be interfered with. This contention was overruled by the learned Subordinate Judge on the ground that the plaintiff by his purchase of the residuary share acquired an undivided share in the entire estate and that he was not bound by the previous partition. The defendants now appeal to this Court.

The question we have to determine is connected with the concurrent jurisdiction of the Collector and of the Civil Court in the matter of partitions. The Collector is responsible for the collection of the land revenue and, with that in view, the Collector has under the various Estates Partition Acts been charged with the jurisdiction of making partition of revenue-paying estates including the partition of liability to land revenue. This jurisdiction is given to the Collector with the object of ensuring that the security for the land revenue shall not be imperilled by the manner in which the partition is effected. The Civil Courts have jurisdiction to grant decrees for partition of revenue paying estates, but the Code of Civil Procedure requires that the execution of the decree for partition shall be effected by the Collector, see section 54 of the present Code of Civil Procedure. Under the decision of the Full Bench of the Calcutta High Court in *Jogodishury Debea* v. *Kailash Chundra Lahiry* (1), however, the majority of the Judges took the view that a Civil Court has jurisdiction to execute a decree for partition of a revenue-paying estate provided that it does not assume jurisdiction to partition the liability for the land revenue. This view of the matter has been confirmed by the terms of section 12 of the Estates Partition Act, 1897. It is thus possible to say that in the event of a party applying to the Collector for a partition of the land revenue after partition has been effected by the Civil Court, it would be open to the Collector to re consider the allotment of the shares granted in the Civil Court proceeding.

While, however, the jurisdiction of the Collector to re-open a partition made by the Civil Court may possibly have been retained, there is nothing in any of the Statutes and certainly not in any principle of law which would enable a Civil Court to re-open a partition properly made under a Civil Court decree otherwise than by proceedings by way of review. This view of the matter is based both upon the principle of *res judicata* which was applied in the case of a previous partition by the Privy Council in the case of *Nalini Kanta Lahiri* v. *Sarnamoyi Debya* (2), and also upon the principle that the effect of the final decree of a Civil Court for partition is to put an end to co-tenancy and to vest in each person or group a sole estate in a specific property or allotment. The law does not provide for

(1) 24 C. 725; 1 C. W. N. 374; 12 Ind. Dec. (N. S.) 1152 (F. B.).

(2) 24 Ind. Cas. 294; 19 C. W. N. 531; 27 M. L. J. 76; 1 L. W. 607; 16 M. L. T. 544; (1914) M. W. N. 948; 21 C. L. J. 28; 17 Bom. L. R. 1 (P. C.).

a suit in the Civil Court under which these separated estates can be divested and a co-tenancy re-created for the purpose of making a fresh partition.

The learned Subordinate Judge has taken a different view upon the authority of the case of *Gungadeen Misser* v. *Kheeroo Mundul* (3) That was a decision of the year 1874. The facts of that case appear from the judgment to be as follows:—

A share holder in a revenue-paying estate had been in exclusive possession of 25 *bighas* of land, the subject of the suit, together with other land in lieu of his undivided share in the estate. The plaintiff purchased the 25 *bighas* of land above referred to from this share holder. The contesting defendants had purchased the share of certain other co sharers at a revenue sale. The plaintiffs' contention was that these contesting defendants by their purchase at the auction sale had obtained merely a right to exclusive possession of specific portions of the estate held by the defaulting share-holders whose shares these contesting defendants had purchased. The argument was that inasmuch as the defaulting share-holders had been content to hold exclusive possession of specific portions of the revenue-paying estate in lieu of their undivided share, the contesting defendants who purchased the defaulting shares were entitled only to get those specific portions. It appears that the defaulting share-holders had obtained a separation of accounts under section 10 of the Revenue Sales Act and not under section 11. The Judges held that the plaintiffs' suit must be dismissed upon the ground that under the terms of the Revenue Sales Act where an account has been separated under section 10 and the corresponding share is sold, what is sold is an undivided share and not any specific portion of the estate, and that to enable the plaintiff to succeed in such a suit would be to introduce uncertainty into the auction sales and the security of the land revenue. The report in the Bengal Law Reporter is imperfect. A fuller report of the judgment will be found in *Gungadeen Misser* v. *Kheeroo Mundul* (3). It is not clear from that report that there had in fact been a regular partition effecting the complete separation of the interests of the share-holders. Phear, J., who delivered the judgment said that the different share-holders had *by some sort of private partition come to among themselves appropriated different portions of the mahal*; but the Judges did not expressly find that there had been such a complete partition as to put an end to the condition of co tenancy. In such a case no question of *res judicata* or of the effect of a Civil Court decree for partition arises That case obviously would be no authority to justify us in holding that a partition effected by a Civil Court decree can be re-opened in a subsequent suit in a Civil Court. I would also be disposed to qualify the statement of the law made in that case. It would be more correct to say that when a share in respect of which a separate account has been opened under section 10, or a residuary share is sold under the Revenue Sales Act, the extent to which the share must be held to be undivided will depend on the facts of each case. It may be that the share remains undivided only in respect of liability for land revenue and is divided in every other respect subject to the power of the Collector to re-adjust the allotments in the event of the liability for land revenue being partitioned by him. In the present case the plaintiff asked that the liability to land revenue should remain joint as before.

The case of *Gungadeen Misser* v. *Kheeroo Mandal* (3) was referred to with approval in the case of *Annoda Prosad Ghose* v. *Rajendra Kumar Ghose* (4) and in the cases of *Bhawani Koer* v. *Mathura Prasad* (5) and *Kumar Kalimand Singh* v. *Syed Sarafat Hossein* (6). These cases do not carry the matter any further and certainly provide no authority for the contention that a decree for partition effected by a Civil Court does not finally terminate the condition of a co tenancy and put an end to all further right to partition so far at any rate as the Civil Courts are concerned.

In the case of *Moonshee Buzlool Rahman* v. *Pran Dhun Dutt* (7) it was held that an auction-purchaser of the rights of Government in an estate sold for arrears of revenue is not bound by a decision previously obtained to which the defaulting proprietor was a party, and this principle has been

(3) 14 B. L. R. 170; 22 W. R. 449.

(4) 29 C. 223; 6 C. W. N. 375.

(5) 7 C. L. J. 1.

(6) 12 C. W. N. 528.

(7) 8 W. R. 222.

extended to the case of an auction-purchaser of an entire estate at a sale under the Revenue Sales Act [*Kanta Proshad Hajari* v. *Abdul Jamir Sadagar* (8), *Gokul Chandra Das* v. *Hara Sundari Dasi* (9) and *Gadadhar Bose* v. *Radha Charan Poddar* (10)]. But the principle has never been applied to the purchaser of the share of an estate at a revenue sale.

In the present case it would be obviously most inequitable that the properties, created into separate estates so far back as 1893 and separately enjoyed now for some 25 years, should be again thrown into the hotchpot. We set aside the judgment and decree of the learned Subordinate Judge and, in lieu thereof, we direct that there be a preliminary decree for a partition of the plaintiff's share in the *pattis* created by the previous partition in which the share purchased by him now lies. These *pattis* will be ascertained by the Subordinate Judge and a preliminary decree made by him accordingly. In order to make an equitable partition of the plaintiff's share in these *pattis*, it may be necessary to make a fresh partition of the defendants' share also in these *pattis*. The defendants are entitled to their costs in this Court and to half their costs in the Court below. In assessing the costs in this Court no allowance should be given for the preparation of the paper-book having regard to the reckless manner in which numbers of unnecessary papers were included in it.

ATKINSON, J.—I concur.

Appeal allowed.

(8) 8 C. W. N. 676.
(9) 9 C. W. N. 383.
(10) 34 C. 868.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 155 OF 1914.
June 24, 1915.

Present:—Sir Henry Drake-Brockman, KT., J. C.

LAXMAN RAO—PLAINTIFF—APPLICANT
versus
VITHOBA—DEFENDANT—NON-APPLICANT.

Civil Procedure Code (*Act V of* 1908), *O. XVII, r.* 1 (1)—*Adjournment, power of Court to grant—Order refusing adjournment, whether appealable—Appellate Court, discretion of, to interfere with order refusing adjournment—Evidence Act* (*I of* 1872), *s.* 162—*Summoning Government servant to produce document—Discretion of Court—Procedure.*

Under rule 1 (1), Order XVII, of the Civil Procedure Code, a Court may at any time grant an adjournment if sufficient cause is shown; but no appeal is allowed from an order refusing adjournment and even where the refusal is impeached in an appeal from the decree, an Appellate Court is generally disinclined to interfere with the trial Judge's exercise of his discretion. [p. 899, col. 1.]

Simon Elias v. *Jorawar Mull*, 24 W. R. 202, relied upon.

If a Court decides to summon a Government official for the production of certain documents, it should only do so after careful consideration and once the summons has been issued, production should ordinarily be insisted on if the party who obtained the summons so desires. [p. 899, col. 2; p. 900, col. 1.]

Application for revision of the decree of the Judge, Small Cause Court, Nagpur, dated the 10th February 1914, in Suit No. 2291 of 1913.

Mr. *R. B. Gadgil*, for the Applicant.

ORDER.—This is an application for revision of a decree dismissing with costs the applicant's suit against the non-applicant.

The parties were both head constables at Kamptee Police station house from the 1st to the 14th November 1910. The applicant's case is that he was the Muharrir during that period and in that capacity supplied oil and stationery worth Rs. 14-6-3 for Police purposes. Rupees 20 are allowed by Government for the said station house as monthly expenditure on oil, paper, pens and ink and the admitted practice is for this sum to be drawn and paid monthly in arrears to the Muharrir on production of his vouchers. The claim includes also Rs. 1-13-10, being the allowance for 14 days in respect of work done by the Muharrir in connection with the registration of vital statistics. His duty is performed jointly by the Muharrir and the Madadgar who divide between them the sanctioned allowance of Rs. 6 per mensem, the Muharrir taking Rs. 4 and the Madadgar Rs. 2 in the event of the District Superintendent of Police or other proper authority deciding that the allowance has been duly earned.

The trial Judge has held that the defendant, not the plaintiff, was the Muharrir during the first 14 days of November 1910 and that the plaintiff has not established supply of the oil, etc., of which he claims the price.

In revision two points are pressed, one that production of two documents should have been enforced and the other that the reasons given for disbelieving the plaintiff's evidence are insufficient.

The documents in question are (1) a copy of the entry in the several diaries of the station house, generally known as the *roznamcha*, which notes transfer of charge from the plaintiff to the defendant on the 14th November 1910 with the charge report annexed thereto and (2) the station house register of purchases of oil and stationery and their distribution to Police Officers. On the 12th January 1914 the Inspector-General of Police was directed by summons issued in the form of a letter to produce these and other documents or cause them to be produced at the next hearing on the 7th February 1914. Instead of complying with this direction, as he was bound to do, the Inspector-General wrote intimating that he was "not prepared to sanction the production of the documents asked for". The plaintiff was represented by an experienced Pleader at the hearing of the 7th February, but the witnesses in support of the claim were examined and the case closed without any application to the Court for further action in respect of the aforesaid documents. The Judge fixed the 10th February for delivery of judgment and that date was duly adhered to, but the same day an application was filed asking that the documents should again be called for. This application was rejected on the ground that it had been preferred too late.

In my opinion it cannot be said that the lower Court acted illegally or irregularly in declining to adjourn the case. Under rule 1 (1), Order XVII, First Schedule to the Civil Procedure Code, the Court may at any time grant an adjournment if sufficient cause is shown; but no appeal is allowed from an order refusing adjournment, and even where refusal is impeached in an appeal from the decree, an Appellate Court is generally disinclined to interfere with the trial Judge's exercise of his discretion. See *Simon Elias* v. *Jorawar Mull* (1). Moreover, the plaintiff did not really require the charge report which he wanted the Inspector-General to produce, inasmuch as a witness admitted that in the *roznamcha* transfer of the duties of Muharrir from the plaintiff to the defendant was recorded on the 14th November 1910, no reference being made therein to any earlier devolution of work. That the charge report did not mention any articles of stationery as made over to the defendant is expressly stated by the plaintiff's own witnesses, Hiralal and Chandrabhan constables stationed at Kamptee on November 1910, the latter still there. The register of purchases is not to be found in the list of registers prescribed in the Police Manual, P. V. V., Ch. II, Sec. IV nor is it spoken of by any of the plaintiff's witnesses.

The real dispute between the parties seems to be whether the plaintiff or the defendant actually did the work of Muharrir during the first 14 days of November 1910. That none of the entries in the cash book for that period are in the plaintiff's hand was admitted by the plaintiff's witness Chandrabhan to whom the book, produced by Mr. Sewell, A. D. S. P., was shown. Sitaram, D. W. No. 3, the shop-keeper who supplied the oil used in November, deposed that he dealt with the defendant and showed his *bahi* containing entries in the defendant's hand of those transactions. As to the credibility of the plaintiff's witnesses one is admittedly a friend of his, as to another the Judge recorded a note to the effect that his manner was so hesitating as to show that he was "far from truthful", and the third till confronted with the cash book swore that the entries of the 8th and 12th November 1910 were in the plaintiff's handwriting. That P. W. Nos. 1 and 2 are not truthful persons seems to me indicated by their alleging an acknowledgment of liability and promise to discharge as made by the defendant shortly before the plaint was filed, a story to which there is no corresponding allegation in the plaint.

On the whole then I see no reason to interfere. The application is dismissed without notice to the opposite party.

In conclusion I think it desirable to direct the trial Judge's attention to section 162, Indian Evidence Act. If a Court decides to summon a Government official for the production of certain documents it should only do so after careful consideration, and

(1) 24 W. R. 202.

once the summons has issued production should ordinarily be insisted on, if the party who obtained the summons so desires.

Application dismissed.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION NO. 1144 OF 1917.

April 15, 1918.

Present:—Mr. Justice Chevis.

THE PUNJAB MUTUAL HINDU FAMILY RELIEF FUND, LAHORE—DEFENDANT—PETITIONER

versus

SARDARI MAL—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 20—Civil Procedure Code (Act XIV of 1882), s. 17, Exp. III—Cause of action—Place of suing—Money payable on death in Lahore—Death occurring at another place—Jurisdiction.

Plaintiff's mother who resided in Lahore became a member of the Punjab Mutual Hindu Family Relief Fund, Lahore. She died at Lyallpur where the plaintiff resided. The Fund's moneys which went to relieve distress on the death of members, were payable under the rules in Lahore. The Fund also carried on business at Lyallpur through an agent. Plaintiff brought a suit to recover the moneys from the Fund at Lyallpur:

Held, that the Lyallpur Court had jurisdiction to hear the suit against the Fund on the grounds (1) that the death of its member which was part of the cause of action occurred at Lyallpur and (2) that the defendant Fund carried on its business at Lyallpur through an agent.

Petition for revision of the order of the Munsif, 1st Class, Lyallpur, dated the 29th November 1917, holding that his Court has jurisdiction to entertain the suit.

Mr. *Manohar Lal*, for the Petitioner.

Lala *Jagan Nath*, for the Respondent.

JUDGMENT.—The petitioner is the Punjab Mutual Hindu Family Relief Fund, which I gather to be a benevolent society, managed by certain philanthropists, collecting subscriptions, which go to relieve distress on the death of members.

The plaintiff's mother resided in Lahore and became a member. According to the rules of the Fund moneys payable on deaths are payable in Lahore.

Plaintiff resides in Lyallpur and his mother died there. He has sued the Fund in Lyallpur and the Lyallpur Munsif has decided that he has jurisdiction on two grounds, (1) that the death which occurred in Lyallpur is part of the cause of action, and (2) that defendant carries on business in Lyallpur through an agent.

For petitioner it is contended on the strength of *Salig Ram* v. *Chuba Mal* (1) that Explanation III of section 17 of the old Code is still good law. I think it would still apply to most cases, but it has been omitted from section 20 of the present Code, which speaks simply of a Court within the local limits of whose jurisdiction the cause of action wholly *or in part* arises. The words underlined (italicised) are new, and found no part in the old Code. Now in a case like the present, is not the death the immediate cause of action? Had the death not occurred, how could the plaintiff sue at all? In *Vishvendra Thirtha* v. *National Insurance Co. Ltd.* (2), where plaintiff sued to recover on a life policy, it was held the suit could be brought where the policy-holder died. And in *Read* v. *Brown* (3) it was held that the cause of action comprises "Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support... the judgment of the Court," and so though every other part of the cause of action had arisen outside the City of London, the plaintiff was allowed to sue within the city merely because the debt had been assigned to him within the city. I think then that the lower Court is right in regarding the fact of the death having occurred in Lyallpur as giving jurisdiction to the Lyallpur Courts. Further I think the lower Court is right in holding that the defendant carries on business in Lyallpur, seeing that the defendant keeps an agent there who, though he cannot enter into contracts, collects subscriptions and induces new members to join, supplying them with entrance forms which are filled in and sent to Lahore.

It may be urged on behalf of the defendant that it is very hard that the defendant

(1) 11 Ind. Cas. 712; 34 A. 49; 8 A. L. J. 1160.
(2) 41 Ind. Cas. 392.
(3) (1889) 22 Q. B. D. 128; 58 L. J. Q. B. 120; 60 L. T. 250; 37 W. R. 131.

should be liable to be sued in remote places. It may, however, be said in return that in some cases it would be very hard on a poor man living far from Lahore to be compelled to come to Lahore to sue the defendant, especially if the evidence which he had to produce (*e.g.*, relating to the death of a person) was only obtainable at his own home and not in Lahore.

I reject the application but pass no order as to costs.

Appeal rejected.

PATNA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 729 OF 1917.

April 30, 1918.

Present:—Mr. Justice Thornhill.

Babu RAMADHIN CHAUDHURY —DEFENDANT—APPELLANT

versus

Musammat KUMODINI DASSI AND ANOTHER —PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Agreement to pay enhanced rate of rent after expiration of term of tenancy, validity of—Contract Act (IX of 1872), s. 74.

An agreement by a tenant that if he holds over upon the expiry of the term he would pay rent at a higher rate than that which he paid during the term, is valid and enforceable. [p. 903, col. 1.]

Appeal from a decision of the District Judge, Monghyr.

Mr. *Jager Nath Prasad*, for the Appellant.

Mr. *Atul Krishna Ray*, for the Respondents.

JUDGMENT.—This is an appeal from the judgment of the District Judge of Monghyr dismissing the appeal from the decree of the lower Court.

The plaintiffs-respondents' case is that the defendant took a settlement of 2 *bighas* 17 *cottahs* of land at an annual Jama of Rs. 8-8-0 under a registered Kabuliat, dated the 28th April 1905. In the Kabuliyat it was stated that after the expiration of the term of five years he won't retain possession without taking fresh settlement and if he does retain possession, he shall go on paying rent to the Maliks at the rate of Rs. 5 per *bigha* so long as he shall so continue in possession, and to this payment neither he nor his heirs shall have any objection. The term mentioned in the Kabuliat expired in 1320 and the plaintiffs brought a suit to recover two years' rent, that is, for 1321 and 1322, at the rate of Rs. 5 per *bigha*.

The chief point for decision is whether the plaintiffs are entitled to recover rent at this rate. For the defence it is stated that the enhanced rate is in the nature of penalty. The plaintiffs rely on the case of *Gunput Singh* v. *Josodhur Singh* (1). In that case it was stipulated in the Kabuliats "that after the expiration of the term of five years I shall cease to have any right to retain possession; that in case I fail to execute fresh Kabuliats the Malik Zamindars shall have the power to realise rent at Rs. 5 per *bigha* on the strength of the Kabuliyat and I shall have no objection to this."

It appears to me that the present case and the case referred to above are almost identical so far as the terms of the Kabuliyats are concerned. It remains only to consider whether this decision has been overruled or encroached upon.

In *Gobind Mandar* v. *Banarsi Prosad* (2) Mookerjee, J., followed the decision of *Gunput Singh* v. *Josodhur Singh* (1) referred to above, holding an agreement by the tenant that if he held over upon the expiry of the term, he would pay rent at a higher rate than he did during the term, was valid and enforceable. That case was decided on the 26th February 1913 by Mookerjee, J., and Beachcroft, J. The same Hon'ble Judges a few weeks later formed the Court which heard the case reported as *Abdul Aziz* v. *Karu* (3) which is relied on by defendant. In his judgment Mookerjee, J., refers to the two former cases and points out that they are clearly distinguishable from the case before them, inasmuch as the lease had been granted for a term at a rent specified and the tenant had agreed that if he continued in occupation after the expiry

(1) 20 Ind. Cas. 516; 17 C. L. J. 590.
(2) 21 Ind. Cas. 35; 18 C. L. J. 74.
(3) 21 Ind. Cas. 443; 18 C. L. J. 95.

of the term, he would pay rent thereafter at a rate which was not deemed as the proper consideration for occupation of the land. Such enhancement of rent depended upon "if the tenant claimed an occupancy right in the land or caused a claim to be put up by any other person." The learned Judges held that the enhancement amounted to a penalty and was consequently not enforceable in law. I think the decision in *Gunput Singh* v. *Josodhur Singh* (1) above mentioned must govern this case.

With reference to the question of cesses referred to in the lower Appellate Court's judgment, the defendant's Vakil has been unable to find any notification to exempt the holding from the operation of the Bengal Tenancy Act, and consequently abandons the point.

The appeal is dismissed with costs.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 800 OF 1914.

February 21, 1916.

Present:—Mr. Batten, A. J. C.

BAPU—DEFENDANT—APPELLANT

versus

SITTI AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Co-sharers—Surrender of tenancy lands to one co-sharer—Notice by other co-sharers to vacate their shares—Suit for possession—Delay, unreasonable, effect of.

The ordinary tenancy lands in suit were at first held by the 1st defendant as sub-tenant. After having acquired a share in the village he got a surrender from the tenants and the fields were held by him as *khudkasht*. The plaintiffs, who were co-sharers in the village, gave a notice to the 1st defendant calling on him to vacate their shares in the land but the notice did not contain any offer to contribute the plaintiffs' share of the cost of acquisition. The plaintiffs brought the present suit for joint or exclusive possession of their share of the fields about 2 years after the notice and nearly 4 years after the entry in the *khasra* about the surrender:

Held, (1) that there had been unreasonable delay in bringing the suit; [p. 903, col. 1.]

(2) that as the notice was of a threatening nature describing the possession of the defendant as wrongful and making no offer to contribute towards the cost of acquisition and as the defendant had been in occupation of the field as sub-tenant for many years, it was not a case in which the plaintiffs could get a decree for joint physical possession. The remedy of the plaintiffs was to have a partition effected. [p. 903, col. 1.]

Appeal from the decree of the Court of the District Judge, Chhindwara, dated the 7th November 1914, in Appeal No. 172 of 1914.

Dr. *H. S. Gour* and Mr. *S. C. Chowdhury*, for the Appellant.

Sir *Bipin Krishna Bose*, for the Respondents.

JUDGMENT.—The facts found are that the 2nd defendant Ramprasad, the *lambardar* of the village, and the plaintiffs Sitti and Pitti are separated brothers. Each of them is a co-sharer to the extent of 5 annas. The 1st defendant Sitaram (*alias* Bapu) became a one-anna co-sharer on the 26th June 1906. The ordinary tenancy lands in suit were at first held by the 1st defendant as sub-tenant. He subsequently got a surrender from the tenants and the fields were held by him as *khudkasht*. There is no finding as to the exact date on which the surrender was given effect to, but the fact was entered in the *khasra* on the 22nd February 1910, from which date there is a presumption that the plaintiffs were aware that the 1st defendant was in possession not as a sub-tenant but as a co sharer. On the 17th January 1911 the 2nd defendant accepted *nazrana* from the 1st defendant and gave his approval to the surrender. The plaintiffs admit that they knew on the 1st September 1911 that the tenants had surrendered the fields to the 1st defendant. On the 12th December 1911 the plaintiffs gave a notice to the 1st defendant calling on him to vacate within 8 days the shares of the plaintiffs in the fields, alleging that he had entered wrongfully into possession; the notice contained no offer to contribute the plaintiffs' share of the cost of acquisition. The plaintiffs' suit for "joint or exclusive possession" of their 10-annas share of the fields was filed on the 28th November 1913, that is to say, about 2 years after the notice, and nearly 4 years after the entry in the *khasra*. The lower Courts have given a decree to the plaintiffs for joint possession to the extent of their 10-annas share, subject to their paying Rs. 750 to the 1st defendant as their share of the cost of acquiring the fields from the tenants. The 1st defendant appeals to this Court. It has been laid down

by Stanyon, A. J. C., in *Ramdayal* v. *Gulabia Bai* (1) that a suit like this must be brought without unreasonable delay. What is unreasonable delay is a question for determination according to the circumstances of each case. In Second Appeal No. 766 of 1907 the same learned Additional Judicial Commissioner held 3 years to be an unreasonable delay. The learned District Judge while recognising these principles, held that the plaintiffs made an early declaration of their intention to share physical possession of the fields by means of the notice of 12th December 1911. I am unable to agree that this notice in any way affected the situation. The notice was of a threatening nature, it described the possession of the 1st defendant as wrongful, and it made no offer to contribute towards the cost of acquisition. In this case also there is the fact that the 1st defendant was in occupation of the fields as sub-tenant for many years. In the circumstances of the case I am of opinion that it is not a case in which the plaintiffs should get a decree for joint physical possession and that the proper course is to adopt the course indicated by Bose, A. J. C., in Second Appeal No 406 of 1909. The remedy of the plaintiffs is to have partition effected. The decrees of the lower Courts are set aside and a fresh decree will be drawn up declaring that the plaintiffs are co-sharers to the extent of 10 annas in the village and that their title as such as regards the fields in suit is not affected by the 1st defendant's sole possession of the fields. Having regard to the conduct of the parties I order that the parties shall bear their own costs throughout

Decrees set aside.

(1) 4 N. L. R. 120.

CALCUTTA HIGH COURT.
CIVIL RULE No. 741 OF 1917.
February 25, 1918.
Present:—Mr. Justice Teunon and Mr. Justice Newbould.
JOTINDRA KUMAR DASS—DECREE-HOLDER—PETITIONER
versus
GAGAN CHANDRA PAL AND OTHERS—JUDGMENT-DEBTORS—OPPOSITE PARTY.

Limitation Act (IX of 1908), Sch. I, Art. 182 (5)—Execution of decree—Payment of portion of decretal amount by judgment-debtor—Limitation, fresh starting point of.

A decree-holder gets a fresh starting point for limitation to execute the decree within the meaning of Article 182, clause (5) of the Limitation Act, from the date on which a portion of the decretal amount is paid by the judgment-debtor. [p. 904, col. 1.]

Rule against the order of the Court of Small Causes, Dacca, in Suit No. 450 of 1913.

FACTS appear from the judgment.

Babu *Rajendra Chandra Guha*, for the Petitioner.—The application for certifying payments can be made under Article 181 of the Limitation Act within three years of the date of payment, and such an application has been held to be a step-in-aid of execution. See *Chhoto Rakhal Das Majumdar* v. *Jogendra Narain Mozumdar* (1) and *Radha Charan* v. *Man Singh* (2). The present application for execution was made three days after the application for certifying payment and was, therefore, within time. See *Eusuffzeman Sarkar* v. *Sarchia Lal Nahata* (3) and *Lakhi Narain Ganguli* v. *Felamani Dasi* (4). The learned Small Cause Court Judge fell into an error in holding that section 20 of the Limitation Act is a bar to the execution of the decree, although that section has no application to the facts of the case.

No one appeared for the Opposite Party.

JUDGMENT.—This Rule is directed against an order by which the Court of Small Causes of Dacca has refused the application for execution of a certain decree on the ground that the decree is time-barred. The decree is dated the 9th May 1913. The decree-holder, who is the petitioner before us, alleges that the judgment-debtor made a payment to him of Rs. 25 on the 10th June 1914, and a further payment of Rs. 50 on the 20th November 1914. He also alleges two earlier payments which for the purposes of this Rule we may disregard. On the 6th June 1917 he made an application to the Court for certifying the above payments. On the 9th June 1917 he next applied for execution of his decree. Without taking evidence in

(1) 3 Ind. Cas. 391; 10 C. L. J. 467 at p. 470.
(2) 12 A. 392 at p. 395; A. W. N. (1890) 119; 6 Ind. Dec. (N. S.) 995.
(3) 34 Ind. Cas. 606; 20 C. W. N. 272; 43 C. 207, 23 C. L. J. 390.
(4) 27 Ind Cas. 11; 20 C. L. J. 131; 18 C. W. N. cxcvi (196).

the matter the learned Subordinate Judge held that the payments of the 10th June 1914 and 20th November 1914 to which we have referred, taken with the decree-holder's application of the 6th June 1917, were not sufficient to save limitation. We are unable to hold that on the facts before him he he has come to a proper decision in this matter. We need only refer him to the cases reported as *Chhoto Rakhal Das Majumdar* v. *Jogendra Narain Majumdar* (1), *Lakhi Narain Ganguli* v. *Felamani Dasi* (4) and *Ensuffzeman Sarkar* v. *Sanchia Lal Nahata* (3). From these cases it will appear that the payments of June and November 1914 being within three years from the date of the decree and the application of the 6th June 1917 being again within three years from the date of those payments, it follows that if those payments were in fact made, the decree-holder will have a fresh starting point for limitation within the meaning of Article 182 (5) of the First Schedule of the Limitation Act.

Under these circumstances we set aside the order made by the Court of Small Causes and return the record to him, in order that after the taking of evidence he may proceed to dispose of the application before him in accordance with law.

Order set aside; Record returned.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 246 OF 1915.

October 4, 19 6.

Present:—Mr. Mittra, A. J. C.

TUKARAM—DEFENDANT—APPELLANT

versus

ARJUNA—PLAINTIFF—RESPONDENT.

Transfer of Property Act IV of 1882, s 95—Payment by co-mortgagor—Charge, whether created Payment made by natural guardian of co-mortgagor not appointed by Court, whether sufficient to create charge—Evidence Act (1 of 1872), s. 8—Res gestæ, admissibility of.

All that section 95 of the Transfer of Property Act requires is that one of several co-mortgagors should redeem the mortgaged property in order to obtain a charge on the share of the other co-mortgagors It is not essential that the redemption should take place in Court If the money is paid out of Court and the decree holder accepts it and certifies the payment, the requirements of the section are fulfilled. [p. 905, cols. 1 & 2.]

Plaintiff alleged that he had paid the whole amount of a mortgage decree passed jointly against him and the defendant, and claimed a charge against the mortgaged property in respect of the amount paid for the defendant The defence was that the payment was made by the plaintiff's mother who was not authorised to act on behalf of her minor son, the plaintiff. Her name was proposed as the guardian *ad litem* of the plaintiff in the mortgage suit but she was removed from the guardianship and the defendant was appointed in her place:

Held, that though the payment by the plaintiff's mother was irregular, the acceptance of the decree-holder amounted to a certificate that the payment was duly made and had the effect of curing the irregularity and that the plaintiff, therefore, acquired a valid charge over the defendant's share in the mortgaged property. [p. 905, col. 2.]

Under section 8 of the Evidence Act statements accompanying conduct and explaining such conduct are relevant. [p. 905, col. 1.]

Appeal from the decree of the Court of the Divisional Judge, Nagpur, dated the 24th February 1915, in Appeal No. 62 of 1914.

Dr. *H. S. Gour*, for the Appellant.

Mr *V. R. Pandit*, R. B., for the Respondent.

JUDGMENT.—The second appeal arises out of a suit for contribution under section 95 of the Transfer of Property Act. One Ramrao Joshi had obtained a mortgage-decree against the plaintiff Arjuna, who was then a minor, and the defendant Tukaram and his mother *Musammat* Janhi. The plaintiff's case is that he paid the whole amount of the mortgage decree, hence he is entitled to a charge upon the defendant's share of the mortgaged property for half the amount paid. The defence was that the money was paid by one Pagu Patil, who had entered into an agreement jointly with the plaintiff's mother and the defendant for advancing the money, that as Pagu allowed his claim to be barred by limitation, he has thereupon set up the plaintiff to institute a false suit. The first Court, after disposing of the plea of limitation against the plaintiff, summarily decided the facts in favour of the defendant. The lower Appellate Court has held that the money was paid by the plaintiff. The other points arising out of the case will be dealt with after disposing of the main contention on the merits. On behalf of the defendant-appellant, the finding of fact is impeached on the ground that the application made by the plaintiff's mother, Exhibit P 4, relied on by the Divisional Judge is not relevant, and also on the ground that there has been misconception of the evidence on the part of the learned

Judge of the Court below. I have no reason to suppose that there has been any misconception of evidence. All that is urged is that there is not any reference to some of the documents in the case and amongst others to Exhibit D 10. The judgment of the learned Divisional Judge does not indicate that he had not read the whole of the evidence. There is nothing in the letter Exhibit D 10 which is inconsistent with the findings of the lower Appellate Court. As regards the statements made in the application Exhibit P 4, they are admissible as part of the *res gestæ*. The statement is to the effect that Arjuna was making the payment on his behalf, and not on behalf of his co-defendant Tukaram. Under section 8 of the Evidence Act statements accompanying conduct and explaining such conduct are relevant. There is, therefore, no error of law to vitiate the finding of the lower Appellate Court and I must hold that it is binding on me in second appeal.

It is urged that the payment made by the plaintiff's mother was an officious payment by a person not authorised to act on behalf of the plaintiff, and, therefore, no claim for contribution lies. This argument is founded upon the fact that the plaintiff's mother who was originally named as guardian *ad litem* in Ramrao's suit was removed from the guardianship, and defendant Tukaram appointed as guardian *ad litem* in her place. This payment was made without a formal order appointing her as guardian *ad litem*. It is clear that the procedure of the Court was somewhat irregular. The appointment of the defendant as guardian *ad litem* of Arjuna did not, in any way, take away the right of the natural guardian to redeem the mortgaged property with the consent of the decree-holder. Although the proceedings were in Court, the decree-holder accepted the money and waived all irregularities. I do not think that it is competent to the defendant to rely upon this irregularity for the purpose of defeating the plaintiff's claim. All that section 95 of the Transfer of Property Act requires is that one of the several co-mortgagors should redeem the mortgaged property in order to obtain a charge on the share of the other co-mortgagors. It is not essential that the redemption should take place in Court. If money is paid out of Court and the decree-holder accepts it and certifies the payment, the requirements of the section are fulfilled. The payment by the plaintiff's mother without her being formally appointed as guardian *ad litem* was an irregular payment. But the acceptance of the decree-holder amounted to a certificate that the payment had been duly made, and this had the effect of curing the irregularity in payment. The result is that, in my opinion, the plaintiff acquired a charge over the defendant's share in the mortgaged property. There was some discussion as to whether the claim is barred by limitation or not. So far as the enforcement of the charge is concerned, it is clearly within time. But a personal claim against the defendant under section 69 of the Contract Act is barred. Although the point has not been specifically taken before me, I think the decree of the lower Court should have been limited by adding a declaration that the defendant is not personally liable for the claim, if the sale proceeds of the property fall short of the decretal amount. The appellant has failed on all important points. In lieu of the decree of the lower Appellate Court a proper decree for sale will be passed as suggested above. The appellant will pay the costs of this appeal. Time for payment is extended till 4th April 1917.

Decree varied.

MADRAS HIGH COURT.
FULL BENCH.

APPEAL No. 84 OF 1915.

February 20, 1918

Present:—Justice Sir William Ayling, KT., Mr. Justice Coutts Trotter and Mr. Justice Seshagiri Aiyar.

CHIDAMBARA PILLAI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RANGASAMI NAICKER AND OTHERS—DEFENDANTS NOS. 2 TO 18 AND 20 TO 40—RESPONDENTS.

Hindu Law—Joint family consisting of one adult co-parcener and minors—Testamentary guardian, appointment of, for minors' properties by manager, validity of—Statutory authority, sanction of.

It is not competent to the only adult co-parcener of a Mitakshara family consisting of himself and his minor co-parceners to appoint a testamentary guar-

dian to the co-parcenary properties of the minor co-parceners. [p. 910, col. 2; p. 911, cols. 1 & 2.]

Soobah Pirthee Lal Jha v. *Soobah Doorgah Lal Jha*, 7 W. R. 73 at p. 74, not followed.

Raj Lukhee Dabea v. *Gokool Chunder Chowdhry*, 13 M. I. A. 209; 12 W. R. P. C. 47; 3 B. L. R. P. C. 57; 2 Suth. P. C. J. 275; 2 Sar. P. C. J. 518; 20 E. R. 529, *Sami Row* v. *Eliavatha Row*, 16 M. L. J. 357 and *Gharib-ullah* v. *Khalak Singh*, 25 A. 407; 30 I. A. 165; 5 Bom. L. R. 478; 7 C. W. N. 681; 8 Sar. P. C. J. 483 (P. C.), distinguished.

Mahableshwar Krishnapa v. *Ramchandra Mangesh Kulkarni*, 21 Ind. Cas. 350; 38 B. 94 at p. 103; 15 Bom. L. R. 882, dissented from.

Kanakasabai Mudaliar v. *Ponnusami Mudaliar*, 21 Ind. Cas 848, *Krishna Aiyar* v. *Chakrapani*, 29 Ind. Cas. 475 and *Alagappa Iyengar* v. *Mangathai Ammanyar*, 34 Ind. Cas. 766; 40 M. 672; 30 M. L. J. 504, followed.

Per *Ayling, J.*—The attractive doctrine that everything which is not expressly forbidden should be held lawful, if expedient, is one which has its dangers and requires careful consideration before application. [p. 910, col. 1.]

Per *Seshagiri Aiyar, J.*—On principle, a person who is not capable of making a gift of his property or to dispose of it by testament cannot be in a position to control that property after his death. [p. 911, cols. 1 & 2.]

The Indian enactments dealing with guardianship, *viz.*, the Court of Wards Regulation, the Guardians and Wards Act and the Widows' Re-marriage Act give no statutory authority for the appointment of a testamentary guardian in respect of co-parcenary property. They only refer to cases in which such power of appointment is permissible under the law, for example cases of self-acquired property in Madras or Dayabhaga property in Bengal. [p. 913, col. 1.]

Appeal against the decree of the Court of the Temporary Subordinate Judge, Tanjore, in Original Suit No. 3 of 1913.

This appeal coming on for hearing on the 31st of August 1917 and having stood over for consideration till the 19th of September 1917, the Court (the Chief Justice and Kumaraswami Sastri, J.,) made the following

ORDER OF REFERENCE TO A FULL BENCH.

KUMARASWAMI SASTRI, J.—This appeal arises out of a suit filed by the appellants against the 1st defendant and several others for an account of the management of their properties by the 1st defendant during their minority and for the setting aside of the alienations made by him in favour of the other defendants. The case of the plaintiffs is that one Chidambaram Pillai died leaving two undivided sons, Ramasami Pillai the father of the 4th plaintiff and Appukutti Pillai the father of the 1st, 2nd and 3rd plaintiffs. Ramasami Pillai died in 1900 and Appukutti Pillai in 1902. At the time of Appukutti Pillai's death all the plaintiffs were minors and he was the only adult member of the undivided family. He left a Will, dated the 6th October 1902. The material portion of the Will runs as follows :—"As my sons and my elder brother's sons are minors, I have appointed Venkatachella Pillai son of Theagaraja Pillai of Puduputhur, Negapatam Taluk, executor herein having requested him regarding the management of the affairs for the purpose of looking after all the affairs of the family after my death till the minors come of age, as he is a near relative of mine being maternal uncle and a reliable man who would faithfully look after the affairs and take pains in improving the property ... ... If the creditors press for payment, the lands in Orathu Kannur Vattam Vadakathalai village shall be sold to him who wants the same. The properties after paying up the debts shall be added to the family property."

This defendant who was appointed executor took possession of the estate and made the alienations complained of in the plaint. The 1st plaintiff attained majority in 1908 and the 1st defendant is alleged to have severed his connection with the estate and to have put him in possession of the properties that then remained. The alienations made by the 1st defendant are impeached on the ground that the Will is invalid under Hindu Law and that there was no necessity for the alienations.

As the Will on its face purports to deal with joint family properties, it cannot confer any title on the 1st defendant so far as the properties are concerned, as section 4 of the Probate and Administration Act expressly provides that no property which would otherwise have passed by survivorship shall vest in the executor or administrator.

It is argued that the Will is valid in so far as it appoints the 1st defendant the guardian of the minor members of the undivided family and that under the terms of the Will the appointment of the 1st defendant as executor and the conferring upon him of the powers of management (set out in detail) amounted to his appointment as a testamentary guardian.

The question for determination, therefore, is whether a Hindu, who is the only adult member of a co-parcenary consisting of

himself, the sons and nephews, can appoint a testamentary guardian to his minor co-parceners.

So far as appointment of a guardian to the person of minors is concerned, the power of a Hindu father is not disputed. In *Albrecht* v. *Bathee Jellamma* (1) Wallis, C. J., and Abdur Rahim, J., held, following *Soobah Pirthee Lal Jha* v. *Soobah Doorgah Lal Jha* (2), that a Hindu father was entitled to appoint a guardian for his child by Will so as to exclude the mother from the guardianship. This decision was followed by Sadasiva Aiyar and Moore, JJ., in *Alagappa Iyengar* v. *Mangathai Ammangar* (3), where the learned Judges held that it was competent to a Hindu father to appoint a guardian by Will to the person of his minor son, though he could not do so in respect of undivided family properties.

As regards appointment of a guardian to the properties of minor co-parceners there is a conflict of authority. In *Soobah Pirthee Lal Jha* v. *Soobah Doorgah Lal Jha* (2) it was held that under Hindu Law the father has power to appoint either orally or by writing a person to be guardian of his minor children.

The facts appearing in the report show that the parties were governed by the principles of Hindu Law current in Mithila, where the Mitakshara is the leading authority though it is supplemented by the Vivada Ratnakara and the Vivada Chintamani. In dealing with the powers of the father, Leeh, J., observed :—"We think the Principal Sudder Ameen has taken an erroneous view of the Hindu Law as regards the power of a parent to appoint a guardian for his children. No doubt the mother is the natural guardian of her child ; and were any person to attempt to deprive her of this right without authority, her right would, under ordinary circumstances, be supported ; but we are not aware of any provisions of the Hindu Law, nor have any such been shown in support of the Principal Sudder Ameen's view, which prohibit a father from appointing by writing or by word any other person than the mother to be the guardian of his minor children. The Principal Sudder Ameen has found the Will to have been duly executed. If his finding in this respect be correct, the Will, though inoperative as regards the disposition of the property which is contrary to the principles of the Hindu Law current in Mithila, is not so as regards the appointment of a guardian." The decision has not been questioned in any of the subsequent decisions and is clear authority for the proposition that a Will, though invalid as a disposition of property, can be effective to create a testamentary guardian.

In *Bindaji* v. *Muthurabai* (4) Jenkins, C. J., and Aston, J., held that the principle that no guardian can be appointed to the property of a minor, who is a member of a joint and undivided Hindu family and whose only property is his interest in the joint property, does not apply to cases where all the members of the family are minors and that a testamentary guardian can be appointed, subject to the limitation that it would be open to any minor on attaining majority to apply for the removal of the guardian so appointed. This case was followed in *Ramchandra* v. *Krishnarao* (5). In *Mahableshwar Krishnapa* v. *Ramchandra Mangesh Kulkarni* (6) Scott, C.J., and Beaman, J., after referring to *Soobah Pirthee Lal Jha* v. *Soobah Doorgah Lal Jha* (2) and *Rai Lukhee Dabea* v. *Gokool Chunder Chowdhry* (7), were of opinion that it was competent to a Hindu father to appoint a testamentary guardian to the property of his minor children and to give directions for management.

A contrary view, however, has been taken in *Kanakasabai Mudaliar* v. *Ponnusami Mudaliar* (8) by Sadasiva Aiyar and Spencer, J. The appeal arose out of an application to remove a guardian who purported to act as guardian appointed by a Will of the father of certain minors.

It appears from the report that Abdur Rahim and Spencer, JJ., without expressing any opinion, called for a finding as to whether the properties dealt with by the Will were ancestral or self-acquired. On receipt

(1) 13 Ind. Cas. 453; 22 M. L. J. 247; (1912) M. W. N. 53; 11 M. L. T. 53.
(2) 7 W. R. 73 at p. 74.
(3) 34 Ind. Cas. 766; 40 M. 672; 30 M. L. J. 504.
(4) 30 B. 152; 7 Bom. L. R. 809.
(5) 32 B. 259; 10 Bom. L. R 279.
(6) 21 Ind. Cas. 350; 38 B. 94 at p. 103; 15 Bom. L. R. 882.
(7) 13 M. I. A. 209; 12 W. R. P. C. 47; 3 B. L. R. P. C. 57; 2 Suth. P. C. J. 275; 2 Sar. P. C. J. 518; 20 E. R. 529.
(8) 21 Ind. Cas. 848.

of the finding Sadasiva Aiyar and Spencer, JJ., observed as follows: "On the finding that the properties are ancestral properties of the testator (petitioner's father) he had no right to appoint guardians by Will in respect of such properties which survived to his sons" and treated the guardian as a "mere trespasser." No authorities seem to have been cited at the Bar and the judgment does not refer to or discuss any of the previous authorities on the subject.

In *Krishna Aiyar* v. *Chakrapani* (9) Mr. Justice Oldfield was of opinion that a testamentary guardian was not a person "appointed by a competent authority" within the meaning of Order XXXII, rule 6 (2), of the Civil Procedure Code so as to entitle him to draw moneys from Court without giving security. The learned Judge simply followed *Kanakasabai Mudaliar* v *Ponnusami Mudaliar* (8) and *Budhilal* v. *Morarji* (10).

The question again arose for decision in *Alagappa Iyengar* v. *Mangathai Ammangar* (3). Mr. Justice Sadasiva Aiyar, who delivered the judgment of the Court, was of opinion that though a Hindu father can appoint a testamentary guardian to the person of his minor sons, he was incompetent to appoint a guardian to the joint family properties which on his death survived to his minor sons. The learned Judge, after referring to *Soobah Pirthee Lal Jha* v. *Soobah Doorgah Lal Jha* (2) and distinguishing *Albrecht* v. *Bathee Jellamma* (1) as only deciding that it was competent to a Hindu father to appoint testamentary guardian [though the decision followed without reservation the broader rule laid down in the case of *Soobah Pirthee Lal Jha* v. *Soobah Doorgah Lal Jha's* (2)] preferred and followed the decision in *Kanakasabai Mudaliar* v. *Ponnusami Mudaliar* (8)

In Second Appeal No. 73 of 1916 [*Chidambaram Pillai* v. *Verappa Chettiar* (11)] the question again came up for consideration before Justices Sadasiva Aiyar and Spencer, and they differed as to the testamentary capacity of the father to appoint a guardian to the properties of his minor sons. Sadasiva Aiyar, J., after distinguishing the cases reported as *Soobah PirtheeLal Jha* v. *Soobah Doorgah Lal Jha* (2) and *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry* (7) as being cases under Dayabhaga Law and *Ramchandra* v. *Krishnarao* (5) as being a case deciding the power of Courts to appoint, dissented from the decision of the Bombay High Court in *Mahableshwar Krishnapa* v. *Ramchandra Mangesh Kulkarni* (6). Spencer, J., after referring to the conflict between the Bombay and Madras views, was inclined to follow *Ramchandra* v. *Krishnarao* (5) and *Mahableshwar Krishnappa* v. *Ramchandra Mangesh Kulkarni* (6). He observed that there might be exceptional cases where a Hindu father may validly and properly appoint by Will a guardian to manage the joint family property during the minority of his sons where he was the only adult male member of the co parcenary at the time of his death, such an act being "a natural act on the part of a prudent Hindu father dying without grown up sons or agnates."

I can find nothing either in the Mitakshara or the Smritis which prohibits a father from providing for the care and management of property during the minority of his sons The only possible ground for negativing the power of a Hindu father governed by the Mitakshara to exercise his natural right (conferred by every civilized system of jurisprudence) to make provision for the care and custody of properties of his minor children on his death is that under the Mitakshara he cannot dispose of property by Will to the prejudice of his co parceners, but I do not think that arrangements made for the protection of property for the benefit of minors amount to a disposition of property or a disturbance of the rights of the minor co parceners to take the property by survivorship. *Soobah Pirthee Lal Jha* v. *Soobah Doorgah Lal Jha* (2), which as I have already pointed out is a case under the Mitakshara, clearly points out and recognises the distinction between a disposition of property contrary to the provisions of Hindu Law and an arrangement for its preservation and management. The limitation to the power of the testamentary guardian to the period when any one of the minors comes of age and so becomes competent to exercise his right of management, which as an adult co-parcener

(9) 29 Ind. Cas. 475.
(10) 31 B. 412; 9 Bom. L. R. 553.
(11) 43 Ind. Cas. 865; 6 L. W. 640; (1917) M. W. N. 744; 22 M. L. T. 380.

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he would have in a Mitakshara family so far as the other minor co-parceners are concerned, would effectually remove any conflict. The decision of the Privy Council in *Gharib-ullah* v. *Khalak Singh* (12) only prevents a Court and by a parity of reasoning a father or other adult co-parcener from appointing a guardian to the property of minor members of a joint family where there is an adult co-parcener. *Bindavi* v. *Mathurabai* (4) and *Mahableshwar Krishnapa* v. *Ramchandra Mangesh Kulkarni* (6) distinguish *Gharib Ullah* v. *Khalak Singh* (12) on this ground and are clear authorities for the view that the decision in *Gharib Ullah* v. *Khalak Singh* (12) has no application when all the co-parceners are minors.

As observed by Scott, C.J., in *Mahbaleshwar Krishnapa* v. *Ramchandra Mangesh Kulkarni* (6) and by Spencer, J., in his judgment in Second Appeal No. 73 of 1916 [*Chidambaram Pillai* v. *Veerappa Chettiar* (11)] it is a matter of practical convenience and necessity that a dying adult member of a co-parcenary, where all the other co-parceners are minors, should be able to make arrangements for the guardianship of the minors and the management of the co-parcenary property, and I am of opinion that unless there is any *express prohibition* in the Hindu Smritis or commentaries recognised as authorities in this Presidency, there is no reason why the rulings of the Calcutta and Bombay High Courts should not be followed. In view of the conflict of authorities referred to by me between the Madras and other High Courts, I think it desirable that the question should be settled by a Full Bench and would refer the following question for determination:—

Whether it is competent to the only adult co-parcener of a Mitakshara family consisting of himself and his minor co-parceners to appoint a testamentary guardian to the co-parcenary properties of the minor co-parceners?

WALLIS, C. J.—I agree to this reference.

This appeal came on for hearing in pursuance of the above Order of Reference before the Full Bench on the 12th February 1918.

Mr. *K. Srinivasa Aiyangar* (with him Messrs. *C. Krishnamacahariar* and *S. Venugopala Chetty*), for the Appellants.—The right to appoint a guardian of a minor's property is based on the absolute ownership of the appointor. Where the person making the appointment cannot control the property, authority to direct the disposal of it after his death must necessarily be wanting. Under Hindu Law, joint family property is not at the absolute disposal of the father or manager and the latter can have no right to make in effect, by Will, a disposal of the right of management.

Guardianship of the person of a minor may be a natural right; the King should manage the properties of infants. There can be no natural right to appoint a guardian for minors' properties.

The following cases were cited: *Kanakasabai Mudaliar* v. *Ponnusami Muda'iar* (3), *Krishna Aiyar* v. *Chakrapani* (9), *Alagappa Iyengar* v. *Mangathai Ammangar* (3), *Chidambaram Pillai* v. *Veerappa Chettiar* (11).

In *Soobah Pirthee Lal Jha* v. *Soobah Doorgah Lal Jha* (2) the facts are not clear. There the guardian was appointed *ad litem* and there is no indication of the nature of the properties, the subject of the compromise. *Raj Lukhee Dobea* v. *Gokool Chunder Chowdhry* (7) is a decision under the Dayabhaga school of law.

Mr. *T. R. Ramachandra Aiyar* (with him Mr. *T. R. Krishnaswami Aiyar*), for Respondents Nos. 3, 30, 34 and 37.—The power of a Hindu father to appoint a testamentary guardian for his minor son is a natural right. The giving away of a boy in adoption is an interference with his rights in the co-parcenary property as the adoptee loses his rights therein. The King can control the properties of infants who have neither parents nor kinsmen, but not of those for whom a manager has been appointed. This power of the father has also the sanction of Statute Law, for example, the Court of Wards Regulation, Hindu Widows' Re marriage Act, Regulation V of 1804. Reference was made to *Raj Lukhee Dobea* v. *Gokool Chunder Chowdhry* (7), *Soobah Pirthee Lal Jha* v. *Soobah Doorgah Lal Jha* (2), *Bindaji* v. *Mathurabai* (4), *Mahableshwar Krishnapa* v. *Ramchandra Mangesh Kulkarni* (6), *Gharib-ullah* v. *Khalak Singh* (12) and *Sami Row* v. *Eliavatha Row* (13).

(12) 25 A. 407; 30 I. A. 165; 5 Bom. L. R. 478; 7 C W. N. 681; 8 Sar. P. C. J. 483 (P. C.)

(13) 16 M. L. J. 357

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Mr. *S. T. Srinivasagopalachari*, for Repondent No. 17.

The Hon'ble Mr. *T. Rangachariar* and Mr. *N. M. Malim Sahib*, for Respondents Nos. 3, 22, 26 and 30.

Mr. *G. S. Ramachandra Aiyar*, for Respondents Nos. 1 to 3, 5 to 7, 22 to 26, 30 and 31.

Mr. *V. Narasimha Aiyangar*, for Respondents No. 33.

OPINION.

AYLING, J.—I have had the advantage of perusing the judgment which my learned brother, Seshagiri Aiyar, J., is about to pronounce; and I agree in the conclusion arrived at by him. It is impossible to contend that the power of appointing a testamentary guardian is supported by anything in the ancient texts; and the attractive doctrine that anything which is not expressly forbidden should be held lawful, if expedient, seems to me one which has its dangers and requires careful consideration before application. In the present case, the power claimed seems to run counter to the conception of a Hindu joint family in which every member obtains an interest at birth. I can only agree with Sadasiva Aiyar, J.'s remark in *Chidambaram Pillai* v. *Veerappa Chettiar* (11) in which that learned Judge says,

"On principle I find it difficult to hold that a man who cannot deal with a particular species of property by Will can make arrangement for the management of that property by Will after his death or can appoint guardians to manage that property for minor owners who obtain it by survivorship after his death."

This seems to me to sum up the whole matter.

I am not even clear that considerations of general expediency support respondents' contention. The reference covers the case, not only of the adult co-parcener's own minor sons, but of his minor nephews, and even minor brother regarding whom the natural right of a father discussed by Kumaraswami Sastri, J., in his order of reference can have no application. Even as regards sons, I think the interests of the minors are sufficiently protected by the power of the Court to appoint a guardian; and while the expressed wishes of the father are sure to receive attention at the Court's hands, nothing further is required.

I would answer the question in the negative.

COUTTS TROTTER, J.—I also have had the advantage of perusing my learned brother Seshagiri Aiyar's judgment. I only abstain from simply expressing my own concurrence in it, because my doing so might seem to be associating myself with a familiarity with the ancient authorities which I cannot pretend to possess. I, therefore, put what I have to say in my own words.

To speak of natural rights has always been recognized as a slippery path for the political thinker to tread from the days of Hobbes and Rousseau. It is an even greater pitfall to a lawyer. To appoint a guardian to the person of his infant children may be, a 'natural' right vested in the father. To clothe him with authority over property which belongs to so complex an institution as a Hindu joint family may be, seems to me to be something which cannot be derived from nature, but must be founded on some legal warrant. In England the warrant is statutory, and it is not pretended that there is any statutory authority in force in India. The citations from Manu seem to show that the original conception was that the custody of properties of the joint family where there was no adult member should be the care of the King, which in modern language means the Courts of the country. No case has been cited which can be said to recognize the suggested right. The case in *Soobah Pirthee Lal Jha* v. *Soobah Doorgah Lal Jha* (2) contains expressions which tend to show that the learned Judges supposed that such a power would be possible; but they do not definitely so decide. Mr. K. Srinivasa Aiyangar supported that judgment on the ground that as the properties dealt with were the properties of the father absolutely and were not joint properties, his right to appoint a guardian for them might be considered as an inherent part of his total right of ownership. That again seems to me to be lapsing into abstract speculation, and it may be that Mr. T. R. Ramachandra Aiyar's attack on this theory—which not insignificantly formed almost the whole of his argument—was well-founded. Beyond that his argument seemed to me to come merely to this. The thing is convenient;

it is consonant with all right notions of what a father ought to be able to do for his children; it is nowhere expressly prohibited; therefore, it can be done. To me on the contrary it seems that to put a person in a definite legal relation to property of which he is not the owner, is a step which cannot be taken unless there is legal authority for taking it. Its convenience and justice may be admirable reasons for the Legislature to take action. They cannot, in my opinion, suffice to set in motion a Court of law.

SESHAGIRI AIYAR, J.—The question referred for our consideration is whether it is competent to the only adult co-parcener of a Mitakshara family consisting of himself and his minor co-parceners to appoint a testamentary guardian to the co-parcenary properties of the minor co parceners.

It was argued before us that the real point for decision is whether the manager of a Hindu family, be he the father, the uncle or an elder brother, can appoint a testamentary guardian for the property of his minor co parceners. In the Hindu Law there is no provision for the appointment of a testamentary guardian. That may be due to the fact that the idea of making a Will is of recent origin. The only texts of Hindu Law which relate to this subject are all collected in Colebrooke's Digest, Volume II, pages 574 to 577. These authorities cast upon the King the duty of protecting the property of a minor.

Mr. T. R. Ramachandra Aiyar for the respondents drew our attention to the commentary of Kullookha Bhatta on Manu's text and argued that the protection of the King should be invoked only where the infant was otherwise unprotected. I do not understand the commentator to indicate by the use of the expression 'Anadha' that the deceased father or manager is competent to appoint a guardian and that it is only in default of such an appointment the King can step in. On the other hand it is clear from Manu's verses that the primary right of guardianship is in the King, and it is only by reflection that the father during his life-time exercises that right (as if by delegation by the Sovereign).

On principle, it appears to me that a person who is not capable of making a gift of his property or to dispose of it by testament cannot be in a position to control that property after his death. However convenient it may be, and however consonant with natural justice, that a father or manager should indicate his preference of an individual as guardian by a testament, in my opinion it would be inconsistent with the theory of survivorship that he should have the power to dictate to the King or to the Judges appointed by him as to who should be the guardian of his minor co-parceners. In the majority of cases the wishes of the father or manager would be acted upon by the Courts. But to that his directions should be regarded as amounting to a legal appointment is opposed to the principle underlying the Mitakshara system of law.

In the order of reference Mr. Justice Kumaraswami Sastriar refers to the natural right of a father to appoint a guardian and says that such a power is conferred by every civilised system of jurisprudence. Mr. K. Srinivasa Aiyangar in a very learned argument has drawn our attention to the theories of guardianship enunciated in the ancient and modern systems of jurisprudence. An examination of the citations shows that whereas the right of appointing a guardian for the person of an infant has been in some systems regarded as the natural or the nurtural right of the parent, in none of them has it been stated that the right to appoint a guardian of property is a Common Law right. In Roman Law just as in the Hindu Law, the protection of property was enjoined upon the State. In English Law the power to appoint a testamentary gurdian was first given by 12 Carl. II, Cap. 24. (See Simpson on Infants, page 105.) It is stated in the textbook that the right of appointing a testamentary guardian is not a Common Law right. In America where the Civil Law of Rome and the English Law have been further developed, it is clear that the right of appointing a testamentary guardian is not regarded as an inherent right in the parent. (See 21 American Cyclopædia, page 12.) Therefore, I am unable to accept the statement of the learned Judge that in other systems of jurisprudence the right of appointing a testamentary guardian exists as a Common Law right in the parent.

I shall now discuss the cases. The earliest

decision upon the subject, barring the decision of the Sudder Adawlat of the High Court of the N. W. Provinces, is *Soobah Pirthee Lal Jha* v. *Soobah Doorgah Lal Jha* (2). There are undoubtedly observations in that judgment which show that the learned Judge believed that he had the authority of the Hindu Law in holding that a testamentary guardian can be appointed for a Mitakshara minor. The actual decision itself is supportable upon other grounds. There were two classes of property in respect of which a person purporting to act on behalf of the minor had entered into a compromise on behalf of the minor. This person was appointed gaurdian by the father in his Will; he was also recognised by the Civil Court as the guardian *ad litem* of the minor. The compromise in the suit related to ancestral property. It was upheld. It is well settled that where a guardian is appointed by the Court and an honest compromise is come to in the presence of the Court, it is *prima facie* binding upon the minor unless the latter can show that his guardian was guilty of fraud or other invalidating circumstances. There was another species of property in regard to which the guardian appointed by the Will had entered into a compromise outside the Court. That property was the self-acquisition of the father. In respect of such property, it can hardly be disputed that it is open to the testator to appoint a guardian to manage it. Therefore, the conclusion come to in the case is right. The observations of the learned Judge that Hindu Law sanctions the appointment of a guardian receive no support from any citation made by him or from any authority to which we have been referred in the course of the argument in this case. I am, therefore, not prepared to follow the *obiter dicta* contained in that judgment.

The next case very strongly relied upon by Mr. T. R. Ramachandra Aiyar is the decision of the Judicial Committee in *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry* (7). It was a case under the Dayabhaga Law, under which it was competent to a father to dispose of property notwithstanding the existence of sons. The suit was brought to set aside the alienation made by the widows of one Guruprasad Sarma. The latter had executed a document in favour of the widows under which the alienees claimed that the widows had ample power of disposition. The Judicial Committee came to the conclusion that the document conferred no rights of property on the widows. They regarded it as providing only "a species of trust for management and that it did not interfere with the devolution of the estate according to the ordinary law of succession under the Hindu Law." Following this view, their Lordships of the Judicial Committee considered whether the disposition by the widows as managers of the property of Guruprasad's sons was impeachable. It is clear from the facts that the question before the Committee did not relate to co-parcenary property or to the power of a Mitakshara father to appoint a testamentary guardian. Notwithstanding the argument of the learned Vakil for the respondents, I am unable to see why a person who is competent to devise his property, whether to his own children or to strangers, should not deal in his testament only with the right of management of that property. It is not necessary to validate such an appointment of a guardian or manager that the testament should make a gift of the property as well The right over property involves two definite rights, the right of management and the right of enjoyment. A person may devise the right of management only by providing that his legal heirs shall have the benefit and advice of a person in whom the testator had confidence. That was really what happened in the Bengal case. Sir James Colville in delivering the judgment points out that the right of succession under the Hindu Law was not interfered with by the testator. I see nothing in the judgment of the Board in that case to warrant the contention that a person who cannot deal with a species of property by a testamentary document can devise the right of management over such property. *Mahableshwar Krishnapa* v. *Ramchandra Mangesh Kulkarni* (6) was the next case referred to. I cannot help saying that the learned Judges have not correctly understood *Rai Lukhee Dabea* v. *Gokool Chunder Chowdhry* (7) on which they base their conclusion; I feel constrained to differ from that decision. These are all the cases in the other High Courts. So far as Madras is concerned, the pre-

ponderance of authority is in favour of holding that a Mitakshara father has no power to appoint a testamentary guardian to his son's property, *a fortiori* a Mitakshara manager has no power to appoint such a guardian. The first decision is *Kanakasabai Mudaliar* v. *Ponnusami Mudaliar* (8), to which Mr. Justice Spencer was a party. *Krishna Aiyar* v. *Chakrapani* (9) is to the same effect. In *Alagappa Iyengar* v. *Mangathai Ammangar* (3) Mr. Justice Sadasiva Aiyar and Mr. Justice Moore came to the same conclusion. In *Chidambaram Pillai* v. *Veerappa Chettiar* (11) Mr. Justice Sadasiva Aiyar once again expressed the same view. Mr. Justice Spencer seems to think that the matter requires further consideration. The learned Judge does not give any definite opinion on the point at issue. Mr. T. R. Ramachandra Aiyar attacked the view of Mr. Justice Sadasiva Aiyar on two points. I do not think that the criticism really affects the main conclusion at which the learned Judge has arrived. It is true that his reference to *Soobah Pirthee Lal Jha* v. *Soobah Doorgah Lal Jha* (2), as a Dayabhaga case is not quite accurate, and something may be said also against his reference to the Privy Council decision, but the principle enunciated by him has my entire approval.

Some other cases were referred to by Mr. T. R. Ramachandra Aiyar, *viz.*, *Sami Row* v. *Eliavutha Row* (13) and *Gharib-Ullah* v. *Khalak Singh* (12). In the first of these cases the property dealt with was the self-acquired property of the testator. The second case has really no bearing upon the point. The learned Vakil referred to the enactments dealing with guardianship, *viz.*, the Court of Wards Regulation, the Guardians and Wards Act and the Widows' Re-marriage Act, and contended that these legislative provisions preserve the right of a Hindu father to appoint a guardian. I do not think these Acts give any statutory authority for the appointment of a testamentary guardian in respect of co-parcenary property. They only refer to cases in which such power of appointment is permissible under the law, for example, cases of self-acquired property in Madras or Dayabhaga property in Bengal.

The case has been very fully argued by the two learned Vakils, and my answer to the question referred to us is in the negative.

M. C. P.

Reference answered in the negative.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1728 OF 1915.

January 30, 1918.

Present:—Mr. Justice Fletcher and Justice Sir Shamsul Huda, Kt.

AMBIKA CHARAN CHAKRAVARTY AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

SARAT CHANDRA BASU AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (*Act V of* 1908), *O. XXIII, r.* 1—*Withdrawal of suit, leave for—Judgment, statement in, concerning point not raised, desirability of.*

A suit brought to recover a *jote* on the footing that it was a *kaemi jote* was dismissed by the trial Court as well as by the Appellate Court on the ground that the *jote* was not *kaemi*. The question whether the plaintiffs had acquired an occupancy right was left open by the trial Court but the Appellate Court, while affirming the decision of the trial Court, stated in its judgment that if the question of occupancy right had been before it the plaintiff's suit would be barred by limitation:

Held, that the question of limitation as well as of the right of occupancy should be left open, as the plaintiffs might be prejudiced by the statement in the judgment of the lower Appellate Court in case they brought a suit to enforce the right of occupancy. [p. 914, col. 2.]

Held, also, that the plaintiffs could not be allowed to withdraw the suit with liberty to bring a fresh suit. [p. 914, col. 2.]

Appeal against the decree of the Subordinate Judge, 1st Court, Dacca, dated the 19th of April 1915, affirming the decree of the Munsif, 1st Court, Maniekganj, dated the 6th of February 1914.

FACTS will appear from the judgment.

Babu *Dwarka Nath Chuckerburtty* (with him Babu *Trailokhya Nath Ghose*), for the Appellants.—All the defendants except one admitted the plaintiffs as *kaemi jotedar*, only the defendant No. 1 says that the plaintiffs' right is a non-transferable occupancy right. I submit under the circumstances the plaintiffs are entitled to get a decree as against the defendants who admit the *kaemi* right claimed by the plaintiffs.

MA THIN KYU v. MG. BA THAIN.

[FLETCHER, J.—You can't get that.]

Cannot a co-sharer landlord grant a separate lease of his own share conferring a *kaemi* right upon the tenant, though the other co sharers may not be willing to grant that right but may be willing to grant a *non-kaemi* right? In this case those co-sharer landlords who admit the plaintiffs' *kaemi* right cannot be compelled to treat the plaintiffs as mere occupancy *raiyats*, so as against them the plaintiffs are entitled to get a decree, though their suit might be dismissed as against the defendant No. 1 who denied the plaintiffs' *kaemi* interest. Furthermore I beg to submit that the lower Appellate Court was quite wrong in making the observation in the judgment that if my clients had any occupancy right that right was barred by limitation This point was not in issue before that Court and no opinion ought to have been expressed on it, as such an opinion will seriously prejudice the plaintiffs in case they bring a suit to enforce their occupancy rights. Under the circumstances of this case I would at any rate ask your Lordships to grant permission to the plain iffs to withdraw the suit with liberty to bring a fresh suit.

Babu *Jogesh Chunder Roy* (with him Babu *Upendra Lal Roy*), for the Respondents. —The plaintiffs failed to prove the title on which they based their claim and the suit was rightly dismissed. There was no formal defect in the suit as it was framed, so they cannot ask for permission to withdraw the suit. The tenancy was one and indivisible, so it cannot be split up by decreeing the suit against the defendants who admit the plaintiffs' *kaemi* right and dismissing it against the others who do not make such an admission.

JUDGMENT.

FLETCHER, J.—This appeal is preferred by the plaintiffs against the decision of the learned Subordinate Judge of Dacca affirming the decision of the Munsif at Manickganj. The suit was brought to recover a *jote* on the footing that it was a *kaemi jote*. The defendant No. 1 who is the landlord of 1·6th of the *jote* opposed the plaintiffs' claim. He denied that the plaintiffs had a *kaemi* interest and he stated that their predecessor had a temporary ordinary occupancy *raiyati jote*. The first Court held that the *jote* was not *kaemi* and left the question as to whether the plaintiffs had an occupancy right by recognition open. The lower Appellate Court agreed with the primary Court and stated that the question of occupancy right was not before the Court and then proceeded to state that, if it had been before the Court, the plaintiffs' suit was barred by limitation. Only two questions are urged in this appeal. First of all, that the plaintiffs should have liberty to withdraw the whole suit. That clearly cannot be assented to The second point is that, if the plaintiffs think fit to attempt to enforce in any subsequent proceeding this right of occupancy which was left open by the primary Court, they will be seriously prejudiced by the statement made by the learned Judge of the lower Appellate Court that, if that question had been before the Court, the learned Judge would have held that the plaintiffs' claim was barred by limitation. I think that this contention is sound. The plaintiffs, whether their rights are well founded or not on that claim, ought not to be prejudiced by a statement in this suit that, if that case had been before the Court, the Judge would have decided it against them on the ground of limitation. That would depend on a variety of circumstances. It is not necessary for us to express any opinion one way or the other. That question of limitation just as much as the question of the right of occupancy by recognition will be left open between the parties. The present appeal fails and must be dismissed with costs.

SHAMSUL HUDA, J.—I agree.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

CIVIL REFERENCE No. 6 OF 1917.

May 16, 1918.

Present:—Sir Daniel Twomey, KT., Chief Judge, Mr. Justice Ormond and Mr. Justice Pratt.

MA THIN KYU—APPLICANT

versus

MG. BA THAIN *alias* JOHNNY CAREW—RESPONDENT.

Divorce Act (IV of 1869), s. 10—Divorce—Judicial

MA THIN KYU *v.* MG. BA THAIN.

separation—Adultery and cruelty after separation, effect of.

A wife who has obtained judicial separation on the ground of her husband's adultery alone, is entitled to a dissolution of marriage on proof that her husband has again committed adultery after the separation and has in addition been guilty of cruelty to her after the separation. [p. 916, col. 1.]

Civil Reference made by the Divisional Judge, Mandalay, in Civil Suit No. 2 of 1917.

Mr. *Shaw*, for the Applicant.

JUDGMENT.

TWOMEY, C. J., AND ORMOND, J.—The petitioner and the respondent are both American Baptist Christians. The petitioner Ma Thin Kyu applied in 1914 for dissolution of her marriage with the respondent Mg. Ba Thain *alias* Johnny Carew on the ground of his adultery and desertion. Desertion was not proved, and the Court, therefore, granted only a decree for judicial separation. Subsequently the petitioner applied to the Magistrate for a maintenance order under the Criminal Procedure Code and the respondent was ordered to pay her Rs. 25 a month. She has received only Rs. 59 in all under that order. The petitioner's attempts to recover the amount due to her were thwarted by the respondent, who resigned the salaried post that he held. Not content with this, the respondent went repeatedly to the petitioner's house and abused her and threatened to kill her, his object being to prevent her from enforcing the maintenance order. The evidence shows that the respondent's conduct has seriously affected the petitioner's health and caused a nervous breakdown. In consequence of the respondent's conduct the petitioner applied again for a dissolution of her marriage on the ground of his continued adultery coupled with cruelty. It is shown that the respondent has continued to live in adultery with another woman since the time of the judicial separation, and as regards the alleged cruelty subsequent to the separation the learned Judge's finding is that although no physical violence was used the respondent's behaviour amounted to legal cruelty. The Divisional Judge, therefore, has granted a decree for dissolution of the marriage and this decree now comes before us for consideration.

The respondent did not oppose the petition in the Divisional Court and he does not appear in this Court, though he has been served with notice. There is no reason to suspect collusion.

We see no reason to differ from the conclusion of the Divisional Judge as regards the facts of the case. The continued adultery and the cruelty subsequent to the separation are well established. The only question that arises is one of law, namely, whether a wife who has obtained judicial separation on the ground of her husband's adultery alone, is entitled to a dissolution of marriage on proof that her husband has again committed adultery after the separation and has in addition been guilty of cruelty to her after the separation. The nearest English case that we can find is that of *Green* v. *Green* (1), in which a wife who had obtained a judicial separation on the ground of her husband's adultery obtained a decree *nisi* five years later on pooof of further adultery subsequent to the judicial separation coupled with cruelty *before* the separation. The wife in her first petition in that case had not pleaded the cruelty and she asked only for a judicial separation in the first instance because she hoped that her husband would reform. Afterwards she abandoned the hope of his reformation, and asked for a dissolution of the marriage, and the Court then allowed her to revive the cruelty which she condoned in the first instance. Sir James Hannen remarked: "The husband by his adultery subsequent to the former decree has committed a fresh matrimonial offence, (for the decree of judicial separation is not to be considered as a license to commit adultery for the future), and for this offence, aggravated by the previous cruelty, the wife has had no redress. If the failure of the petitioner to charge her husband with cruelty be regarded as equivalent to a forgiveness of it, still cruelty condoned is revived by subsequent adultery, and I can see no reason why the husband should be in a better position because he has already been guilty of a wrong which entitled the wife to relief."

The present case differs from the above inasmuch as there was no cruelty before the decree for judicial separation and it is open to argument that the cruelty contemplated in the Divorce Law is cruelty com-

(1) (1874) 43 L. J. Mat. 6; 3 P. 121; 29 L. T. 251; 21 W. R. 824.

mitted while the wife is actually living with the husband and that cruelty cannot be regarded as a matrimonial offence when they are living apart from one another under a decree of judicial separation. There is, however, no express authority to this effect, and we are at liberty as in the English case above cited to treat the cruelty of the husband after the judicial separation as an aggravation of the fresh matrimonial offence involved in the husband's continued adultery. We, therefore, confirm the decree of the Divisional Court under section 17, Indian Divorce Act, 1869.

PRATT, J.–I agree that the decree should be confirmed. It seems to me that the facts of the present case are even stronger than in *Green* v. *Green* (1). Here there is not merely continued adultery after judicial separation, but subsequent cruelty as well.

I do not consider that adultery or cruelty on the part of the husband, when living away from his wife under judicial separation, can be held not to be a matrimonial offence.

To take this view would be practically to place the wife in a worse position, after she had obtained a decree of judicial separation on the ground of her husband's misconduct, than she was before.

Decree confirmed.

PATNA HIGH COURT.

FIRST CIVIL APPEAL No. 766 OF 1917.

April 15, 1918.

Present:—Justice Sir Ali Imam, KT.

DURGA PRASAD—DEFENDANT APPELLANT

versus

Raja HARIHAR PRASAD AND OTHERS—PLAINTIFFS—RESPONDENTS.

Record of Rights, entry in, value of—Presumption—Evidence in rebuttal of presumption, consideration of—Court, duty of.

An entry in the Record of Rights merely raises a presumption as to its correctness, and where this presumption is sought to be rebutted the Court must show by its judgment that it has considered the evidence on the record and then come to a distinct finding whether the evidence has or has not rebutted that presumption. [p. 917, col. 1.]

Second appeal from a decision of the District Judge, Patna, dated the 23rd March 1917, confirming that of the Munsif, Bihar.

Messrs. *Kulwant Sahay, Purnendu Narain Singh, Sheswurdyal* and *Jagannath Prasad*, for the Appellant.

Messrs. *Ganesh Dutt Singh* and *Gangadhar Das*, for the Respondents.

JUDGMENT.—The plaintiffs instituted this suit for recovery of rent in respect of 60 *bighas* of land situated in Mauza Singthu. The defendant resisted the claim on the ground that the land in question was "*aima lakhraj*" and that he had never paid any rent to the *maliks* and that no such rent was payable for this land. The learned Munsif of Bihar, who tried the suit, decided it in favour of the plaintiffs and gave them a decree at the rate of the *jama* claimed in the plaint. The defendant appealed to the learned District Judge of Patna, who dismissed it with costs. The present appeal is from the decision of the learned District Judge.

It is contended on behalf of the defendant-appellant that the learned Judge did not apply his mind judicially to the evidence adduced on his behalf in rebuttal of the presumption arising from the Record of Rights.

It appears that the land in question was recorded in the Record of Rights in the column which runs thus: "*darmiani haqdar ke taraf se adai honeke laek lagan*". The lower Appellate Court has correctly construed this heading and has rightly come to the conclusion that the amount mentioned under this heading, namely, Rs. 37-8-0, is the amount which is the actual rental of the land in question. The learned Judge has also correctly construed Exhibit 3, which is a *mokurrari* deed, executed by defendant No. 1 in favour of defendant No. 2. An examination of this deed clearly points out that there was some Government revenue payable on account of the 60 *bighas* of land. I am, therefore, of opinion that on the construction of Exhibit 3 and on the construction of the Record of Rights the lower Appellate Court has come to correct findings. The difficulty in this appeal, however, is that there is nothing in the judgment of the lower Appellate Court to show that the presumption that arises from the Record of Rights has been considered in the light of the evidence adduced by the defendants.

KALAMUA KHADIM *v.* AMIR ALI KHALIFA.

The learned Vakil, Mr. Kulwant Sahay, appearing on behalf of the defendant-appellant urges that it was necessary for the lower Appellate Court to have considered that evidence and then come to a distinct finding as to whether or not that evidence had or had not rebutted the presumption that arises from the Record of Rights. The contention of the learned Vakil is supported by the decision given in *Lalco Singh* v. *Tahbal Gope* (1) and *Dilan Singh* v *Choa Singh* (2).

I accept the contention of the learned Vakil. The result is that the judgment and the decree of the lower Appellate Court are set aside and the case is remanded to the learned Judge for re-hearing and disposing of the appeal on arriving at a distinct finding on the question as to whether the presumption arising from the Record of Rights has or has not been rebutted in the light of the evidence produced by the defendants. Costs will follow the result.

Case remanded.

(1) 38 Ind. Cas. 814; 1 P. L. W. 193.
(2) 42 Ind. Cas. 397; 2 P. L. W. 182.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE NO. 1101 OF 1916.

March 23, 1918.

Present:—Mr. Justice Fletcher and Justice Sir Syed Shamsul Huda, KT.

KALAMUA KHADIM—PLAINTIFF—APPELLANT*

versus

AMIR ALI KHALIFA—DEFENDANT, AND MAHMAD SAYAD—PLAINTIFF, NO. 2—RESPONDENTS.

Ejectment, suit for— Notice sent through registered post—Proof of service of notice—Evidence necessary.

A notice to quit was sent through registered post. The posting was duly proved and the registered envelope was produced in Court with an endorsement purporting to have been made by the postal peon stating that the addressee refused to accept it:

Held, that though the evidence adduced as to the service of the notice was not legally sufficient, the plaintiff's suit for ejectment on notice to quit should not have been dismissed on the ground that the service of notice was not proved, but that the plaintiff should have been given an opportunity to prove the actual service of notice on the defendant. [p. 918, col. 2.]

Appeal against the decree of the Sub-Judge of Assam Valley Districts, dated the 10th February 1916, reversing that of the Munsif, Gauhati, dated the 15th February 1915.

FACTS material to the report will appear from the following judgment of the lower Appellate Court:—

"This appeal arises out of a suit for ejectment. The lower Court has passed a decree. It is assailed on several grounds. The first ground is that the service of notice to quit was not properly proved. It was proved by the production of the registered cover containing a notice to quit, with an endorsement on it of the postal peon that the addressee refused to receive it. It is argued that the mere production of this cover without calling the peon is not sufficient evidence of service as laid down in the High Court decision reported as *Gobinda Chandra Saha* v. *Dwarka Nath Patita* (1). It is, however, contended for the respondent, that this decision of the Calcutta High Court came out in the Weekly Notes of 15th March 1915, while the case under appeal had been decided on 15th February 1915 and the procedure then followed in serving notice was in accordance with the law laid down in the previous decision of the same High Court referred to in the judgment of the lower Court [*Jogendro Chunder Ghose* v. *Dwarka Nath Karmokar* (2)] and that the case should under the circumstances be sent on remand in order to give the plaintiff an opportunity to prove the service of notice in accordance with the law as laid down in the more recent decision of the High Court. Neither party could cite before me any decision of the High Court as to what course should be followed in a case like this. I am inclined to think that the subsequent decision is a legal adjudication that the prior one was not law at the time it was made and that it was a mere mistake upon which the plaintiffs acted at their peril. I find, however, that the case of *Jogendro Chunder Ghose* v. *Dwarka Nath Karmokar*

(1) 26 Ind. Cas. 962; 19 C. W. N. 489; 20 C. L. J. 455
(2) 15 C. 681; 7 Ind. Dec. (N. S.) 1038.

(2) does not lay down the broad proposition that the mere production of a registered cover containing a notice with an endorsement on it that the addressee refused to receive it is sufficient service of notice, without proving the truth of the endorsement in any way. Then there is the evidence of defendant in this case that no registered cover was tendered to him. Under the circumstances I think that the plaintiff's suit must fail. It is not necessary to consider the other grounds of appeal. The appeal is accordingly decreed with costs and the plaintiff's suit will stand dismissed with costs."

Babu *Prakas Chandra Majumdar*, for the Appellant.—The appeal arises out of a suit for ejectment which has been dismissed by the lower Appellate Court on the ground that service of 'notice to quit' sent through registered post has not been proved according to the procedure laid down in the case of *Gobinda Chandra Saha* v. *Dwarka Nath Patita* (1). The first Court relying on the case of *Jogendro Chunder Ghose* v. *Dwarka Nath Karmokar* (2), which has been followed in several other subsequent cases, held that notice to quit was duly served on the defendant. The ruling of *Gobinda Chandra Saha* v. *Dwarka Nath Patita* (1) came out in the Weekly Notes after the decision of the case by the first Court; so the Court of Appeal below ought, under the circumstances, to have allowed the plaintiff an opportunity to prove the endorsement of the postal peon on the cover. The correct procedure which the lower Appellate Court should have followed was either to allow the postal peon to be examined before it or to remand the case to the first Court for the said purpose.

Maulvi *Nur-ud-din Ahmad*, for the Respondents, submitted that when the lower Appellate Court has, by following the latest decision of this Court, held that the requisite notice has not been duly served, its decision is not liable to be set aside in second appeal.

JUDGMENT.—This appeal must be allowed. The learned Subordinate Judge disagreeing with the Munsif has found that the plaintiff has failed to prove service of notice which was sent through registered post. The proof of the posting was duly given. The registered envelope was produced in Court with an endorsement said to have been made by the postal peon, stating that the addressee refused to accept the letter. On that, the learned Judge purporting to act on a decision of this Court came to the conclusion that the service of the notice was not duly proved. Even assuming that the decision on which the learned Judge has relied says that, it is quite clear that on a point like this, when the appellant has got an earlier decision, of this Court in his favour which has been acted on on more than one occasion, he ought to have an opportunity of proving the service of the notice by producing other evidence. The case must go back to the Court of first instance to be re heard as regards the actual service of the notice on the defendant. Cost will abide the result of the re-hearing by the Court of first instance.

Case remanded.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL NO. 156 OF 1916.

March 19, 1918.

Present:—Mr. Justice Ormond and Mr. Justice Pratt.

D. BADRI DAS—DEFENDANT—APPELLANT

versus

THE CHETTY FIRM OF O. A. M. K. AND ANOTEER—RESPONDENTS.

Registration Act (XVI of 1908), s. 17—Mortgage, equitable—Memorandum of securities handed over to mortgagee—Registration, whether necessary—Presidency Towns Insolvency Act (III of 1909), s. 17—Secured creditor, suit by, to realise security—Leave of Court, whether necessary.

A document merely reciting what securities are handed over to an equitable mortgagee is a memorandum and not a mortgage and does not require registration. [p. 919, col. 1.]

A secured creditor of an insolvent can bring a suit to realise his securities without the leave of the Court under section 17 of the Presidency Towns Insolvency Act. [p. 919, col. 1.]

Appeal against the decree of the District Court, Toungoo, in Civil Regular No. 14 of 1915.

Mr. *Bilimoria*, for the Appellant.

Mr. *Connell*, for Respondent No. 1.

JUDGMENT.—The plaintiff Chetty Firm O.A.M.K. of Rangoon sued Badri Dass of

Toungoo and the Official Assignee as representing the firm mark S.V.A.R. on an equitable sub-mortgage of the 24th September 1914. The plaintiff obtained a decree in the District Court and Badri Dass now appeals.

The District Judge has carefully considered all the facts. The defence raised one or two legal points which we will now deal with: *First*, the equitable sub-mortgage was by the deposit of a mortgage-deed made by Badri Dass in favour of the S.V.A.R. Firm and the deposit was made by the mortgagee with the plaintiff in Rangoon. It was accompanied by a document Exhibit B and the question is whether that document is merely a memorandum or whether it should be construed as a mortgage. That document merely recites what securities were handed over at that time to the plaintiff. We are satisfied that it is a memorandum and not a mortgage and, therefore, it does not require registration; *secondly*, it is contended that the suit is not maintainable because no leave has been obtained under section 17 of the Presidency Insolvency Act. The case of *B. N. Lang* v. *Heptullabhai Ismailjee* (1) is an authority to show that a secured creditor can bring a suit to realise his securities without the leave of the Official Assignee. The defence of Badri Dass on the facts is that he had paid up the balance due on this mortgage to S.V.A.R. and that he had not received notice of the equitable sub-mortgage. Rs. 10,000 was due on the mortgage by Badri Dass when this equitable sub-mortgage was made, *i.e.* on 24th September 1914. He alleges that on the 4th April 1915 he paid to Oodayappa, the agent of the S.V.A.R. Firm in Rangoon, Rs. 4,500 in cash and handed him over a promissory note on which Rs. 5,500 was due which had been executed by S.V.A.R. in favour of Lalchand Rukmull, who in turn had sold the note to Badri Dass' uncle Hardyal and liability under it was taken over by Badri Dass. Beyond the entries in the book of Badri Dass and Hardyal there is no documentary evidence to support this settlement or payment to S.V.A.R. On previous occasions when Badri Dass had made payments in respect of this mortgage such payments were endorsed on the mortgage. On this occasion he took no receipt and he did not get back the mortgage-bond. His explanation of that is that when the mortgage was made in favour of S.V.A.R. the title-deeds of the property were also handed to that firm and when this settlement was made in Rangoon the title-deeds were handed back but the mortgage-deed was in Toungoo; that Oodayappa gave him (Badri Dass) a letter to Vellasami, the agent of the S.V.A.R. Firm in Toungoo, directing him to hand over the mortgage-deed to Badri Dass. Badri Dass says he went to Tongoo and showed the letter to Vellasami, that Vellasami said he would give him the mortgage-deed and Badri Dass thereupon handed him the letter and Vellasami subsequently said he had lost the mortgage-deed. Badri Dass, therefore, parted with the letter without receiving the mortgage-deed. Vellasami and S.V.A.R. deny the whole of this story and it is almost impossible to believe that Badri Dass would have parted with that letter without receiving the mortgage-deed. No written demand was made for the mortgage-deed until the 10th May, more than a month later. The plaintiff alleges that he gave notice to Badri Dass a day or two after the 24th September and that Badri Dass paid three instalments of interest to the plaintiff through one Perianan, the agent at Toungoo of the firm of C.R.V.V.C.T. The plaintiff had no branch at Toungoo and Perianan must have been known to Badri Dass as having no business connection with the S.V.A.R. Firm Badri Dass alleges that he made these payments to Vellasami. Perianan alleges that they were made direct to him by Badri Dass on behalf of the plaintiff. Perianan has entered two of these payments in a temporary loan account book and two letters are put in, Exhibits J and K, written by Perianan to the plaintiff explaining what arrangements Perianan had made with Badri Dass for the repayment of this mortgage. The District Judge has disbelieved the case set up by Badri Dass and has believed the plaintiff's case as to notice having been given to Badri Dass. We agree with the view the District Judge has taken of the case. The appeal is dismissed and the plaintiff will have his costs against the appellant of this appeal.

Appeal dismissed.

(1) 21 Ind. Cas. 714; 33 B. 359; 15 Bom. L. R. 939.

RAGHU SINGH *v.* USUF AIL.

PATNA HIGH COURT.

CIVIL REVISION No. 258 OF 1917.

March 22, 1918.

Present:—Mr. Justice Chapman and Mr. Justice Atkinson.

RAGHU SINGH AND OTHERS—PLAINTIFFS—PETITIONERS

versus

USUF AIL AND OTHERS—DEFENDANTS—OPPOSITE PARTY.

Bengal, N. W. P. and Assam Civil Courts Act (XII of 1887), s 21 (a)—Suit valued at more than Rs. 5,000—Appeal preferred to District Judge—Jurisdiction—Consent of parties, whether confers jurisdiction—Objection, when to be taken.

A suit for recovery of money on the basis of a mortgage valued at more than Rs. 5,000 was instituted in the Court of the Subordinate Judge who decreed it *ex parte* and dismissed an application by the defendant for re-hearing under Order IX, rule 13, Civil Procedure Code. The defendant preferred an appeal to the District Judge against the order dismissing his application under Order IX, rule 13. The parties did not raise any objection as to the jurisdiction of the District Judge, who decreed the appeal:

Held, (1) that under section 21, clause (*a*) of the Bengal, N. W. P. and Assam Civil Courts Act, the District Judge had no jurisdiction to entertain the appeal and his order was a nullity; [p. 920, col. 2.]

(2) that the fact that the plaintiff did not raise any objection as to jurisdiction in the appeal did not estop him from raising it before the High Court, inasmuch as where there is an inherent want of jurisdiction, the consent of parties cannot confer jurisdiction and objection can be taken at any time. [p. 921, col. 1.]

Where a Court has no inherent jurisdiction to try a case it cannot pronounce any decree and if it does pronounce a decree that decree is null and void. On the other hand, if a Court has jurisdiction and the law requires some preliminary conditions to be observed ancillary to such jurisdiction being exercised, the parties may waive these conditions and in that event the jurisdiction cannot be impeached on the ground of irregularity in the exercise of the Court's jurisdiction. [p. 920, col. 2.]

Application against an order of the District Judge, Monghyr, dated the 25th June 1917, setting aside that of the Additional Subordinate Judge, Monghyr, dated the 14th April 1917.

Mr. *Purnendu Narain Singh*, R. B., for the Petitioners.

Mr. *Abani Bhushan Mukerji* for Mr. *Muhammad Mustafa Khan*, for the Opposite Party.

JUDGMENT.

ATKINSON, J.—This application comes before us in revision seeking to set aside the order of the District Judge of Monghyr, dated the 25th of June 1917. The facts out of which this application arises are that the plaintiffs, the petitioners before us, instituted a suit for recovery of money due on foot of a mortgage-bond, dated the 13th of September 1904; and for the purposes of Court-fee the suit was valued by the plaintiffs at Rs. 5,992-3-5. The case came on for hearing and was decreed *ex parte*. An application was then made by the defendants to set aside the *ex parte* decree under Order IX, rule 13 of the Code of Civil Procedure. The learned Subordinate Judge declined to set aside the *ex parte* decree and from that order there was an appeal to the District Judge. It is contended before us that the learned District Judge had no jurisdiction to entertain the appeal by virtue of the provisions of section 21, clause (*a*) of the Civil Courts Act of 1887. That section provides that a District Judge shall have jurisdiction in first appeal where the value of the suit appealed from does not exceed Rs. 5,000. Here, it is conceded that the value of the suit exceeds Rs 5,000 and is nearly Rs. 6,000. Thus it is contended that the order of the learned District Judge is a nullity and is void. With that view we agree; and that view is amply supported by authority. The authorities may shortly be summarized to be that where a Court has no inherent jurisdiction to try a case it cannot pronounce any decree and if it does pronounce a decree that decree is null and void. On the other hand, if a Court has jurisdiction and the law requires some preliminary conditions to be observed ancillary to such jurisdiction being exercised, the parties may waive these conditions and in that event the jurisdiction cannot be impeached on the ground of irregularity in the exercise of the Court's jurisdiction. The learned Vakil appearing on behalf of the petitioners has referred us to the case of *Ledgard* v. *Bull* (1) and at page 203 their Lordships of the Privy Council say: "When the Judge has no inherent jurisdiction over the subject matter of a suit, the parties cannot by mutual consent convert it into a proper judicial process although they may constitute the Judge their arbiter and be bound by his decision on the merits when these are submitted to him." I think that what their Lordships mean to lay down is

(1) 9 A. 191; 13 I. A. 134; 4 Sar. P. C. J. 741; 5 Ind. Dec. (N. S.) 561.

that where the parties agree to submit their differences to a particular person who has no jurisdiction as a Judge that then they are bound by the decision of that arbiter to whom they submit for determination the matter in dispute between them. But where a Court has no inherent jurisdiction the consent of parties cannot give jurisdiction. That proposition has never been denied. The learned Vakil for the defendants has endeavoured to argue that the plaintiffs, not having raised the question of jurisdiction before the learned District Judge when the application was before him, are estopped from doing so at this stage. In my opinion, there is no foundation for, or substance in, this argument. I think that at page 384 of the latest edition of Woodroffe's Code of Civil Procedure a correct summary of the law is to be found, where it is stated as follows:—

"A party can only appeal when so allowed by Statute; and it is only the Court to which jurisdiction is given to entertain an appeal in a particular matter which can determine it. And where there is inherent incompetency in a Court, it has been held that objection can be taken at any time and that consent cannot confer jurisdiction".

Two cases have been referred to by the learned Vakil for the defendant. One is *Jose Antonio Barreto v. Francisco Antonio Rodrigues* (2). That case is clearly distinguishable on its facts, because in that case the learned Judges were not dealing with the general proposition of law with which we are concerned. The only question in that case was as to the determination of the market value of a certain property for the purposes of establishing jurisdiction and it was held that as neither party raised any question as to want of jurisdiction on the part of the Court which tried the case, they must be taken to have admitted that the market value of the property in suit was below Rs. 5,000. That case was essentially different from the present case. The second case relied upon by the learned Vakil for the defendant is *Dayaram Jagjivan* v. *Govardhandas Dayaram* (3). That case seems to be a very strong case because the learned Judges there admitted that the Court had no jurisdiction; but they declined to interfere on the ground that the plaintiff to whom relief was granted by the lower Appellate Court would, if the application was allowed, be obliged to bring a suit to establish the right which he claimed to the property in dispute after the expiry of the period of limitation within which he was entitled to bring that suit. I cannot follow the reasoning of the judgment of the learned Judges in that case. It seems to me to be quite inconsistent with the principles laid down in the Civil Procedure Code. In my opinion, the learned District Judge in the case with which we are dealing had no inherent jurisdiction to hear the appeal and that his judgment is, therefore, illegal and must be set aside. I would, therefore, allow this application and set aside the order of the learned Judge, dated the 25th of June 1917. There will be no order as to costs.

CHAPMAN, J.—I agree.

Application allowed.

(2) 7 Ind. Cas. 950; 35 B. 24; 12 Bom. L. R. 712.
(3) 28 B. 458; 6 Bom. L. R. 462.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1929 OF 1915.

February 13, 1918.

Present:—Mr. Justice Richardson and Mr. Justice Walmsley.

KHETRA NATH MANDAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

MAHOMED ALLA RAKHA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Evidence Act (I of 1872), s. 35—Evidence, admissibility of—Certified copies of papers of partition under Regulation XIX of 1814, whether admissible.

Certified copies of the papers in the Collectorate, which *prima facie* appear to be the record of a partition made in a proceeding under Regulation XIX of 1814 between the predecessors of the parties to a suit, are good and admissible evidence, quite apart from anything contained in section 35 of the Evidence Act. [p. 923, col. 1.]

Appeal against the decree of the District Judge, Birbhum, dated the 28th

April 1915, reversing that of the Munsif, 1st Court at Rampurhat, dated the 26th March 1914.

Dr. *Dwarka Nath Mitter* and Babu *Debendra Nath Mandal*, for the Appellants.

Babus *Ram Chandra Majumdar* and *Nagendra Nath Ghosh*, for the Respondents.

JUDGMENT.

RICHARDSON, J.—This second appeal is preferred by the defendants in a suit in ejectment. The suit relates to a tank claimed by the plaintiffs as appertaining to an estate No. 718 of the Birbhum Collectorate, their title to which as *patnidars* has now been conclusively established. As to the question of limitation, there are materials on the record to support the District Judge's finding that the plaintiffs' predecessor-in-interest was in possession of the tank within 12 years of the institution of the suit. That finding, therefore, is also conclusive.

The only question for our consideration is whether the learned District Judge's further finding that this disputed tank does in fact appertain to Estate No. 718 does or does not rest on evidence which is admissible in law.

It is common ground that in the year 1852 there was a partition of the lands common to four revenue paying estates of which the present Estate No. 718 was one. The partition was carried out, as the parties also agree, under Regulation XIX of 1814. That Regulation related to the partition of estates paying revenue to Government. The law on the subject is now contained in the Estates Partition Act of 1897 (Bengal Act V of 1897) which superseded and repealed a previous Act of the year 1876.

In dealing with this part of the case, the District Judge has founded himself mainly, if not entirely, on certified copies of certain *chittas* and a map produced by the plaintiffs. The learned Pleader for the defendants contends that those papers are not evidence and are not within section 35 of the Evidence Act. In support of that contention he has cited the cases of *Perma Roy* v. *Kishen Roy* (1) and *Nanda Lal Pathak* v. *Chanurpat Das* (2). The latter of these two cases rests on the former and that case again rests on the earlier case of *Mohi Chowdhry* v. *Dhiro Misrain* (3).

In all three cases the papers were apparently papers prepared by a Government official in the course of proceedings taken under the Act of 1876. In none of the cases, however, did the question arise in a contest between rival claimants to the Zemindari or proprietary title.

In *Mohi Chaudhry's case* (3) the question was the amount of rent payable by a tenant whose name appeared in the *batwara* papers. In *Perma Roy's case* (1) the contesting parties were rival tenants and in *Nanda Lal Pathak's case* (2) they were landlords and persons claiming possession under a rent-free title.

The distinction to which I have adverted between cases in which the parties to the dispute are parties claiming under the partition and other cases is clearly vital. Reference may be made to *Gopal Chunder Shaha* v. *Madhub Chunder Saha* (4) which was decided in 1873. There again the contest was between persons claiming as tenants and it was said: "The *batwara* was between the Zemindars: it is not binding in any way upon the *raiyats*, and any statements made in the *batwara chittas* are no evidence as against the parties to this suit."

It may be observed in passing that the law has been differently and more broadly laid down under the Act of 1897. In *Janki Dobey* v. *Kirtarath Roy* (5) it was held that *batwara* papers were admissible in evidence for the purpose of proving the amount of rent payable by a tenant. No express reference is made to section 35 of the Evidence Act, but stress is laid on the similarity of the procedure prescribed by Chapter VI to the procedure laid down in the Bengal Tenancy Act for the preparation of a Record of Rights.

In the present case the controversy arises between persons claiming as proprietors or standing in the shoes of the

(1) 25 C. 90; 13 Ind. Dec. (N. S.) 61.
(2) 18 Ind. Cas. 143; 17 C. L. J. 462; 17 C. W. N. 779.
(3) 6 C. L. R. 139.
(4) 21 W. R. 29.
(5) 4 Ind. Cas. 316; 13 C. W. N. 93.

proprietors. The proceedings under the Regulation were proceedings to which admittedly the plaintiffs' predecessor-in-interest and the defendants' predecessor-in-interest were parties. The *chittas* are not signed, but the map to which they relate purports to be signed by a Deputy Collector and the words which follow his name imply that he was attached to the western Survey Division. According to the procedure laid down in the Regulation, the division of the common lands among the different estates was first to be made by an Amin on the spot. The Amin was to prepare certain papers and transmit them to the Collector under section 18 Under section 19, the Collector was required to examine the papers submitted by the Amin and after hearing the parties to draw out a paper of partition. He was then to give the parties 5 days within which to make objections. If no objections were made (and there is no suggestion that any were made in this case) the next step was to put the parties in provisional possession of the lands attached to them respectively. The paper of partition was then to be forwarded to the Board of Revenue or to the Board of Commissioners for confirmation.

It is said that the documents produced may be merely the *chittas* and map prepared by the Amin on the shop, but that is hardly consistent with the signature of the Deputy Collector on the map, to which the *chittas* are an index. Then it is said that it is not shown that the partition was confirmed by any superior Revenue Authority. Lapse of time, however, and the absence of any dispute at the time requiring settlement by such authority may account for the order of confirmation not being forthcoming.

The copies produced are copies of papers in the Collectorate. The map is authenticated by a Deputy Collector. *Prima facie* the papers appear to me to be the record of the partition which was in fact made and made in a proceeding between the predecessors-in interest of the present parties. If so the certified copies produced are good and admissible evidence, quite apart from anything in section 35 of the Evidence Act.

The Commissioner appointed to make a local enquiry reported that according to the map in question the tank was included within Estate No. 718 and that report has been adopted by the learned District Judge.

In my opinion the appeal must be dismissed with costs.

WALMSLEY, J.—I agree.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL No. 25 OF 1916.

March 13, 1918.

Present:—Sir Daniel Twomey, KT., Chief Judge, and Mr. Justice Maung Kin.

U AWBATHA—APPELLANT

versus

U THU DATHANA AND OTHERS—RESPONDENTS.

Buddhist Ecclesiastical Law, questions of, decision of—Vinaya—Atthagatha.

Questions of Buddhist Ecclesiastical Law which come before the Civil Courts must be determined not merely by the canonical text of the Vinaya, *i. e.*, the Palidaw, but the Atthagatha and other commentaries must also be considered and the provisions of the Dhammathats should also be taken into account as throwing a valuable light on the established custom of the country. [p. 923, col. 2.]

Mr. *Wiltshire*, for the Appellant.

Mr. *May Oung*, for the Respondents.

JUDGMENT.—It is agreed in this case that the decrees of the lower Courts must be set aside and that the case must be remanded to the District Court in view of the decision of the Full Bench in Civil Reference No. 1 of 1916. According to that decision it is clear that questions of Buddhist Ecclesiastical Law which come before the Civil Courts must be determined not merely by the canonical text of the Vinaya, *i.e.*, the Palidaw, but that the Atthagatha and other commentaries must also be considered and the provisions of the Dhammathats should also be taken into account as throwing a valuable light on the established custom of the country. The Upper Burma ruling *Nga Po Thin* v. *U Thi Hla* (1),

(1) 23 Ind. Cas. 157; U. B. R. (1910-13) I, 183; 7 Bur. L. T. 27.

on which the judgments of the lower Courts are based, proceeded entirely on the canonical texts, and the decision of the learned Additional Judicial Commissioner as to a gift by a monk of a monastery and site requires re-consideration in the light of Civil Reference No. 1 of 1916.

The decrees of the lower Courts are set aside and the suit is remanded to the District Court for disposal in accordance with the above remarks under Order XLI, rule 23. The District Judge will re-determine the preliminary issue and any other questions of Buddhist Ecclesiastical Law that arise in this case, paying regard to the commentaries and Dhammathats as well as the canonical text of the Vinaya.

A certificate will be granted for the refund of the Court-fee on the memorandum of appeal under section 13, Court Fees Act.

Costs of this appeal will follow the final result.

Case remanded.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 186 OF 1915.

January 30, 1918.

Present:—Sir Henry Rattigan, KT., Chief Judge, and Mr. Justice LeRossignol.

MUHAMMAD YAR AND OTHERS—PLAINTIFFS —APPELLANTS

versus

Malik UMAR HAYAT KHAN AND OTHERS —RESPONDENTS.

Custom—Succession—Sister and sister's son—Gondals of Deowal, Tahsil Bhera, District Shahpur.

Among Gondals of Mauza Deowal, Tehsil Bhera, District Shahpur, a sister succeeds to the property left by her brother in the absence of his collaterals. [p. 925, col. 2.]

It is too broad and sweeping a proposition that a sister and a sister's son cannot under any circumstances be regarded as heirs to property in cases governed by the general customary law of the province. The onus is on them to prove their right of succession as against near and possibly even remote collaterals, but in the absence of any agnatic heirs, their right to succeed is preferable to the rights of the proprietary body or Government, especially in villages which are not homogeneous and are composed of proprietors belonging to different religions, different castes and different tribes. [p. 925, col. 2.]

First appeal from the decree of the Senior Subordinate Judge, Shahpur, at Sargodha, dated the 23rd of November 1914, decreeing the claim on payment of Rs. 10,830-8-0.

Mr. *Mukand Lal Puri*, for the Appellants.

Mr. *NanakChand* and Lala *Madan Chand*, for the Respondents.

JUDGMENT.—On the 1st May 1913. Ziada Gondal sold 439 *kanals* of land, together with the site of a dilapidated house situated in Mouza Deowal, Tahsil Bhera, to Malik Muhammad Umar Hayat Khan for Rs. 12,000, the sale-deed being duly registered on 13th May 1913. On the 5th May 1914 one Palhu, a proprietor of Mauza Deowal, brought a suit against the vendor and the vendee for pre-emption of the property sold, basing his claim on his being a co-sharer in a joint holding and a proprietor in the village. He alleged that the price entered in the sale-deed had been entered *mala fide* and that the real market value was approximately Rs. 5,500.

On the 12th May 1914 *Musammat* Wallan, the sister of Ziada, and her son, Salehon, brought another suit for pre-emption and claimed that their right of pre-emption was superior to that of Palhu, inasmuch as their claim fell within section 15 (*a*) and (*b*) "*thirdly*" of the Punjab Pre-emption Act, 1913. They expressed their readiness to pay the full amount entered in the sale-deed. Palhu was impleaded as a defendant in the second suit and Salehon and *Musammat* Wallan were impleaded as defendants in Palhu's suit. Ziada admitted that he had received full consideration for the sale and the vendee acknowledged the rights of pre-emption both of Palhu and of Salehon and *Musammat* Wallan and he claimed that the full consideration for the sale had been paid to the vendor in good faith.

Palhu in his plaint, and in his written statement in answer to the suit by the rival pre-emptors, based his claim simply on the facts that he was a co-sharer and a proprietor in the village and he himself never alleged that he was collateral of the vendor. At a later stage of the proceedings, however, his Pleader on his behalf vaguely stated that he was a collateral though he could not state in what degree.

The Subordinate Judge by his order passed on the 5th November 1914 dismissed both suits on the ground that *Musammat* Wallan and Salehon had failed to prove

that they were by custom entitled to inherit the vendor's property and, therefore, could not claim the right to pre-empt the land in suit, while Palhu's claim was dismissed on the ground that he had failed to prove that he was a collateral. Immediately after pronouncing judgment the Subordinate Judge appended a "note" to the effect that he had omitted to consider Palhu's claim as a co-sharer. He, therefore, issued notice to the parties to show cause why the mistake made by him in his judgment should not be rectified. After hearing the parties the Subordinate Judge reviewed his previous judgment and on the 23rd November 1914 decided that Palhu had a right to pre-empt the land on the ground claimed by him. He thereafter found on issue No. 4 that Rs. 11,360 out of the total consideration of Rs. 12,000 had been duly proved to have been paid to the vendor but that as the whole amount had not been paid, it was necessary to consider the market value of the property. For this purpose he appointed a Pleader who lived near the village as local Commissioner, and the latter after inspecting the land and recording evidence reported that the market value of the land was Rs. 98 per *bigha*. Accepting this valuation and allowing Rs. 75 for the site of the house, the learned Subordinate Judge held the total amount payable by Palhu was Rs. 10,830-8-0. He accordingly dismissed the suit of *Musammat* Wallan and Salehon with costs and granted Palhu a decree for possession of the property conditional on his paying Rs. 10,830-8-0 to the vendor within one month, failing such payment the suit to stand dismissed with costs. He further directed that Palhu's costs should be borne by the vendor and the vendee equally and that the Rs. 140, which according to the sale-deed had to be paid to a previous mortgagee and which had not in fact been paid up to date, should be paid by Palhu. From this decree both the vendee and Salehon and *Musammat* Wallan have preferred appeals to this Court, making Palhu respondent in each case.

After hearing arguments by Messrs. Nanak Chand, Mukand Lal Puri and Madan Chand, we find ourselves unable to agree with the view taken by the Subordinate Judge as regards the claim of *Musammat* Wallan and her son, Salehon. It has been asserted, and is not denied, that with the possible exception of Palhu, there is no other collateral of Ziada in existence and Palhu's claim to be a collateral has in no sense been established. The pedigree table set out at page 4 of the printed paper-book in First Appeal No. 186 of 1915 makes it quite clear that Palhu's family is entirely distinct from Ziada's and that Palhu's father acquired property in the village by purchase after the settlement. We cannot assent to the broad and sweeping proposition that a sister and a sister's son cannot under any circumstances be regarded as heirs to property in cases governed by the general customary law of this province. No doubt the onus is on a sister or a sister's son to prove their right of succession as against near and possibly even remote collaterals, but in the absence of any agnatic heirs their rights to succeed appears to us to be preferable to the rights of the proprietary body or Government, especially in villages which are not homogeneous and are composed, as Mauza Deowal is, of proprietors belonging to different religions, different castes and different tribes. Our conclusions are supported by the remarks of Robertson and Maude, JJ., in *Sheran* v. *Musammat Sharman* (1) and of Chatterjee and Johnstone, JJ., in *Ballu* v. *Gur Dyal* (2). We accordingly hold in the peculiar circumstances of the present case that *Musammat* Wallan and her son would be entitled to inherit Ziada's property in the event of his decease and that they are consequently entitled to a right of pre-emption superior to that of Palhu. We, therefore, accept their appeal and reversing the decree of the Subordinate Judge we grant *Musammat* Wallan and Salehon a decree for possession of the property in suit on payment within three months from this date of the full consideration entered in the sale-deed, *viz.*, Rs. 12,000, they having expressed their willingness to pay that amount in full. In default of *Musammat* Wallan and Salehon paying the said amount within the time specified, Palhu will be entitled to pre-empt the land on payment of the said amount within six months from this date. We have directed that Palhu shall

(1) 117 P. R. 1901; 182 P. L. R. 1901.
(2) 95 P. R. 1905; 47 P. L. R. 1906.

pay the full amount of Rs. 12,000, because we are satisfied that the vendee actually paid the full consideration to the extent of Rs. 11,860 and that he undertook liability for the Rs. 140 due to the previous mortgagee. It is quite possible that by some arrangement between Ziada and the defendant's servants or agents the sum of Rs. 500 was allowed by Ziada to be retained by such servants or agents, but this fact cannot affect the question whether the vendee himself actually paid the vendor the full amount. Having regard to all the circumstances of the case we are of opinion that the parties may well be left to pay their own costs in this Court and we direct accordingly.

The result is that we accept the appeal of *Musammat* Wallan and Salehon and also the appeal of Malik Muhammad Umar Hayat Khan.

Appeal accepted.

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 153 OF 1916.

February 12, 1918.

Present:—Mr. Justice Ormond.

U ZAYANTA—PLAINTIFF—APPELLANT

versus

U NAGA—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 123—Gift—Registration—Buddhist Law, Burmese—Religious gift, whether requires registration.

Burmese Buddhist religious gifts are not exempted from the operation of section 123 of the Transfer of Property Act. Therefore, a gift or dedication of a Kyaung is not valid unless registered. [p. 927, col. 2; p. 928, col. 1.]

Mr. *May Oung*, for the Appellant.

Mr. *Villa*, for the Respondent.

JUDGMENT.

TWOMEY, C. J.—This was a suit for possession of a certain *pucca* Kyaung and site forming part of a Kyaungtaik at Moulmein. In paragraph No. 1 of the plaint the plaintiff claimed that the whole Kyaungtaik within the specified boundaries, known as Dammayon Kyaungtaik, belonged to him according to the Buddhist Ecclesiastical Law, in other words, he claimed the property as presiding Pongyi Taik-ok or Kyaung-ding in succession to the former Pongyi U Eindasara who is referred to in the proceedings as the leper Pongyi. U Eindasara died from 7 to 12 years before the suit, which was filed in July 1915. The plaintiff was a pupil of Eindasara and states that in 1263 *B. E.*, that is about 1901, U Eindasara went through the ceremony known as *dwithantaka* with him. The effect of this ceremony was to admit the plaintiff to joint ownership of the Kyaungtaik with U Eindasara, so that on U Eindasarar's death the plaintiff would become the sole Taik-ok. The plaintiff states that after he had succeeded U Eindasara on the latter's death he in turn admitted another Pongyi U Wunna to joint ownership with him by the *dawithantaka* method. He afterwards left U Wunna in sole charge and went to Rangoon to study. During his absence the *pucca* Kyaung building which had been begun in Eindasara's time was completed by the lay donors and these laymen dedicated it to U Wunna in the plaintiff's absence. Subsequently while the plaintiff was still absent from Moulmein, U Wunna discarded the yellow robe and went into the world, but just before doing so he made over the newly built Pucca Kyaung to another Pongyi, namely, his uncle U Naga the defendant. When the plaintiff came back and tried to eject U Naga, the latter instituted proceedings under the Criminal Procedure Code and successfully resisted the plaintiff, who thereupon brought this suit against him for possession of the brick Kyaung.

Plaintiff's first witness U Athaba gives evidence as to the *dwithantaka* ceremony between Eindasara and the plaintiff Zayanta. The 2nd and 3rd witnesses give evidence as to the latter *dwithantaka* ceremony between Zayanta and Wunna.

The evidence shows that Eindasara presided over the Kyaungtaik up to his death. The actual Kyaung that he occupied, first by himself and afterwards with Zayanta, was a wooden building on the site of the Pucca building now in dispute and this wooden building has been removed and re-erected at another spot within the Kyaungdaik. The plaintiff says that this wooden building had been given to Eindasara by another Pongyi by a document, but there is no other evidence

on this point. Ma Hlaing, P. W. No. 4, an aged woman who was one of the supporters of the Kyaungtaik, states that when Eindasara died, the supporters telegraphed to Zayanta the plaintiff, who was then absent in Mandalay; that Zayanta then came and presided over the Kyaungtaik in succession to Eindasara and that no one raised any objection, but as Zayanta wanted to go away temporarily to continue his studies he invited another Pongyi Wunna to take charge of the Kyaungtaik in his absence. The defendant Naga's witness U Zarita also says that Eindasara was head Pongyi, *i. e.*, Taik-ok, and that afterwards the plaintiff "invited Wunna to come to the small Kyaung, *i. e.* the old wooden Kyaung and then went away." Subsequenty when the brick Kyaung was about to be dedicated "U Wunna went to Rangoon to call the plaintiff, *i. e.*, presumably for the purpose of receiving the dedication, but he refused to come." This witness admits having heard that Eindasara and the plaintiff had performed the *dwithantaka* ceremony and the defendant's witness No. 3 Mg. Po Te also states that Eindasara presided in the Kyaungtaik and that plaintiff presided after Eindasara's death.

The evidence as to the *dwithantaka* ceremony between Eindasara and Zayanta is not rebutted and there is no reason to disbelieve it, except that it was not relied upon by Zayanta or mentioned by him in the criminal proceedings under section 145, Code of Civil Procedure. But even apart from that alleged ceremony the fact that Zayanta succeeded Eindasara as presiding Pongyi of the Kyaungtaik appears even from the evidence of the defendant's own witnesses. It is shown by this evidence also that the defendant Naga's donor Wunna had originally come to the Kyaungtaik on the invitation of the plaintiff Zayanta and there is, therefore, all the more reason for believing the statements of the plaintiff and his witnesses as to the *dwithantaka* ceremony between Zayanta and Wunna.

It is proved that the brick building was dedicated to Wunna during Zayanta's absence without a registered document. The defendant Naga's claim rests on an unregistered document of transfer written by Wunna on the day he discarded the yellow robe. The transfer was invalid for want of a registered document. But though Naga's title is defective he is in possession and cannot be ejected unless the plaintiff is held to have proved his title. It is clear, however, that the plaintiff has proved it. Whatever may have been the effect of the two *dwithantaka* ceremonies, the evidence establishes that Zayanta became presiding Pongyi or Taik-ok in succession to Eindasara and in that capacity he obtained control over the whole Kyaungtaik. The brick Kyaung built within the Kyaungtaik was dedicated to Wunna but Wunna was either subordinate to Zayanta as Taik-ok or else he was joint owner with Zayanta by virtue of the *dwithantaka* ceremony. Wunna on discarding the yellow robe disappeared and his evidence was not forthcoming. Even if we assume that Wunna himself in whose name the brick Kyaung was dedicated could have resisted a claim by Zayanta for possession, it must be held that the defendant Naga who merely claims under an invalid transfer from this ex-Pongyi has no title to oppose to the plaintiff's claim as presiding Pongyi of the whole Kyaungtaik. But it must be observed that the gift of the brick Kyaung to Wunna by the lay builders also appears to have been inoperative for want of a registered instrument under section 123 of the Transfer of Property Act, which was in force in Moulmein at the time of the dedication.

The District Judge confused *dwithantaka* with *withathagaha* which have nothing in common except that they are both Pali words. He also lost sight of the fact that the plaintiff was claiming as presiding Pongyi of the whole Kyaungtaik and he, therefore, attached undue importance to the fact that neither the plaintiff nor his predecessor Eindasara had ever lived in the new brick building in suit. He treated the gift of the brick Kyaung to Wunna and the transfer by Wunna to the defendant Naga as valid transfers overlooking the absence in each case of a registered instrument. The District Court's decision is clearly wrong and I will set it aside and grant the plaintiff a decree for possession as prayed, with costs in both Courts.

BIBI KULSUM *v.* SYED MUHAMMAD HAMID.

The defendant should be ordered to pay to Government Rs. 630, namely, the amount of Court-fees which would have been paid by the plaintiff-appellant if he had not been permitted to sue and to appeal as a pauper.

ORMOND, J.—The evidence shows that the plaintiff was the head monk of the monastery after U Eindasara's death in 1907 or 1908. The Kyaung in dispute was completed in 1908 or 1909, after the death of Eindasara, and was dedicated to U Wunna who was then acting as head monk during the plaintiff's absence in Rangoon, and who was joint head monk with the plaintiff.

The plaintiff claims possession of the Kyaung by virtue of being the head monk and also under a *dwithantaka* made between himself and U Wunna. The defendant's title rests upon a gift of the Kyaung made to him by U Wunna in 1911 or 1912.

No gift of the Kyaung could be made until the Kyaung had been built. It was not completed until 1908 or 1909, *i. e.*, after section 123 of the Transfer of Property had been extended to Moulmein. Burmese Buddhist religious gifts are not excepted from the operation of that section and as none of the alleged gifts of this Kyaung were effected by a registered document, each of these gifts was void; namely, the gift or dedication of the Kyaung in favour of U Wunna by the lay donors, the gift of a joint share in the Kyaung by U Wunna to the plaintiff under *dwithantaka* and the gift of the Kyaung by U Wunna to the defendant.

U Wunna, therefore, acquired no title to the Kyaung, except as joint head monk with the plaintiff; and U Wunna had no right to hand over the Kyaung to the defendant without the plaintiff's consent.

The Kyaung, having been built on monastery land, must be taken to be an addition to the monastery property and the plaintiff as head monk of the monastery is entitled to possession. I concur in the order passed by the learned Chief Judge.

Order set aside.

PATNA HIGH COURT.

SECOND CIVIL APPEAL No. 159 OF 1918.

February 4, 1918.

Present:—Mr. Justice Roe.

Musammat BIBI KULSUM—PLAINTIFF—APPELLANT

versus

SYED MUHAMMAD HAMID AND OTHERS—DEFENDANTS—RESPONDENTS.

Court Fees Act (VII of 1870), s. 7, cl. (v) (a)—Suit for possession on basis of mokarrari *deed—Court-fee payable—*Mokarrari *lease, whether land*

A suit for possession of immoveable property on the basis of a *mokarrari* lease is purely one for possession of immoveable property within the meaning of section 7, clause (*v*) of the Court Fees Act. [p. 929, col. 1.]

A *mokarrari* lease of a definite share in a revenue-paying estate is land within the meaning of section 7, clause 5 of the Court Fees Act. [p. 929, col. 2.]

FACTS.—One Nurul Hasan was the proprietor of the entire 16-annas of Mouza Badrabad. He was the husband of *Musammat* Walihan, the mother of the plaintiff and the defendants Nos. 2 and 3. To satisfy a mortgage decree held by one Gouhar Ali against Badrabad, Nurul Hasan executed a perpetual Mokarrari deed on 22nd August 1892 in favour of *Musammat* Walihan in respect of the entire 16 annas of Badrabad and a share in another village and put her in possession of the property. In execution of a money decree against Nurul Hasan, the village Badrabad was subsequently sold and was purchased by Gouhar Ali. Gouhar Ali in his own turn sold the village to defendant No. 2, who mortgaged it to defendant No. 1. Defendant No. 1 having obtained a decree on the basis of his mortgage put Badrabrd to sale and purchased it and got delivery of possession on 22nd December 1914. The plaintiff, who was one of the heirs of *Musammat* Walihan, brought the present suit claiming the following reliefs:—

1. It may be declared that out of the entire 16 annas of Mouza Badrabad detailed at the foot of the plaint 5 annas 4 pies is the permanent Mokarrari interest of the plaintiff and that her possession over the said Mokarrari may be confirmed.

2. If in any way the plaintiff be considered or proved to be out of possession of the Mokarrari and defendant No. 1 be proved or considered to be in possession or if the plaintiff be dispossessed after the

institution of the suit the plaintiff may be put in possession of the subject-matter in dispute and defendant No. 1 or any other contesting defendant may be dispossessed and mesne profits may be awarded to the plaintiff.

The plaintiff valued the subject-matter in dispute at Rs. 1,025 for jurisdiction but paid Court-fees on ten times the Government Revenue. The trial Court as well as the District Judge dismissed the suit. The plaintiff preferred a second appeal in the High Court and paid the Court fees on ten times the Government Revenue as she had done in the Courts below.

The Stamp Reporter submitted that the suit was for a declaratory decree with a consequential relief and, therefore, *ad valorem* Court-fee should have been paid under section 7 (*iv*) (*c*) of the Court Fees Act. He relied on *Dinobundhoo Chowdhry* v. *Raj Mohinee Chowdhrain* (1), *Bohuroonissa Bibee* v. *Kureemoonissa Khatoon* (2), *Pirya Dos* v. *Vilayat Khan* (3). Besides, he submitted that the suit was one for possession of lease-hold property. Lease-hold property was not an estate within the meaning of section 7 (*v*). Therefore, the Court-fee payable was on the value of the subject-matter and not on ten times the Government Revenue. He relied on *Ram Ekbal Singh* v. *Baldeo Singh* (4).

The Taxing Officer agreed with the submission of the Stamp Reporter and referred the case to the Taxing Judge for decision.

Mr. *Muhammad Ishfaq*, for the Appellant.

ORDER.—I do not think any declaratory decree was necessary in this case. The suit is purely one for possession of immoveable property. The Mokarrari deed relied upon is merely the document of title on which the suit is based.

With regard to the second part of the reference the decision in *Ram Ekbal Singh* v. *Baldeo Singh* (4) and the two cases quoted in that decision, *Fursand Ali* v. *Mohanth Lal Suri* (5) and *Ram Raj Tewari* v. *Girnandan Bhagat* (6), are authority for the proposition that suits for occupancy rights and rights of Ryots holding at fixed rates do not come within the first clause of section 7, clause (*v*) of the Court Fees Act. *Habibul Hossein* v. *Mahomed Reza* (7) is authority for the proposition that a Mokarrari lease of a definite share in a revenue-paying estate is land within the meaning of this clause. With the latter decision I agree. The appeal may, therefore, be admitted as correctly stamped.

Order accordingly.

(1) 8 B. L. R. App. 32; 16 W. R. 213.
(2) 19 W. R. 17.
(3) 22 A. 384 at p. 386; A. W. N. (1900) 119; 9 Ind. Dec. (N. S.) 1291.
(4) 25 Ind. Cas. 567; 19 C. L. J. 418.
(5) 32 C. 268.
(6) 15 A. 63; A. W. N. (1892) 240; 7 Ind. Dec. (N. S.) 757.
(7) 8 C. 192; 10 C. L. R. 385; 4 Ind. Dec. (N. S.) 123.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1099 OF 1916.

April 19, 1918.

Present:—Mr. Justice Fletcher and Justice Sir Shamsul Huda, Kt.

GOBINDA HOTA AND ON HIS DEATH HIS HEIRS AND LEGAL REPRESENTATIVES—PRINCIPAL DEFENDANT No. 1—APPELLANTS

versus

KRISTAPADA SINGHA BABU AND OTHERS—RESPONDENTS.

Landlord and tenant—Accretion to tenancy by formation of chur *in river—Tenant, rights of—Bengal Alluvion and Diluvion Regulation* (XI *of* 1825), s. 4, *sub-s.* (4)—*Alluvion and diluvion.*

Lands which have gradually accreted to a *mukarrari* holding, forming a *chur* in a small shallow river cannot be claimed by the Zemindar as a portion of his *khas patit* but belong to the tenant subject to the payment of additional rent in respect thereof. [p. 930, col. 2.]

Appeal against the decree of the District Judge, Bankura, dated the 23rd of December 1915, modifying that of the Munsif, Khatra, dated the 7th of September 1917.

FACTS appear from the judgment.

Babu *Narendra Nath Chowdhury*, on behalf of the Appellant—The Court of first instance relied upon a decision in *Ramjan Ali* v. *Maharam Ali Khondkar* (1) and it was discussed by the learned District Judge in the Court of Appeal. But there is a Full Bench case in *Gourhari Kaiburto* v. *Bhola Kaiburto* (2), the facts in which are

(1) 26 Ind. Cas. 406.
(2) 21 C. 233; 10 Ind. Dec. (N. S.) 787 (F. B.).

exactly the same as here and the decision is in my favour. In Regulation XI of 1825, section 4, clause (4), in case of shallow rivers the bed is the property of individual proprietors and where *churs* are formed in the beds of such rivers, those can be occupied by proprietors of lands adjacent to them but in case of navigable rivers the bed belongs to the Government. Many conflicting rulings are set at rest by this Full Bench ruling. Referred to *Rajendra Nath Roy* v. *Nanda Lal Guha* (3).

Babu *Jogesh Chunder Roy* (with him Babu *Kshitish Chunder Neogy*), for the Respondents, contended that the preamble of the Regulation XI of 1825 says that this Regulation applies only to navigable rivers. All the cases which support the other side are not exactly to the point. The river always is the property of the landlord.

[FLETCHER, J.—Yes, but he will only get additional rent for the land thus formed.]

The question is where the river itself is admittedly the property of the landlord, whether section 4, clause (4), of Regulation XI of 1825 will apply in this case. I submit in such cases it does not apply. It is only in cases of navigable rivers where the bed belongs to the Government and not to private individuals that section 4, clause (4), of Regulation XI of 1825 applies and Mr. Justice Holmwood's view in *Ramjan Ali* v. *Maharam Ali Khondkar* (1) applies, but not to the present case where the river is shallow and admittedly the property of the owner. None of the cases referred to by my friend refer to non-navigable rivers.

JUDGMENT.

FLETCHER, J.—This is an appeal by the defendant No. 1 against the decision of the learned District Judge of Bankura, reversing the decision of the Munsif of Khatra. The plaintiff sued for possession of certain *chur* lands. The defence of the tenant, the defendant No. 1, was that these lands were gradual accretions to his holding and, therefore, although he might be liable to pay additional rent, the plaintiff was not entitled to eject him. The case in the lower Appellate Court quite clearly proceeded on the footing that the defendant No. 1 had got a Mukarrari holding. That is quite clear from the judgment of the learned District Judge. It is much too late now for the plaintiff to raise the case that the holding is not a Mukarrari one. He ought to have raised it when the case was decided in the Courts below. The real point is this: The learned Judge of the lower Appellate Court has found that these lands are gradual accretions to the lands of the defendant No. 1 forming a *chur* in a small and shallow river and, therefore, according to the learned Judge's view on the words of section 4, sub-section (4) of the Bengal Alluvion and Diluvion Regulation (Regulation XI of 1825), the defendant No. 1 was not entitled to the accreted lands, but the same formed a portion of the *khas patit* of the Zemindar. In support of that view the learned Judge relied on the decision of the Court of Holmwood and Chapman, JJ., in the case of *Ramjan Ali* v. *Maharam Ali Khondkar* (1). That case, in my opinion, is clearly opposed to the decision of the Full Bench of this Court in the case of *Gourhari Kaiburto* v. *Bhola Kaiburto* (2). We notice in the case decided by Holmwood and Chapman, JJ., that the Full Bench decision was not cited to them. It seems to be quite clear that the view that the learned Judges took of sub-section (4) of section 4 of Regulation XI of 1825, where it mentions that the *chur* thrown up in a small and shallow river should belong to the proprietor of the bed of the river subject to the provisions stated in the first clause of section 4, was that what was intended was not a protection only of the Government revenue, but that the Zemindar or the proprietor acquired the *chur* subject to the rights of the tenure-holders and the subordinate tenure-holders as mentioned in the first sub-section to section 4. I am unable to agree with the conclusion arrived at by the learned District Judge in this case. The appeal must, therefore, be allowed, the decree of the learned District Judge set aside and the decree passed by the Munsif restored with costs both here and in the Court of Appeal below.

SHAMSUL HUDA, J.—I agree.

Appeal allowed.

(3) 26 Ind. Cas. 977; 18 C.W.N. 1206; 19 C. L. J. 595.

HARDUM SINGH *v.* MG. PO HTU.

LOWER BURMA CHIEF COURT.
FIRST CIVIL APPEAL No. 36 OF 1917.
January 30, 1918.
Present:—Sir Daniel Twomey, KT., Chief Judge, and Mr. Justice Ormond.
HARDUM SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS
versus
MG. PO HTU AND ANOTHER—DEFENDANTS—RESPONDENTS.

Construction of document—Sale or mortgage—Consideration, non-payment of, effect of.

Where a document is in the form of an outright sale, the executant is precluded from showing that it is in fact a mortgage but he is entitled to show that the consideration has not been paid, and he is entitled to retain possession until the consideration is paid.

Mr. *Anklesaria*, for the Appellants.
Mr. *Doctor*, for the Respondents.

JUDGMENT.—By a registered deed of the 8th December 1915 the defendant conveyed to the plaintiff the land in suit for Rs. 5,450. The land was let out to tenants. The plaintiff sued for possession and for a declaration that he was the absolute owner. The defence was that the transaction of 8th December 1915 was a *benami* transaction entered into in order to defeat creditors of the defendant and that the defendant was entitled to rely upon that defence inasmuch as the fraud was not carried out.

Plaintiff in his plaint states that the consideration for this sale consisted of an undertaking to redeem a certain mortgage of Rs. 2,000 on this land, a payment of Rs. 1,620 made to the defendant personally on the 14th November 1915, two payments of Rs. 900, Rs. 630 respectively both made on the 2nd December 1915 at the request of the defendant to two judgment-creditors of his, and a payment of Rs. 300 on the 7th December in respect of interest due on the above mortgage, making in all Rs. 5,450. The payments of Rs. 900, Rs. 650 and Rs. 300 are admitted but the defendant states that he re-paid the Rs. 900 in the following Tabodwe through his tenants, one of whom says he gave 600 baskets to the plaintiff's son and the other 300 baskets. An issue was raised as to whether these items forming the consideration for the purchase were actually paid by the plaintiff. The District Judge found that Rs. 1,620 had not been paid. He also found that the defendant had not re-paid the Rs. 900. We agree with the District Judge in those findings. The evidence as to the re-payment of the Rs. 900 is extremely scanty and if the transaction of 8th December 1915 was in fact a mortgage, as the District Judge seems to think, it is improbable that the defendant would re-pay so soon after the mortgage was taken. On the other hand, if it was an outright sale there would be no debt to be re-paid. The document being in the from of an outright sale, the defendant is precluded from showing that it was in fact a mortgage, but he is entitled to show that the consideration has not been paid. The plaintiff states that the Rs. 1,620 was paid on the 14th November at a time when the defendant appears to have been under arrest for a debt, in which case the money could not have been paid at the plaintiff's house. The plaintiff says that on the 14th November the price of the land was arranged; he was to redeem the mortgage and to pay only the balance to the defendant and he paid this curious sum of Rs. 1,620 on that date, *i. e.*, long before he could possibly know the amounts that would be due under the decrees that he subsequently paid off for the defendant. The plaintiff took no receipt from the defendant for this alleged payment of Rs. 1,620 but he took the trouble to call three witnesses to testify to the payment. We think it very improbable that the plaintiff would have paid so large a sum without taking a receipt so long before the document was executed, and we agree with the District Judge in his comment as to the absence of the Thugyi and other respectable witnesses at the time of the alleged payment. We find as a fact that that payment was not made. The question then arises, should we in this appeal grant the plaintiff a decree postponing possession until he has paid the balance of the consideration.

Two cases have been cited as authorities to show that the seller is entitled to retain possession until the consideration is paid. These are *Umedmal Motiram* v. *Davu bin Dhondiba* (1) and *Subrahmania Ayyar* v.

(1) 2 B. 547; 3 Ind. Jur. 119; 1 Ind. Dec. (N. s.) 787.

Poovan (2). It is true that defendant did not raise this question as an alternative defence but he does so in the memorandum of appeal. An issue was raised and determined as to whether these items forming the consideration had been paid, and seeing that those facts have been fully gone into and determined we think we should give such relief as is warranted by the facts proved.

The decree of the lower Court is modified and there will be a decree for the plaintiff for possession upon his paying Rs. 1,620 to the credit of the defendant into Court (District Court) within three months from this date.

The defendant did not raise the point in the lower Court on which his appeal has succeeded and, therefore, he is not entitled to costs on that amount. On the other hand the respondent has been successful in this appeal on the question of the transaction being *benami*. The respondent is, therefore, entitled to his costs to that extent in this appeal, *i.e.*, the difference between the value of the appeal and Rs. 1,620. The order as to the costs in the District Court will stand good.

Decree modified.

(2) 27 M. 28.

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 488 OF 1916.

April 26, 1918.

Present:—Mr. Justice Scott-Smith.

FIRM, RAM GOPAL-KANHIA LAL—PLAINTIFFS—PETITIONERS

versus

NARAIN DAS AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. V, r. 15, O. XXX, r. 3—Munim, *whether a member of family—Direction by Court to issue notice to party and his Pleader—Service on party's* munim, *whether sufficient.*

A *munim* is not a member of the family of his employer within the meaning of Order V, rule 15, Civil Procedure Code [p. 932, col. 2; p. 933, col. 1.]

In a suit for recovery of money the Court directed that notice should issue to the parties and their Pleaders that they should attend on a certain date. It appeared that no notice was served on the plaintiff's Pleader, but one was served upon the *munim* of the plaintiff's firm. The plaintiff not having appeared on the date fixed the suit was dismissed in default:

Held, that inasmuch as the Court actually directed that the notices should be served upon the plaintiffs themselves as well as upon their Pleaders, the service on the *munim*, even if he was the person having the control or management of the plaintiff's business, was not sufficient and that the Court had no power to dismiss the suit for default. [p. 933, col. 1.]

Petition, for revision of the order of the Additional District Judge, Delhi, dated the 25th February 1916, affirming that of the Subordinate Judge, 2nd Class, Delhi, dated the 15th December 1915, rejecting application for restoration of the case dismissed in default on 5th October 1915.

Lala *Moti Sagar*, R. S., for the Petitioners.

Lala *Rama Nand*, for Mr. *Haq Nawaz*, for the Respondents.

JUDGMENT.—The plaintiffs-petitioners' suit was dismissed in default on the 5th October 1915 in the presence of the defendants' Counsel. An application for restoration of the case to the pending file was rejected and an appeal to the District Judge from this order of rejection having been dismissed, the plaintiffs have come up to this Court on the revision side.

It is urged on their behalf that when the case was transferred from the Court of the Munsif to that of the Subordinate Judge, they received no intimation of the date fixed by the Subordinate Judge for proceeding with it. It appears that on the 11th August 1915 the Court directed that notice should issue to the parties and their Pleaders that they should attend on the 5th of October. No notice was served on plaintiffs' Pleader but one was served upon the *munim* of plaintiffs' firm. It is contended on behalf of the petitioners that a *munim* is not a recognised agent within the meaning of Order III, rule 2, Civil Procedure Code. Even if he was a manager of the plaintiffs' business, he would not be his recognised agent within the meaning of clause (*b*) of rule (2), because the plaintiffs themselves reside in Delhi, *i. e.*, within the local limits of the jurisdiction of the Court. Order V, which deals with the issue and service of summons, is also referred to and it is pointed out that a summons directed to a person cannot be served upon his *munim* and that a *munim* is not a member of the family within

the meaning of Order V, rule 15. This contention is correct. But on behalf of the respondents it is contended that the plaintiffs are a firm and that the provisions of Order XXX, rule 3, Civil Procedure Code, as to the service of summons apply. Rule 3 provides that where persons are sued as partners in the name of their firm, the summons shall be served either:—

(*a*) Upon any one or more of the partners, or (*b*) at the principal place at which the partnership business is carried on within British India upon any person having, at the time of service, the control or management of the partnership business there, as the Court may direct.

In my opinion the service on the *munim*, even if he was the person having the control or management of the partnership business in Delhi, was not sufficient, because the Court actually directed that the notices should be served upon the plaintiffs themselves as well as upon their Pleader. The lower Appellate Court says: "It is extraordinary that an application should have been made next day to restore the case if plaintiffs had no notice." The reason why an application was made on the next day has been satisfactorily explained in an affidavit filed in this Court by the plaintiffs' Pleader. I must hold that plaintiffs were never served in accordance with law with notice that the case would be heard on the 5th of October 1915.

I, therefore, allow the revision, and set aside the order of the lower Courts, rejecting plaintiffs' application and also the order of dismissal of the 5th of October 1915, and direct that the first Court shall proceed with the trial of the case in accordance with law. Costs in this Court and the lower Appellate Court will be costs in the case.

Revision allowed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1354 OF 1916.

April 19, 1918.

Present:—Mr. Justice Fletcher and Justice Sir Shamsul Huda, Kt.

JAGAN NATH MARWARI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

EAST INDIAN RAILWAY COMPANY—DEFENDANT—RESPONDENT.

Carriage of goods—Railway Company, whether bound to re-weigh goods and give certificate of shortage—Consignee's refusal to take delivery—Damage to goods after refusal, liability for.

A Railway Company is not bound to re-weigh the goods and give a certificate of shortage on the demand of the consignee. If the consignee refuses to take delivery on the Company declining to re-weigh the goods and give a certificate of shortage, the goods remain at his risk so that any deterioration or damage caused to the goods after the date of his refusal to take delivery falls on him. [p. 934, cols. 1 & 2.]

Appeal against the decree of the District Judge, Burdwan, dated the 18th of March 1916, reversing that of the Subordinate Judge, 2nd Court of that District, dated the 7th of December 1914.

FACTS appear from the judgment.

Babu *Surendra Nath Ghosal*, on behalf of the Appellants.—The goods having been booked at railway risk the Company is bound to recoup me, the consignee, for the loss caused by its wilful negligence on account of the damage for shortage in weight caused by the delay of the Company's servant in weighing the goods and giving delivery. And all these have been found by the trial Court. The question is, can the Company give me less than the price that I am entitled to get. Plaintiffs claimed re-weighing on their own scales but this was refused. The Railway Company was bound to re-weigh the goods under these circumstances as has been held in several cases of this Court, or at least they must give us a certificate of shortage. *Janki Das* v. *Bengal Nagpur Railway Company* (1) and *Ramjash Agarwala* v. *Indian General Navigation and Ry. Co., Ltd.* (2) were cited.

Mr. *Langford James* (with him Babu *Ambica Pado Chowdhury*), for the Respondent, urged that under those decisions the Company could not be called upon to re-weigh

(1) 13 Ind. Cas. 509; 16 C. W. N. 356; 15 C. L. J. 211.

(2) 41 Ind. Cas. 387; 22 C. W. N. 310.

the goods. Those two cases cited rather go against my friend instead of helping him. Even in cases of railway risk, the Company is not bound to re-weigh. The plaintiff refused to take delivery in proper time and as such he was in default and the case being so, the goods were at his risk and he and he alone is liable for any loss or damage to the goods after that date. The Company cannot be liable for the loss or damage.

JUDGMENT.

FLETCHER, J.—This is an appeal by the plaintiff against the decision of the learned District Judge of Burdwan, dated the 18th March 1916, reversing the decision of the learned Subordinate Judge of the same place. The plaintiff sued to recover damages for breach by the defendant Railway Company of a contract to carry and deliver to him certain bags of grain. The goods were admittedly consigned to the Company and they arrived at the destination and apparently five bags were found in a stack in a torn condition. Thereupon, the plaintiff set up the case that he was entitled to have the goods re-weighed and to receive a certificate of shortage, and apparently he set up the case that he was entitled to have the goods re-weighed on his scales and not on the weighbridge of the defendant Company. The defendant Company through their servants refused to assent to the demands of the plaintiff. Thereupon, the plaintiff refused to take delivery and the goods were left in the custody of the Railway Company. After sometime, having served proper notices, the Railway Company sold the goods by auction and having deducted their charges paid the balance into Court to the credit of the plaintiff. The first point that the plaintiff must establish in a case like this is that the Railway Company committed a breach of their contract by refusing to have the goods re-weighed and to give a certificate of shortage in the manner demanded by the plaintiff. No authority has been given to us by the plaintiff showing that the Railway Company were under a liability to re-weigh the goods or to give a certificate of shortage. On the other hand, two cases have been cited to us that are exactly in point, namely, the case of *Janki Das* v. *Bengal Nagpur Railway Company* (1) and the case of *Ramjash Agarwala* v. *Indian General Navigation and Railway Co. Ltd.* (2), a very recent decision of Chatterjee and Newbould, JJ. Both these cases decide that the Railway Company is not under a liability to re-weigh the goods or to give a certificate of shortage. If that is so, then, when the plaintiff refused to take delivery except these conditions were complied with, he was in default and both under the terms of the contract and under the terms of the general law, the plaintiff being in default, the goods were at his risk and any deterioration or damage suffered to the goods after that date fell on the plaintiff. That being so, it is quite clear that the plaintiff cannot sue to recover damages for that loss. The case, to my mind, is clearly covered by authority.

It has been suggested by the Railway Company in their cross-appeal that the evidence does not support a partial award of damages that has been made by the learned Judge and that the only amount that the plaintiff can recover on the facts established in this case is the actual amount for which the goods were sold less the Company's charges for warehousing, and costs of sale and other similar matters. The Railway Campany, however, at our suggestion, have not pressed their cross-appeal and we, therefore, need not consider whether the award made by the learned District Judge can or ought to be reduced. The plaintiff, in my opinion, having regard to the decisions of this Court, has not been able to establish that the railway administration is liable for any larger amount than that awarded by the lower Appellate Court. The present appeal, therefore, fails and must be dismissed. The cross-appeal is also dismissed. We make no order as to costs either in the appeal or in the cross-appeal.

SHAMSUL HUDA, J.—I agree.

Appeal dismissed.

LOWER BURMA CHIEF COURT.

MISCELLANEOUS CIVIL APPEAL No. 24 OF 1917.

January 21, 1918.

Present:—Sir Daniel Twomey, KT., Chief Judge, and Mr. Justice Ormond.

SHWE YIN—APPELLANT

versus

MA ON AND ANOTHER—RESPONDENTS.

Probate and Administration Act (V of 1881), s. 23—Letters of Administration, grant of—Rival applicants—Procedure.

Where rival applicants apply for Letters of Administration one of whom is admittedly entitled to a share in the estate under section 23 of the Probate and Administration Act and the status of the others is disputed, the Court should grant Letters of Administration to the heir whose status is admitted.

Mr. *J. R. Das*, for the Appellant.

Mr. *N. N. Burjorjee*, for the Respondents.

JUDGMENT.—The appellant, Ma Shwe Yin, applied for Letters of Administration to the estate of Maung Win Pan deceased, on the ground that she was his widow. The respondents Ma On and Maung Tin also applied for Letters of Administration—jointly—as the legal representatives of Ma Me who was the second wife of the deceased Win Pan, and who had survived him but had since died. Ma On is the mother and Maung Ba Tin is the brother of Ma Me. The status of Ma Shwe Yin was disputed but the status of Ma Me was admitted. The learned Judge of the original side found that the appellant had not proved that she was the wife of the deceased Win Pan and he granted Letters of Administration to Ma On under section 41 of the Probate and Administration Act.

Mr. Das for the appellant asks us to go into the evidence and to grant Letters of Administration to Ma Shwe Yin as the widow of the deceased Win Pan. The case of *Ma Tok* v. *Ma Thi* (1) lays down that where two rival applicants apply for Letters of Administration one of whom is admittedly entitled to a share in the estate under section 23 of the Probate and Administration Act and the status of the other is disputed, the Court should grant Letters of Administration to the heir whose status is admitted. In the present case Ma Me was admittedly entitled to a share in the estate as a lesser wife. If Ma Me's legal representatives as such apply for Letters of Administration to the estate of the person to whom Ma Me was an heir, we see no reason why they should not stand in the shoes of Ma Me. This is the rule adopted under English Law, on the ground that the grant of Letters should follow the interest. See Williams on Executor, 10th Edition, page 322 and *Gill, In re* (2) Ma Me lived in her husband's house and, therefore, lived separately from, and was not dependent on, her mother Ma On. Ma On and Maung Ba Tin in their application stated that they were the sole heirs of Ma Me and that fact was not denied. But under the Privy Council ruling in *Ma Nhin Bwin* v. *U Shwe Gone* (3) Maung Ba Tin, the 2nd respondent, would be Ma Me's sole heir and he alone, therefore, represents her estate. We see no reason why the principle enunciated in Ma Tok's case should not be applied in the present case and Letters of Administration granted to the 2nd respondent as standing in the shoes of Ma Me and as her legal representative.

The learned Judge on the original side does not explain why he thought it necessary or convenient to proceed under section 41 of the Act. No reason appears for not granting Letters to the person entitled under section 23, namely, Ba Tin.

We vary the order by cancelling the grant of Letters of Administration to Ma On and grant them to the 2nd respondent Ba Tin. There will be no order as to costs.

Order varied.

(1) 3 Ind. Cas. 719; 5 L. B. R. 78.

(2) (1828) 1 Hagg. Ecc. 341; 162 E. R. 606.

(3) 23 Ind. Cas. 433; 8 L. B. R. 1; 16 Bom. L. R. 377; (1914) M. W. N. 449; 27 M. L. J. 41; 18 C. W. N. 1121; 16 M. L. T. 142; 7 Bur. L. T. 105; 20 C. L. J. 264; 41 C. 887; 1 L. W. 914; 41 I. A. 121 (P. C.).

PUNJAB CHIEF COURT.

MISCELLANEOUS SECOND CIVIL APPEAL No. 701 OF 1917.

May 8, 1918.

Present:—Sir Henry Rattigan, KT., Chief Judge.

JESA RAM AND ANOTHER—DEFENDANTS—APPELLANTS

versus

MEHR CHAND—PLAINTIFF AND ANOTHER—DEFENDANT—RESPONDENTS.

Punjab Pre-emption Act (I of 1913), ss. 19, 20—

JESA RAM v. MEHR CHAND.

Notice to pre-emptor not specifying property to be sold or its price, whether valid—Omission of pre-emptor to reply to notice—Suit, whether maintainable.

In a suit for possession by pre-emption, it appeared that the vendor on the 12th June 1913 applied to the Court stating that he proposed to sell certain property and praying that action be taken under section 19 of the Punjab Pre-emption Act and notices issued to the persons entitled to pre-empt. The Court issued the notices, but in those notices there was no mention of the actual property to be sold or of the price at which it was to be sold. The notices were served on the 16th June 1913 and the 1st of July was fixed for the appearance in Court of the persons to whom they were issued. On that date plaintiff appeared and protested that the notice had not given him all the requisite information. Thereupon the Court handed over to him for perusal the original application of the vendor and on the same day he filed certain pleas with regard to the price, etc. The hearing was adjourned to the 21st of July and on that date to the 11th of August, when a further postponement to the 12th of November was ordered. On that date the Court recorded an order to the effect that none of the parties was present, that the three months' limitation had expired and that the proceedings should, therefore, be filed. On the 9th June 1914 the vendor sold the land and the plaintiff instituted his suit on the 8th June 1915:

Held, (1) that under the circumstances there was sufficient notice of the sale given to the plaintiff within the meaning and for the purposes of section 19 of the Pre-emption Act but that on the other hand the plaintiff had failed to prove that he had complied with the provisions of section 20; [p. 937, col. 1.]

(2) that the right of pre-emption had been extinguished before the suit was instituted and the plaintiff was, therefore, not entitled to any relief. [p. 937, col. 1.]

Miscellaneous second appeal from the order of the Additional District Judge, Multan at Dera Ghazi Khan, dated the 30th/31st January 1917, reversing that of the Subordinate Judge, Muzaffargarh, dated the 12th January 1916, and remanding the case to the first Court for re-trial.

Bakhshi *Tek Chand*, for the Appellants.

Lalas *Hargopal* and *Rajindar Parshad*, for the Respondents.

JUDGMENT.—On the 12th June 1913 Mr. Van Milder applied to the Court under section 19 of the Punjab Pre-emption Act, stating that he proposed to sell certain specified property for a sum of Rs. 5,000 and that there were some seven persons entitled to a right of pre emption in respect of such sale. In this application he prayed the Court to take action under section 19 of the Act and issue notice to the said persons. The Court issued notices accordingly, but in those notices there was no mention of the actual property to be sold or of the price at which it was to be sold. The notices were served on the 16th June 1913, and the 1st of July was fixed for the appearance in the Court of the persons to whom the notices were addressed. On the 1st July the present plaintiff, Mehr Chand, who is admittedly one of the persons having a right of pre-emption, appeared in Court and protested that the notice had not given him information either as to the property to be sold or as to the price, and it would appear from the record that the Court thereupon must have handed over to him for perusal the application filed by Mr. Van Milder, as on the same day the plaintiff filed certain pleas in which reference is made to the property, the price and other details set forth in the application. In these pleas the plaintiff asserted that the price fixed, namely, Rs. 5,000 was excessive and that the true market value was Rs. 1,000. The Court adjourned further proceedings to the 21st July and on the latter date to the 11th August, when further postponement to the 12th November was ordered. On the last mentioned date the Court recorded an order to the effect that none of the parties was present and that the three months' limitation had expired and that the proceedings should, therefore, be filed. On the 9th June 1914 Mr. Van Milder sold the land in question to Seth Jesa Ram and Seth Lurind Chand for Rs. 3,500 and on the 8th June 1915 plaintiff instituted the present suit for pre-emption.

It is contended by the vendee that plaintiff has lost his right of pre-emption by failure to comply with the provisions of section 20 of the Punjab Pre-emption Act. This contention was upheld by the Subordinate Judge, but was overruled on appeal by the District Judge on the ground that plaintiff had substantially complied with the provisions of section 20, inasmuch as on the 1st July 1913 he had announced in Court and in the vendor's presence his intention to assert his pre-emptive right. He accordingly remanded the case for trial on the remaining issues. The vendee has appealed from this decision and I have heard Mr. Tek Chand on his behalf and Mr. Hargopal on behalf of the plaintiff-respondent. The first objection urged by Mr. Tek Chand was that the plaint had not been sufficiently stamped for the purposes of the Court Fees Act, but I

overruled this objection as it appears to me that the Court-fee stamp is sufficient under the provisions of section 7 (*v*) of the Court Fees Act, 1870.

There can be no doubt that the decision of the District Judge under appeal is erroneous, inasmuch as there is nothing on the record to shew that on the 1st July 1913 plaintiff announced in Court and in the presence of the vendor his intention to exercise his rights of pre emption. All that we know from the record is that the plaintiff sometime that day filed his written pleas in the Court, but there is nothing to shew that the vendor had those pleas brought to his notice or even that he was present when they were filed. Such being the facts it is not necessary for me to decide whether, had the facts been as stated by the District Judge, there would have been a sufficient compliance with the provisions of section 20. On behalf of the respondent, however, it is contended that the notices issued through the Court at the instance of the vendor were themselves materially defective, inasmuch as they did not mention the property to be sold or the price at which it was proposed to sell it and in this connection reliance is placed on *Amir Chand* v. *Amar Singh* (1). Mr. Tek Chand for the vendee admits that the notices in themselves were defective, but points out that the plaintiff pre-emptor was duly notified on the 1st July 1913 of all the necessary facts when he appeared in Court on that date and was shewn the copy of the application filed by the plaintiff. As I have already stated, it is obvious that the plaintiff must have been shewn this application on the 1st July and that it must have been the Court which shewed it to him. In the circumstances I think there was sufficient notice given to the plaintiff within the meaning and for the purposes of section 19 of the Act, but that, on the other hand, plaintiff-respondent has failed to prove that he duly complied with the provisions of section 20 The right of pre-emption had, therefore, been extinguished before the present suit was instituted.

I accordingly accept the appeal and setting aside the order of the District Judge I dismiss plaintiff's suit with costs throughout.

Appeal accepted.

(1) 41 Ind. Cas. 266; 53 P. R. 1917; 115 P. W. R. 1917.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 1181 OF 1916.

April 16, 1918.

Present :—Mr. Justice Fletcher and Justice Sir Syed Shamsul Huda, Kt.

GIRISH CHANDRA MITRA—PLAINTIFF—APPELLANT

versus

GIRIBALA DEBI, WIDOW OF ADYA CHARAN MUKHOPADHYA, AND OTHERS—DEFENDANTS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885 B. C.), Sch. III, Art. 3—Dispossession of tenant by landlord—Limitation for suit to recover possession of holding—Recognition of ryot's interest in holding, effect of.

After the dispossession of a *ryot* by some of the co-sharer landlords, his right to redeem the holding was recognised by the Court in a mortgage suit by another of the co-sharer landlords:

Held, that such recognition by the Court did not extend the period of two years' limitation which the *raiyat* had under Article 3, Schedule III, of the Bengal Tenancy Act for bringing a suit for recovery of possession of the holding [p. 938, col. 1.]

Appeal against the decree of the District Judge, Birbhoom, dated the 16th of February 1916, reversing that of the Munsif, Suri, dated the 18th of January 1915.

FACTS appear from the judgment.

Babu *Samatul Chunder Dutt* (with him Babu *Jyotish Chunder Sirkar*), for the Appellant.—It is laid down in *Sheikh Sarfuddin Mandul* v. *Chandra Mani Gupta* (1) that where the landlord recognises the tenant's interest within two years of the suit limitation is saved.

I rely upon the recognition in the mortgage suit by Rajubala who is a 4 annas landlord. There was a previous mortgage suit by Giribala with which I am not concerned.

[FLETCHER, J.—You were dispossessed by defendants Nos. 2 and 3 more than two

(1) 5 C. W. N. 405.

years ago as landlords. Then where do you get recognition?]

I get it from the recognition of my right to redeem the mortgage in the mortgage suit of Rajubala, a co-sharer landlord. The redemption suit is an acknowledgment of my title and hence limitation is saved under Schedule III, Article 3 of the Bengal Tenancy Act.

Babu *Biraj Mohan Mozumdar* and Babu *Bankim Chunder Mukherjee* for Babu *Manmatha Nath Mukherjee* and Babu *Debendra Nath Mandal* for Babu *Sarat Chunder De*, for the Repondents, were not called upon.

JUDGMENT.—This is an appeal by the plaintiff against the decision of the learned District Judge of Birbhum dated the 16th February 1916 reversing the decision of the Munsif at Suri. The plaintiff sued to recover possession on the ground that he had the right as a tenant. The story of the title is a complicated one. Amongst the defendants-landlords are the defendants Nos. 2 and 3, and it has been found as a fact in this case that the defendants Nos. 2 and 3 dispossessed the plaintiff more than two years prior to the institution of the suit. Therefore, the suit is barred by limitation under Article 3 of Schedule III to the Bengal Tenancy Act. It is said that that is not so, because in this case the landlords recognized the interest of the plaintiff as being a subsisting interest, and the manner in which it is said that the landlords recognized the interest of the plaintiff is this: That, in a mortgage suit by one Rajubala, another of the co-sharer landlords, the Court recognized that the plaintiff had a right to redeem the property. That is not a recognition by the landlord. You may call it a recognition by the Judge. It is not suggested that a recognition by the Judge extends the period of limitation under the provisions of the Bengal Tenancy Act. The case is clearly concluded by the finding of fact that the plaintiff, even if he had the right as a tenant, was out of time in bringing the present action. The present appeal, therefore, fails and is dismissed with costs. The two sets of respondents who have appeared are entitled each to a separate set of costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 902 OF 1917.

May 3, 1918.

Present:—Mr. Justice Scott Smith.

HAYAT MUHAMMAD—DEFENDANT—APPELLANT

versus

MAHMUD - PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Tenancy Act (XVI of 1887), s. 59—Occupancy rights, succession to—Burden of proof—Settlement record, entry in—Presumption of correctness.

M. son of *K.* claimed possession of certain occupancy land on the ground that he was the heir of one *S.* It appeared that in the Summary Settlement of 1853 one *K.* was entered as an *asami* of certain land in the same village, but *K.*'s name did not appear in the Regular Settlement of 1860 and *S.*, the uncle of the plaintiff, was found to be in possession of certain land which he stated he had reclaimed from *banjar* within the previous 15 years and was granted occupancy rights therein. On the death of *S.* the land was mutated in the name of his widow, the landlord allowing her to remain in possession for her lifetime:

Held, (1) that inasmuch as it was not proved that the land entered in the name of *S.* was the same as that entered in the name of *K.*, it could not be presumed to be the same; [p. 939, col. 1.]

(2) that a presumption of correctness attached to the entry in the Regular Settlement of 1860 and that *S.* having at that time been declared as having personally acquired occupancy rights in the land in suit, *K.* having had no part or share in bringing the land under cultivation, the plaintiff's suit was not maintainable; [p. 939, col. 2.]

(3) that presumption could not take the place of positive proof. [p. 939, col. 1.]

Second appeal from the decree of the District Judge, Jhelum, dated the 24th February 1917, reversing that of the Munsif, 1st Class, Jhelum, dated the 17th January 1917, dismissing the claim with costs.

Lala *Moti Sagar*, R. S., for the Appellant.

Mr. *Devi Dayal*, for the Respondents.

JUDGMENT.—In the suit out of which the present appeal arises Mahmud, son of Khwaja, claimed possession of certain occupancy land on the ground that he was the heir of Sharfu deceased. The main question at issue was whether the father of Mahmud occupied the land. The first Court found that he had not proved this and dismissed the suit. The lower Appellate Court on the contrary held that the presumption was that Khwaja did occupy the land and decreed the plaintiff's claim. Hayat Muhammad, one of the defendants-landlords, has filed a second appeal in this Court

and it is urged on his behalf that the lower Appellate Court was not justified in the presumption that Khwaja occupied the land and that there is no evidence on the record in support of the view that he did occupy it. It appears that in the Summary Settlement of 1853 one Khwaja son of Kamman was entered as an *asami* of 7 *bighas* 3 *kanals* 7 *marlas* of land in village Monan where the land in suit is situate. In the Regular Settlement of 1860 Khwaja's name does not appear at all, but Sharfu, the uncle of Mahmud plaintiff, was found to be in possession of 4 *ghumaons* 1 *kanal* 10 *marlas* of land, and he stated that he had re-claimed it from *banjar* within the previous 15 years. He was accordingly granted occupancy rights in this land. In 1886 upon Sharfu's death the land was mutated in the name of his widow, *Musammat* Afzal Bibi. A copy of the mutation on the record shows that the landlord did not admit that she was entitled to the occupancy rights but allowed her to remain in possession for her lifetime. It is not proved that the land which was entered in the name of Sharfu in the Regular Settlement of 1860 is the same as that which was entered in the name of Khwaja, son of Kamman, in the Summary Settlement. The District Judge presumed that it must have been the same. Now, granting for the sake of argument that the Khwaja, son of Kamman, whose name appears in the Summary Settlement, was the father of Mahmud, it cannot, in my opinion, be presumed that the land then occupied by him was the same land which we find to have been in Sharfu's possession at the time of the Regular Settlement in 1860. It is not proved to be the same, and presumption cannot take the place of positive proof, see *Atar Singh* v. *Thakar Singh* (1). It is quite possible that Khwaja may have abandoned the land of which he was in possession in 1853 and that Sharfu his brother was in possession of other land which was omitted to be entered in his name in the Summary Settlement. *Moula Baksh* v. *Gulsher Khan* (2) is referred to as authority for the proposition that the entries made at the Summary Settlement should be presumed to be true in the absence of any evidence or reason to discredit them, but all that was held in that case was that the evidence which the papers of the Summary Settlement supply is worth something and that the person who desires to upset an entry in the Summary Settlement records should be called upon to prove the entry wrong. Now, all that the entry in the Summary Settlement in the present case shows is that one Khwaja, son of Kamman, occupied a certain amount of land in 1853 but the entry did not show that the land was the same as that now in suit. On the other hand a presumption of correctness does attach to the entry in the Regular Settlement of 1860. At that time Sharfu was declared to be an occupancy tenant of the land now in suit, because he had himself re claimed it from *banjar* during the previous 15 years. I must hold then that Sharfu actually brought the land under cultivation and acquired the occupancy rights therein and that it is not proved that Khwaja had any part or share in doing so. Upon these findings the plaintiff's suit must be dismissed.

I, therefore, accept the appeal and setting aside the order of the lower Appellate Court, restore that of the first Court, dismissing the plaintiff's suit, and direct that he pay costs in all Courts.

Appeal accepted.

(2) 3 P. R. 1875.

(1) 6 Ind. Cas. 721; 42 P. R. 1910; 128 P. W. R. 1908; 35 C. 1039; 8 C. L. J. 859; 12 C. W. N. 1049; 10 Bom. L. R. 790; 18 M. L. J. 379; 4 M. L. T. 207; 35 I. A. 206 (P. C.).

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 56 OF 1915.

August 27, 1917.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Beachcroft.

SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—APPELLANT

versus

DIGAMBAR NANDA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Court Fees Act (VII of 1870), Sch. I, Art. 1—Cross.

SECRETARY OF STATE *v.* DIGAMBAR NANDA.

objections, memorandum of—Court-fee payable—Lease, construction of—Covenant for renewal.

A memorandum of cross-objections filed by a respondent must be properly valued and bear Court fees *ad valorem*. [p. 941, col. 1.]

A respondent who files a memorandum of cross-objections is not excused from the payment of Court-fees thereon, merely because the appellant has paid more than adequate Court-fees on the memorandum of appeal. [p. 941, col. 1.]

Where a lease granted by Government contained a clause to the following effect: "If you agree to pay the enhanced rent which will be fixed at the time of re-settlement in future, the Government will have the right to settle with you, and if you decline, with some other person:"

Held, that the clause in the lease embodied in essence a covenant for renewal under which the lessee became entitled to a fresh lease on the same terms as before, except as to the amount of rent and the covenant for renewal. [p. 940, col. 2.]

Appeal against the decree of the Subordinate Judge, Midnapore, dated the 15th November 1914.

Babu *Ram Charan Mitra*, for the Appellant.

Babus *Sib Chunder Palit* and *Kshirod Narayan Bhuiya*, for the Respondents.

JUDGMENT.—This is an appeal by the Secretary of State for India in Council from the decree in a suit instituted by the respondents to obtain a lease from Government in respect of an area of 18,510 *bighas* of land. The facts material for the determination of the questions raised before us are not in controversy. On the 13th May 1872 a settlement was made with Bholanath Nanda (predecessor of the plaintiffs), which was to continue from 1278 till the next measurement and settlement of rent. The settlement proceedings were completed about the year 1878, and on the 5th August 1878 a *patta* was granted to Bholantah Nanda for a term of (22) twenty two years from 1285 to 1305 at a progressive rate of rent. This lease contained a covenant in the following terms:—

"If you agree to pay the enhanced rent which will be fixed at the time of re-settlement in future, the Government will have the right to settle with you, and if you decline, with some other person."

The evidence shows that when the term of the lease came to an end in the year 1306 (1899-1900), settlement operations were still in progress, and, as a result, the lease was renewed for a term of one year only on the 28th May 1900; this lease contained a covenant in the same terms as the lease of the 5th August 1878. The tenancy was subsequently renewed from year to year, and the last of the series of annual leases was granted on the 6th January 1908. By the time that the term of this lease expired, the settlement operations had been concluded, and, on the 19th March 1909, the plaintiffs, (representatives of the original grantee) presented a petition to the Collector praying that the original lease might be renewed. On the 23rd March 1909 this application was rejected by the Collector, and his order was confirmed by the Commissioner on appeal. On the 15th December 1909 the Board of Revenue, however, reversed the order of the Commissioner, and directed that the petitioners should be offered a renewal of the lease, at enhanced rent, for one year only with effect from the 1st April 1910, the new lease not to contain a clause for renewal. The plaintiffs refused to accept a renewal of the tenancy on these terms, and instituted the present suit on the 30th May 1912. In the plaint, they prayed that the defendant might be directed to renew the lease of 1878 with a covenant for renewal or to execute a permanent lease. The Subordinate Judge has decreed the suit in part and has held that the plaintiffs are entitled to a lease for the period extending from the last Settlement up to the completion of the next periodical Settlement on the same terms as the lease of 1878 and at the rent assessed at the last Settlement minus a profit of 20 per cent., but that there will be no clause about renewal in the new lease. The Secretary of State for India in Council has appealed against the decree on the ground that the plaintiffs cannot claim a renewal of the lease as a matter of right and that the suit should have been entirely dismissed. The plaintiffs have, on the other hand, presented a memorandum of cross objections and have contended that they were entitled to a lease for twenty two years with a covenant for renewal, if not to a permanent lease. The memorandum of appeal by the Secretary of State was valued at Rs. 10,280 (that is, at the same figure as the original suit) and Court fees were paid *ad valorem* thereon; this could be justified only on the hypothesis that the relief granted to the plaintiffs was all that they sought in their plaint. The memorandum of cross-objections also was valued by the plaintiffs-respondents

at Rs. 10,280 (apparently on the assumption that the relief granted to them by the decree was entirely valueless) but no Court-fee was paid on the memorandum, on the ground that the Court-fee paid by the appellant fully covered the value of the suit. We ruled at the hearing of this appeal that the memorandum of cross-objections must be properly valued and Court fees paid thereon *ad valorem*. Order XLI, rule 22 (2) of the Civil Procedure Code, 1908, shows that a memorandum of cross-objections must conform to the requirements of Order XLI, rule 1, so far as they relate to the forms and contents of a memorandum of appeal, and Article 1 of Schedule I to the Indian Court Fees Act, 1870, as amended in 908, indicates that Court-fees must be paid on a memorandum of cross-objections precisely in the same manner as on a plaint in a suit or on a memorandum of appeal. It is thus impossible to sustain the view that a respondent who has presented a memorandum of cross-objections is excused from the payment of Court-fees thereon, merely because the appellant may have paid more than adequate Court-fees on the memorandum of appeal. In our opinion, it is incumbent upon the respondent to value the relief claimed by way of cross-objection and to pay Court-fees accordingly. This view is confirmed by the fact that under Order XLI, rule 22 (4), the cross-objection may be heard, even though the appeal is withdrawn or dismissed for default, which indicates that, under the present Code, the memorandum of cross-objections stands, for some purposes at least, in the same position as the memorandum of appeal. In conformity with this expression of our opinion, the respondents have valued their cross-objections at Rs. 5,000 and have paid the deficit Court-fees due. The appeal and cross-objections must consequently now be considered on the merits.

There can be no room for reasonable doubt that the clause in the lease set out above embodied in essence a covenant for renewal. In the absence of such a clause, the grantor would have been at liberty, on the expiry of the term of the lease, to settle the land on any terms with any person he might choose; hence, if the construction were accepted that the clause was intended merely to reserve liberty to the Government to make a re-settlement with the lessee at enhanced rent, it would be obviously superfluous. It is not necessary for our present purpose to determine, whether, notwithstanding this clause in the lease, the Government might not, on the expiry of the term, decide not to settle the lands with anybody. This much is plain that if the Government did decide to re-settle the lands, the first offer would have to be made to the settlement holder whose term had expired and a settlement would have to be made with him if he should agree to pay the enhanced rent; in other words, he had the option of refusal. In the case before us, the Revenue Authorities did actually decide that the land should be re settled, and, in this contingency, the plaintiff was entitled to have the land settled with him at the enhanced rent. The decisions of this Court in the cases of *Secretary of State* v. *Forbes* (1) and *Lani Mia* v. *Muhammad Easin Mia* (2) show that where there is a covenant for renewal, if the option does not state the terms of renewal, the new lease would be for the same period and on the same terms as the original lease in respect of all the essential conditions thereof, except as to the covenant for renewal itself. This view is in conformity with what is recognised as well-settled doctrine in England. Consequently in the case before us, immediately on the expiry of the lease of the 5th August 1878, the lessee became entitled to a fresh lease on the same terms as before, except as to the amount of rent and the covenant for renewal. No fresh grant, however, was made as we have seen, and the tenancy was renewed from year to year during a period of nine years. If nothing were known as to the reasons which moved the parties to adopt such a course, the inference might, perhaps, have been legitimately drawn that the lessee abandoned the right of the renewal which he possessed under the lease of the 5th August 1878. It is indisputable, however, that the tenancy was renewed from year to year, because the Settlement operations had not been completed and the amount of rent payable under the new arrangement had not yet been ascertained. The parties

(1) 17 Ind. Cas. 180; 16 C. L. J. 217.
(2) 33 Ind. Cas. 448; 20 C. W. N. 948.

plainly intended that the grant of the new lease should be postponed till the fresh settlement then in progress, had been completed. This is clear from the decision of the Board of Revenue given on the 15th December 1909; but the lease which was then offered to the plaintiffs was a lease for a term of one year only. In our opinion, the plaintiffs were not bound to accept the offer thus made. They were entitled to a renewal for the same period and on the same conditions as were to be found in the lease of the 5th August 1878, subject to the reservation that they were liable to pay the enhanced rent and could not claim the insertion of covenant for renewal in the new lease. This in substance is all that they are entitled to have in the present suit, and the Subordinate Judge has made a decree accordingly. But the plaintiffs and the defendant have both attacked this decree. The plaintiffs contend that they are entitled to a lease for 22 years with a covenant for renewal, that is, in substance, a lease in perpetuity though not at fixed rent. The defendant, on the other hand, contends that the suit should be dismissed as the plaintiffs are not entitled, as a matter of right, to a fresh lease at all. For the reasons already assigned, neither of these extreme views can be sustained on principle. On a true construction of the lease of the 5th August 1878, we hold that it was a grant to continue till the next Survey and Settlement proceedings which happened to follow the previous one at an interval of 22 years. In this view the plaintiffs are entitled now to a lease to continue till the completion of the next periodical Settlement, as the trial Court has decreed.

The result is that the appeal as well as the cross-objections must stand dismissed, and there will be no order for costs in this Court.

Appeal and cross-objections dismissed.

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL No. 32 OF 1917.

January 31, 1918.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Sadasiva Aiyar.

Hajee ISMAIL SAIT AND SONS—PLAINTIFFS—APPELLANTS

versus

WILSON & Co.—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 73, illus (a)—*Contract for delivery of goods—Breach—Market, absence of, at place of delivery—Goods not for sale but for use—Damages, measure of.*

The measure of damages in case of breach of a contract for delivery of goods, where there is no market at the place of delivery and where the goods are not to be re-sold but are intended only for the buyer's use, is that contained in illustration (*a*) to section 73 of the Contract Act, *i. e.*, the sum by which the contract price falls short of the price for which the purchaser might have obtained goods of like quality at the time when the goods ought to have been delivered. [p. 945, col. 1.]

Per *Sadasiva Aiyar, J.*—Section 73 of the Contract Act mentions two alternatives, the latter alternative being an additional right to be availed of at the plaintiff's option. [p. 945, col. 2.]

Illustration (*a*) to the section authoritatively interprets what the Legislature meant by the phrase 'loss or damage which naturally arose in the usual course of things from a breach of the contract' in a 'no-market' case also. The language of the illustration is absolutely general and wide and it makes no exception on account of special circumstances, such as (*a*) where the party complaining of the breach could get some other substitute for the goods ordered, (*b*) where he was made a gift of the articles as substitute on the day fixed for delivery and (*c*) where there was no market at all for the goods at the place of delivery. [p. 947, col. 2; p. 948, col. 1.]

Appeal from the judgment and decree of Mr. Justice Kumaraswami Sastri, dated the 21st March 1917, passed in the exercise of the Ordinary Original Civil Jurisdiction of this Court in Civil Suit No. 89 of 1916.

Mr. *D. Chamier* and Dr. *K. Pandalai* instructed by Messrs. *Short, Bewes & Co.*, for the Appellants.

Mr. *Nugent Grant* instructed by Messrs. *King* and *Partridge*, for the Respondents.

This Original Side Appeal coming on for hearing on the 5th and 6th December 1917, and having stood over for consideration till this day, the Court delivered the following

JUDGMENT.

WALLIS, C. J.—The plaintiffs in this case are a well-known firm carrying on business in Mysore and Madras. In 1913 they obtained from the Mysore Government the Abkari contract for Mysore and arranged with the defendants, who carry on business in Madras,

that they should go on importing molasses for them in the same way as they had done for the previous holders of the contract. Admittedly the goods contracted for were intended for use by the plaintiffs in their factories at Bangalore. Owing to the disorganization of shipping consequent on the outbreak of the war at the beginning of August 1914, the defendants were unable to ship 800 tons from Java in the month of October 1914 as they were bound to do under their contract. This was a breach of contract for which admittedly they are bound to compensate the plaintiffs in damages, and the main question argued before the learned Judge and before us is as to the measure of damages. The learned Judge awarded the plaintiffs only nominal damages on the ground that they had failed to put before him the proper materials for estimating the damages, and the plaintiffs have appealed.

The law as to this subject is to be found in section 73 of the Indian Contract Act and the explanation thereto. Under the body of the section the damages are to be those which naturally arise in the usual course of things from the breach which the parties knew when they made the contract to be likely to result from the breach. By the explanation, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account. The explanation is in accordance with the decisions in *Dunkirk Colliery Co.* v. *Lever* (1) and the decision of the House of Lords in *British Westinghouse Electric and Manufacturing Company* v. *Underground Electric Railways* (2). In that case Lord Haldane, L. C., observed: "The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach and debars him from claiming any part of the damage which is due to his neglect to take such steps."

The law was recently laid down to the same effect by the Judicial Committee in *Jamal* v. *Moolla Dawood Sons and Co.* (3). The rule that, where there is a market at the place of delivery, the damages are the difference between the contract price and the market price at the date of delivery may be regarded as an application of the principle embodied in the explanation that the buyer must take the necessary steps to minimize the damage. Where there is a market and the seller has no notice of any contract entered into by the buyer, the market price in the case of failure to deliver is the test by which to estimate the value of the goods, independently of any circumstances peculiar to the buyer and so independently of any contract made by him for sale of the goods. This is the rule in *Rodocanachi* v. *Milburn* (4), approved by the House of Lords in *Williams* v. *Agius* (5) and applied by the Judicial Committee under the Indian Contract Act in *Jamal* v. *Moolla Dawood Sons and Co.* (3). This is the rule in cases of non-delivery. It has recently been stated in the House of Lords that there is a difference where delivery is only delayed, but that is not the case here, and, also, we are bound by the terms of the Indian Contract Act.

When there is no market for the goods at the place of delivery, the buyer may procure a substitute at a higher cost if it is a reasonable and business-like thing to do and calculated to diminish the loss, and may recover the difference in price as damages from the seller. It has not yet been decided that he is bound to do so and apparently he may refrain from doing so and rely on his claim for damages. See the observations of Lord Atkinson in *Erie County Natural Gas and Fuel Company* v. *Carroll* (6). Where there is no market, Mr. Mayne says, "the principle upon which the damages are to be assessed is exactly the same. They are to be taken at the value of the article at the date of breach. But the mode of estimating this value is different, for there is no market price which can be quoted." Where the

(1) (1878) 9 Ch.D. 20 at p. 25; 39 L. T. 239; 26 W. R. 841.

(2) (1912) A. C. 673 at p. 689; 81 L. J. K. B. 1132; 107 L. T. 325; 56 S. J. 734.

(3) 31 Ind. Cas. 949, 43 C. 493; 20 C. W. N. 105; 30 M. L. J. 73; 14 A. L. J. 89; 19 M. L. T. 80; 3 L. W. 181; 23 C. L. J. 137; (1916) 1 M. W. N. 70; 18 Bom. L. R. 315; 9 Bur. L. T. 8 (P. C.).

(4) (1887) 18 Q. B. D. 67 at p. 77; 56 L. J. Q. B. 202; 56 L. T. 594; 35 W. R. 241; 6 Asp. M. C. 100.

(5) (1914) A. C. 510; 83 L. J. K. B. 715; 110 L. T. 865; 19 Com. Cas. 200; 58 S. J. 377; 30 T. L. R. 351.

(6) (1911) A. C. 105; 80 L. J. P. C. 59; 103 L. T. 678.

buyer was under a contract to re-sell, as in *Borries* v. *Hutchinson* (7) and *Hinde* v. *Liddell* (8), the re sale price is evidence of the value of the goods at the place and time of delivery as observed by Mr. Mayne, and as recently held in *Stroms, Bruks, Aktie Bolag* v. *Hutchison* (9), which approved the judgment of Blackburn, J., as he then was, in *O'Hanlan* v. *Great Western Railway Co.* (10), that the natural and fair measure of damages is the value of the goods at the time and place at which they ought to have been delivered to the owner, which I read as meaning the value of the goods to the owner of such goods at the time and place they ought to have been delivered. In that case also, the goods were intended for re-sale by the buyer.

Where, as in the present case, the article is purchased not for sale but for use to the knowledge of the sellers, Mr. Mayne observes, "damages will also be assessed with reference to its value to the purchaser. But its value will be determined by other considerations, that is to say, by the use for which it was intended, the loss which followed from its not being supplied, and the profit which would have been made out of it if it had been delivered in time." In *Portman* v. *Middleton* (11), where the defendant failed to deliver a fire box, the plaintiff recovered the price and the extra cost of procuring a substitute but not the special damages of which the defendant had no notice. In *Smeed* v. *Foord* (12) the defendant who had failed to supply on the due date a threshing machine was held liable for the deterioration of the wheat owing to its being stacked and injured by rain, as that was a natural consequence of the delay in supplying the machine according to the contract. In *Gee* v. *Lancashire and Yorkshire Railway Co.* (13), as I read it, all that was ruled was that it could not be held as a matter of law that the stoppage of the buyer's mills was a natural consequence of the seller's delay in delivering cotton under his contract. In *Elbinger Actien Gesellschaft* v. *Armstrong* (14) Blackburn, J., as he then was, delivering the judgment of the Court of Queen Bench observed that "where, from the nature of the article, there is no market in which it can be obtained, the rule as to the difference of contract and market prices is inapplicable," and the plaintiffs were allowed to retain the damages awarded them as to the reasonable results of the delay in delivery. We have not been referred to any case in which a different test was applied in the case of non-delivery as distinguished from late delivery of goods intended for use.

As regards goods intended for re-sale where there is no market price at the place of delivery, in *O'Hanlan* v. *Great Western Railway Co.* (10) (which was a case of non-delivery by a carrier, but that appears to make no difference), the value of the goods was arrived at by taking into account the wholesale price at the place of manufacture and adding to it the cost of carriage to the place of delivery and the profit which a hypothetical importer at the place of delivery might be expected to charge. This hypothetical market price is by no means so satisfactory a measure of damages as the real market price where it exists, and is only applicable in the absence of other evidence of value such as the price at which the buyer had contracted to re-sell. It is especially unsatisfactory in cases like the present, where it takes nearly a month from the date of order to procure the goods at the place of delivery. Logically, the price at the date when the goods would have had to be ordered so as to reach the place of delivery on the contract date would seem to be the price to be regarded, rather than the price at the contract date which the

(7) (1865) 18 C. B. (N. S.) 445; 34 L. J. C. P. 169; 11 L. T. 771; 11 Jur. (N. S.) 267; 13 W. R. 386; 144 E. R. 518; 144 R. R. 563.

(8) (1875) 10 Q. B. 265; 44 L. J. Q. B. 105; 32 L. T. 449; 23 W. R. 65.

(9) (1905) A. C. 515; 74 L. J. P. C. 130; 93 L. T. 562; 10 Asp. M. C. 138; 11 Com. Cas. 13; 21 T. L. R. 718.

(10) (1865) 6 B. & S. 484 at p. 491; 34 L. J. Q. B. 154; 12 L. T. 490; 11 Jur. (N. S.) 797; 13 W. R. 741; 122 E. R. 1274; 141 R. R. 482.

(11) (1858) 4 C. B. (N. S.) 322; 27 L. J. C. P. 231; 4 Jur. (N. S.) 689. 6 W. R. 598; 140 E. R. 1108; 31 L. T. (O. S.) 152; 114 R. R. 743.

(12) (1859) 1 E. & E. 602; 28 L. J. Q. B. 178; 5 Jur. (N. S.) 291; 7 W. R. 266; 120 E. R. 1035; 32 L. T. (O. S.) 314; 117 R. R. 365.

(13) (1860) 6 H. & N. 211; 30 L. J. Ex. 11; 6 Jur. (N. S.) 1118; 3 L. T. 328; 9 W. R. 103; 123 R. R. 465; 158 E. R. 87.

(14) (1874) 9 Q. B. 473; 43 L. J. Q. B. 211; 30 L. T. 871; 23 W. R. 127.

learned Judge has adopted; but, in the case of goods purchased for use, whichever date be taken, and whether in the present case the price be taken at Calcutta, or at Java, damages assessed on this basis bear no real relation to the buyer's actual loss, and as in the present case, give him heavy damages where he has sustained no real loss. I think, therefore, there is much to be said in favour of adopting Mr. Mayne's rule, and have felt considerable doubt on the question. In this Court, however, we are governed by the Indian Contract Act and illustration (*a*) to section 73 says that the measure of damages in this case is the sum by which the contract price falls short of the price for which the purchaser might have obtained goods of like quality at the time when they ought to be delivered.

On a careful consideration of the question, I have not found sufficient reason for refusing to follow the rule laid down in the illustration, which also appears from the latest edition of Sidgwick on Damages to be the accepted rule in America.

In the present case the learned Judge finds, and I entirely agree with him, that the plaintiffs sustained no actual loss from the defendants' failure to ship the October consignment, as they were admittedly well stocked. They might, therefore, without any prejudice to themselves have accepted the defendants' offers to ship the October consignment along with the November consignment, or their subsequent offer about the 29th November to forward it by an early shipment in December. These considerations, however, are inapplicable if the rule in illustration (*a*) is to be strictly applied, as I think it should be.

In arriving at the price for which the goods might have been obtained on the date of delivery, I entirely agree with the learned Judge that we should look *prima facie* at the cost of obtaining them from Java, and not from Calcutta which gets its supplies from Java, especially as the evidence is that the goods can be obtained as quickly from Java as from Calcutta. Obviously, the market price at Java would ordinarily be less than at Calcutta. It is quite clear that the shipping and insurance difficulties consequent on the outbreak of war in August 1914 must have caused an advance of the prices ruling in Java and Calcutta over those at which the plaintiffs purchased before the war. Exhibit G shows that the defendants were asking Rs. 2-9-0 per cwt., ex-war risk on the 29th October 1914, about the time when the hypothetical dealer in Madras might be expected to purchase the goods in Java to have them ready in Madras on the 29th November, which the learned Judge has fixed as the date of delivery in Madras. Though the plaintiffs have only tendered evidence as to the prices ruling in Calcutta, and the defendants have abstained from tendering any evidence on the subject, Mr. Chamier for the plaintiffs has put before us certain calculations from which he estimates the *c.i.f.* Java Madras price on November 29th at Rs. 2-8-7 per cwt. This figure he arrived at by deducting the freight to Calcutta, as spoken to in evidence, and adding the freight from Java to Madras, but these are not proved to have been the prevailing freights either at the end of October or of November 1914, and I agree with the learned Judge that the *c.i.f.* prices from Java are not accurately proved. I think, therefore, that Mr. Chamier is not entitled to judgment as claimed by him for Rs. 8,800 as the difference on 800 tons between Rs. 2-8-7 per cwt., his estimated *c.i.f.* price from Java on the 29th November, and the *c.i.f.* contract price of Rs. 1-15 6 plus Rs. 250 importer's profit and Rs. 33 lading charges, in all Rs. 9,083. On the other hand, looking at the evidence as a whole, and especially at Exhibit G-1, I think there is evidence from which I am justified in concluding that the hypothetical value of 800 tons in Madras at the end of November must have exceeded the *c.i.f.* contract price by not less than Rs. 5,000. It is very likely that the figure would be higher if all the evidence were before us, but we are agreed that that sum may safely be awarded on the evidence before us. I would accordingly allow the appeal and increase the damages to Rs. 5,000. The respondents will pay the costs of the appeal. The memorandum of objections is dismissed with costs.

SADASIVA AIYAR, J.—Plaintiffs are the appellants. The defendants under two contracts with the plaintiffs were bound to ship 800 tons of solid Java molasses in October 1914 at Java to arrive in Madras in November 1914, the plaintiffs to take

delivery at Madras paying Rs. 1-15-6 per cwt. The defendants failed to make the October shipment and thus committed breach of the contract. The plaintiffs sue for recovery of (*a*) Rs. 23,000, alleged to be the difference "between the contract price and the market price" of the 800 tons of molasses in November 1914 when the molasses ought to have been delivered at Madras by the defendants, and (*b*) Rs. 2,725-15-6, being the sum paid under protest by the plaintiffs to the defendants owing to the illegal detention by the defendants of some other shipments under the contract till that sum was paid to the defendants.

The learned Judge on the Original Side gave a decree for the Rs. 2,725-15-6 claimed under the heading (*b*) on account of the sum paid under protest, but gave only Rs. 100 as nominal damages in respect of the Rs. 23,000, damages claimed under heading (*a*). Hence the plaintiffs have appealed under the Letters Patent, the appeal being valued at Rs. 21,000 evidently because the plaintiffs' contention in appeal is that the learned Judge on the Original Side ought to have given them Rs. 21,100 as damages instead of only Rs. 100 under the heading (*a*).

As stated by my Lord in his judgment, the law as to this subject is to be found in the Indian Contract Act, section 73 and in the illustrations thereto. The plaintiffs are by the section entitled to have "compensation for the loss or damage caused" to them "by the breach, the loss or damage being such as *naturally* arose in the usual course of things from such breach or which the parties knew when they made the contract to be likely to result from the breach of it." Though there are 18 illustrations (*a*) to (*r*) appended to section 73, none of them refers in terms to a case where there is no market for the goods at the place of delivery mentioned in the contract. [Three of the illustrations namely (*e*), (*o*) and (*q*) expressly refer to "market price" as one of the essential ingredients to be considered in arriving at the damages.] If there was no illustration at all which could be reasonably held to govern the facts of this case and if the body of the section alone remained for consideration on the question of the amount of damages which the plaintiffs are entitled to, there seems much to be said in favour of the view that, as there is no market for the goods at the place of delivery, and as the pecuniary loss *naturally* flowing from such a breach cannot, therefore, be estimated with reference to the market price, the plaintiffs ought to prove that "damage" capable of calculation in some other reasonable manner *naturally* flowed and was sustained by them from such breach, or prove (the second alternative mentioned in section 73) that both themselves and the defendants knew that some other damage was likely to result from the breach of the contract and the amount of such damage. This latter alternative right is, in my opinion, given by the section only as an additional right to that given by the clause which gives compensation for "the loss or damage which naturally arose in the usual course of things" from such breach, such additional right to be availed of at the plaintiffs' option.

Assuming, as I said before, that none of the illustrations to the section throws any light on the dispute in this case in which there is no market for the goods at the place of delivery, I agree with my Lord that the plaintiffs have not proved that any loss or damage naturally arising in the usual course of things from the breach of the plaintiffs' contract has been caused to them, nor (in the alternative) any loss or damage which both parties knew when they made the contract to be likely to result from its breach.

The English cases [see *Hinde* v. *Liddell* (8) and *Elbinger Actien-Gesellschaft* v. *Armstrong* (14)] no doubt decide that in such a case (which we might shortly call "no-market case") the damages must be calculated on the basis of the value fixed by the price which would actually have to be paid for the best and nearest available substitute. Some of the English cases, if I may say so with respect, use the expression "market-value" in a loose manner and lay down that the market-value for the calculation of damages must be ascertained in particular modes where there is no market at all for the goods at the place of delivery. [See *Wertheim* v. *Chicoutimi Pulp Company* (15).]

(15) (1911) A. C. 301; 80 L. J. P. C. 91; 104 L. T. 226; 16 Com. Cas. 297.

ISMAIL SAIT & SONS *v.* WILSON & CO.

I agree with Mr. Justice Kumaraswami Sastri that the English and Indian cases do not lay down any inflexible rule that in estimating damages in "no-market" cases that "one has to go to the place which is nearest to the place where the breach occurred" and where there is a market. I agree with him that "it is not the nearest market that always governs but the place where, having regard to all the facts of a particular case, the plaintiff would without any material inconvenience to himself procure the goods in a manner that would throw the least amount of hardship on the other party." In the present case, it was to Java and not to Calcutta that the plaintiffs should have turned to, if they really wanted to procure molasses as a substitute for the molasses contracted for.

I further agree with Mr. Justice Kumaraswami Sastri that the fact that the plaintiffs did not make any purchase of molasses as a substitute for the molasses contracted for or that they have not proved that they suffered a pie of actual damages through the breach of contract does not disentitle them, if the English and American Law applies to this case, from recovering the difference between the Java price in October 1914 plus the cost of carriage to Madras and the contract price. As I said already, it may be a question whether, if the body of the section 73 stood alone, such a difference in a "no-market" case could be treated as loss or damages arising *naturally* from the breach. I shall take an extreme case, to illustrate what is in my mind, as extreme cases sometimes bring out clearly the principle in dispute. Suppose *A* at Madras wishes to bring up a wild animal found in Australia as a household pet; there being no market for such an animal at Madras, he enters into a contract with *B* of Australia through *B's* agent at Madras in March 1917 for delivery to him at Madras of the animal, the price to be Rs. 300 payable to *B's* agent at Madras on delivery in September 1917. *B* illegally repudiates the contract in July 1917 and thus commits a breach. If *A* had taken other steps in July or August 1917, he could have obtained a similar wild animal from Australia delivered at Madras in September at a cost of Rs. 500. *A* does not take any such steps but makes a demand for Rs. 200 as damages payable to him and he dies (say) 3 days after the date fixed for the delivery of the animal to him at Madras under the contract. *A's* son and heir *C* does not himself care to have any such animal as a pet. Is *C* entitled to recover Rs. 200 as damages from *B* for breach of the contract according to section 73 of the Contract Act? Section 73, as I said before, speaks of loss or damage which *naturally arose* from such breach, using the word 'arose' in the past tense. Can we say that Rs. 200 was the damage which had naturally arisen to *A* by his not having had a pet wild animal by him during the three days between the date fixed for delivery of the same under the contract and *A*'s death or to *A*'s son and heir by not having inherited a wild animal which he does not want? If, of course, he had tried to obtain a substitute and had obtained it at a cost of Rs. 500, the loss of Rs. 200 might be said to have naturally arisen. Apart from authority therefore and on the language of the body of the section 73 alone, I would be inclined to think that no damages at all can be claimed.

But I think illustration (*a*) to section 73 authoritatively interprets what the Legislature meant by the phrase "loss or damage which naturally arose in the usual course of things from a breach of the contract" in a "no-market" case also. That illustration is as follows: "(*a*) *A* contracts to sell and deliver 50 maunds of saltpetre to *B*, at a certain price to be paid on delivery. *A* breaks his promise. Is *B* entitled to receive from *A*, by way of compensation, the sum, if any, by which the contract price falls short of the price for which *B might have obtained* 50 maunds of saltpetre of like quality at the time when the saltpetre ought to have been delivered?" It will be seen that the language of the illustration is absolutely general and wide and it makes no exception on account of special circumstances like the following: (*a*) a case where *B* could have used some other substitute for the saltpetre, (*b*) a case where *B* was made a gift of 50 maunds of saltpetre as substitute on

the date fixed for delivery by *A*, (c) where there was no market at all for the saltpetere at the place of delivery. The law as stated in the illustration gives an unconditional right to *B* to get the difference between the contract price and the cost which he would have had to incur to obtain the like quantity of saltpetre with, of course, the least amount of hardship to *A*. I think this illustration is fully consistent with the English Law as laid down in the House of Lords case of *Wertheim* v. *Chicoutimi Pulp Co.* (15), though that case was a case of breach by late delivery and not a case of no delivery at all. So also in *Jugmohandas* v. *Nusserwanji* (16) Jenkins, C. J., and Chandavarkar, J., construe section 73 of the Contract Act similarly: "There was no ready market rate. We, therefore, must have recourse to some other test." And then the learned Judges consider all the facts including a statement prepared by the plaintiff himself in that case as to what he considered reasonable compensation from another party who committed a similar breach of contract with plaintiff. Where there are absolutely no materials put forward by the plaintiff to indicate what it would have cost him to obtain similar goods in the cheapest manner, it may be that only nominal damages would have to be allowed. But where there are some materials, the Court should, I think, as a Jury try to arrive at the cost at which the plaintiff could have got other similar goods for the contracted date of delivery and give him the difference, if any, between that and the contracted price. In the present case, we have got the facts that the defendants themselves wrote the letter Exhibit G in October 1914, wherein they offer to deliver molasses at Rs. 2-9-3 per cwt. in November. If we take that rate as the rate at which the plaintiffs would have been obliged to pay if they had attempted to obtain 800 tons or 16,000 cwts., as substitute for the molasses contracted for, then the damages which they would be entitled to would be 16,000 *into* Rs. 2-9-3 *minus* Rs. 1-15-6 (9 annas 9 pies) or Rs. 9,750. But it appears that the plaintiffs themselves considered the price Rs. 2-9-3 as too high a quotation and that the price of molasses was probably rising even between the beginning of October and the end of October at Java.

I might here remark that the plaintiffs might have let in evidence as to why they considered Rs. 2-9-3 as too high or what they considered as a fair price, and the defendants might also have let in evidence as to how they arrived at the figure Rs. 2-9-3 and what the real price was of molasses at Java and what, with the freight and reasonable commission to importers, the costs per cwt. would have come to when delivered at Madras. I, therefore, agree with my Lord that under the circumstances Rs. 5,000 must be taken as a reasonable amount to be awarded to the plaintiffs as damages in this case.

I would, in the result, allow the appeal to the extent of this amount of Rs. 5,000 minus Rs. 100, nominal damages allowed under this head by the learned trial Judge, with the costs of the appeal. The memorandum of objections is dismissed with costs.

M. C. P.

Appeal allowed.

(16) 26 B. 744; 4 Bom. L. R. 504.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1245 OF 1917.

April 16, 1918.

Present:—Mr. Justice Shah Din.

Musammat FAZAL NUR AND ANOTHER —PLAINTIFFS—APPELLANTS

versus

MUHAMMAD HASSAN—DEFENDANT—RESPONDENT.

Costs—Court exercising discretion in arbitrary manner—Appeal, second, whether maintainable.

Where a lower Appellate Court exercises its discretion as to the award of costs in an arbitrary manner and not according to judicial principles, a second appeal lies from its decree. [p. 949, col. 1.]

Plaintiff, a minor, sued through her brother as next friend for a declaration that she was not the lawfully wedded wife of the defendant and obtained a decree with costs, the Court holding that no valid marriage had taken place between the plaintiff and the defendant as alleged by the latter and that the plaintiff had never lived with the defendant as his wife. On appeal the District Judge, while agreeing with the lower Court on all points, held that the

defendant had been badly treated as the customary reparation for the abduction of his sister by plaintiff's brother had been denied to him and that therefore the plaintiff's next friend must pay the defendant's costs:

Held, that inasmuch as the defendant's allegations as to the alleged marriage had been found to be false, the District Judge's order as to costs was wholly unjustifiable and must be set aside.

Second appeal from the decree of the District Judge, Jhelum, dated the 16th January 1917, varying as to costs only that of the Senior Subordinate Judge, Jhelum, dated the 20th October 1916 decreeing the claim.

Dr. *Muhammad Iqbal*, for the Appellants.

Mr. *Badr-ud-Din* Kureshi, for the Respondent.

JUDGMENT.—This second appeal relates only to costs; and it is urged by the appellants' Counsel that since the District Judge has exercised his discretion as to the award of costs in an arbitrary manner and not according to judicial principles, a second appeal lies from his decree [*Daulat Ram* v. *Durga Prasad* (1), *Bhugobati Pal* v. *Mahomed Ali* (2) and *Ranchordas Vithaldas* v. *Bai Kasi* (3)]. The facts which are relevant to the question of costs are briefly these. The appellant, who is a minor, brought a suit through her brother as next friend for a declaration that she was not the lawfully married wife of the respondent. The Subordinate Judge who tried the suit gave her a decree with costs, holding that no valid marriage had taken place between the appellant and the respondent in 1902, as alleged by the latter, that the appellant had never lived with the respondent as his wife, and that the agreement of 1902 between the appellant's step-brother and the respondent by which the appellant, who was then only two years of age, was to be married to the respondent, a boy of eighteen years, was opposed to public policy and as such invalid. The District Judge while agreeing with the Subordinate Judge, on all points, has held that the respondent has been badly treated as the customary reparation for the abduction of his sister by the appellant's step-brother has been denied to him by the appellant's family, and that, herefore, the appellants' next friend must pay his costs. This is an entirely erroneous view of the situation. It is clear that the appellant was never married to the respondent, and yet in this litigation the respondent has set up a false claim to the effect that he is the husband of the appellant, that the appellant had lived with him as his wife for a great many years, and that she having attained puberty some years ago had ratified the marriage. These allegations have been found to be false ; and yet the District Judge has awarded costs to the respondent simply and solely because the appellant's step-brother did not give full reparation to the respondent for having abducted his sister in 1902.

It is clear that the District Judge's order as to costs is wholly unjustified and arbitrary. I accordingly accept this appeal and setting aside his decree as to costs restore that of the first Court.

Appeal accepted.

(1) 15 A. 333; A. W. N. (1893) 110; 7 Ind. Dec. (N. S.) 930.

(2) 7 C. W. N. 647.

(3) 16 B. 676; 8 Ind. Dec. (N. S.) 929.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1135 OF 1916.

October 25, 1917.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Napier.

TIRUMALAI MUTHUVEERA PARAMASIVA VENKITASAMI NAICKER —DEFENDANT No. 1—APPELLANT

versus

MUTHUSAMI PILLAI AND ANOTHER—PLAINTIFF AND DEFENDANT No. 2—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 72—Mortgage, usufructuary—Expenses of criminal litigation conducted by mortgagee to support title, whether chargeable on property—Suit for re-imbursement, maintainability of—Hindu Law—Guardianship—Step-mother, right of, to act as guardian of her step-son—Contract by guardian, whether chargeable on minor's estate.

It is open to doubt whether an expensive criminal litigation, conducted by a usufructuary mortgagee for the purpose of securing the conviction of persons who have reaped and carried away the crops on the mortgaged land, can be regarded as a proceeding necessary to support the mortgagor's title. [p. 950, col. 2.]

Where, however, the mortgagee acts as a prudent owner and at the request of the mortgagor and the proceedings are rendered necessary, he is entitled to be indemnified in respect of such expenses. [p. 951, col. 1.]

VENKITASAMI NAICKER v. MUTHUSAMI PILLAI.

In such an event the mortgagee has the right to add the amount so expended to the principal money and insist on its payment before redemption or sue separately for its recovery. [p. 951, col. 1.]

Section 72 of the Transfer of Property Act does not restrict the mortgagee's remedy to what is stated there. There is an independent cause of action for expenses incurred under any of the clauses of the section. [p. 952, col. 1.]

Bavanna v. *Balagurivi*, 9 M. L. J. 177, dissented from.

McEwan v. *Crombie*, (1884) 25 Ch. D. 175 at p. 177; 53 L. J. Ch. 24; 49 L. T. 499; 32 W. R. 115, explained and distinguished.

In the absence of nearer relations, a step-mother is, under the Hindu Law, entitled to act as the guardian of her step-son. [p. 952, col. 1.]

Maharanee Ram Bunsee Koonwaree v. *Maharanee Soobh Koonwaree*, 7 W. R. 321, not approved.

A Hindu guardian cannot enter into a transaction so as to charge the minor on attaining age with personal liability. [p. 952, col. 2.]

Waghela Rajsanji v. *Shekh Masludin*, 11 B. 551; 14 I. A. 89; 11 Ind. Jur. 315; 5 Sar. P. C. J. 16; 6 Ind. Dec. (N. S.) 364, followed.

Where a decree makes the minor personally liable on a contract by his guardian the Appellate Court has jurisdiction to amend and rectify it even in the absence of a memorandum of objections or cross-appeal on behalf of the minor. [p. 952, col. 2.]

The minor's liability, however, for debts properly incurred on his behalf by his guardian can be charged against his estate. [p. 953, col. 1.]

Second appeal against the decree of the Court of the Temporary Subordinate Judge, Madura, in Appeal Suit No. 10 of 1916, preferred against the decree of the Court of the Additional District Munsif, Dindigul, in Original Suit No. 324 of 1913.

Messrs. *K. Jagannadha Aiyar* and *K. Balamukunda Aiyar*, for the Appellant.

Mr. *A. Krishnasami Aiyar*, for the Respondents.

JUDGMENT.

SESHAGIRI AIYAR, J.—The plaintiff obtained a usufructuary mortgage from the father of the 1st defendant in 1906. He was in possession for three years. After that period, the tenants whom he had let into possession colluded with one Sekhomoni Ammal, a neighbouring Zemindarini, and carried away the crops on the land without paying the landlord's share. Thereupon, the plaintiff instituted criminal proceedings against the tenants and they were convicted. For the expenses incurred in conducting the criminal proceedings, the 2nd defendant, who is the step-mother of the 1st defendant, executed a document, which is styled a Varthamanam, in December 1909. The present suit is brought against both the defendants on that document. The 1st defendant denied the right of the 2nd defendant to be his guardian and contended that the criminal litigation was not conducted *bona fide* and that he is not liable for the expenses incurred. The District Munsif came to the conclusion that the criminal prosecution was not necessary for protecting the interest of either the mortgagor or the mortgagee, that the expenses incurred were not covered by any of the provisions of section 72 of the Transfer of Property Act, and that, under any circumstances, the plaintiff is not entitled to any decree against the 1st defendant who was a minor at the time of Exhibit A. He dismissed the suit. In appeal the Subordinate Judge differed from the District Munsif upon the question whether the criminal proceedings were necessary to protect the estate. His finding is that as Sekhomoni Ammal disputed the ownership of the defendants it was necessary to have conducted criminal proceedings in order to protect the estate. He also held that the document executed by the 2nd defendant was binding upon the 1st defendant. He gave a decree to the plaintiff for Rs. 800. The decree is personal and does not charge the property of the 1st defendant.

No serious attempt was made before us to impeach the finding of the Subordinate Judge that the expenses of the criminal prosecution were necessary. If we heard the case on the facts, we may not have come to the same conclusion as the lower Appellate Court has done. Under section 72, clause (*c*), of the Transfer of Property Act, the mortgagee in possession may add any moneys spent in supporting the mortgagor's title to the property. It is open to doubt whether an expensive criminal litigation carried on for the purpose of getting convicted certain persons who had reaped and carried away the crops on the land can be regarded as a proceeding necessary to support the title of the mortgagor. But, apparently the accussed were set up by a rival claimant, and it appears from the evidence that the 2nd defendant requested the plaintiff to take criminal proceedings to protect the 1st defendant's title to the property. As we said before, the matter has not been seriously argued before us, and we are not

prepared to differ from the Subordinate Judge on this point.

The further question is whether the expenses incurred were reasonable. The mortgagee in possession must act as a prudent owner. That is a question of fact, on which the Subordinate Judge has given a finding which has not been seriously attacked in this Court. We are bound by that finding. On these two findings there can be no doubt that the mortgagee is entitled to be indemnified in respect of the expenses incurred by him. The cases of *Godfrey* v. *Watson* (1), *Sandon* v. *Hooper* (2) and *Fenton* v. *Blackwood* (3) lay down this proposition in clear terms.

The next question is whether a separate suit is maintainable in respect of the expenses. Mr. Jagannadha Ayyar contended that the only remedy open to the mortgagee, who has spent money, under clauses (*a*) to (*e*) of section 72, is to add them to the moneys due under the mortgage and to insist upon being paid those sums before redemption, and not bring a separate suit. The language of section 72 is against this contention. The words are, "the mortgagee may, in the absence of a contract to the contrary, add such money to the principal money". It is a permissive provision and not an obligation imposed upon the mortgagee. As we read the section, it seems to us that the Legislature intended to give larger rights to the mortgagee than he would otherwise have. Every person who spends money for the benefit of another is entitled to sue for that money. The ordinary rules of contract would secure him that right. In the case of a mortgagee, the Legislature apparently intended to put him on a higher footing. He is given the liberty of adding the expended moneys to the amount of the mortgage, thereby securing to the moneys a charge upon the property. The use of the word *may* shows that it is an additional remedy conferred upon the mortgagee and that it is not the sole remedy. The learned Vakil for the appellant has been able to find a case which certainly supports him in his contention. In *Bavanna* v. *Balagurivi* (4) it was held by Justice Subramania Aiyar and Justice Boddam that the only right secured under section 72 is to add the amount to the mortgage money. This judgment has not been referred to or followed in any of the subsequent cases in this or any other High Court. With all respect to the learned Judges, we are unable to agree with their conclusions. There is no discussion of the section of the Act nor is there any citation of authorities in support of the proposition laid down by the learned Judges. Mr. Jagannatha Ayyar referred us to *McEwan* v. *Crombie* (5). One preliminary observation may be made as regards that case, and that is the learned Lord Justices had not to construe any Act of Parliament as we have to do. Lord Justice Cotton points out that the right of redemption is itself an indulgence granted to the mortgagor, and that he would not be allowed to exercise that right except on condition of paying the mortgagee any expenses which have been properly incurred. He adds that the mortgagee's right to bring actions for the debt is not permissible, because the condition imposed by a Court of Equity is not in the nature of a contract which can be independently enforced. As we understand the learned Lord Justice, he seems to have laid down that the Common Law Courts should not entertain an action for the debt due in a matter which is purely within the jurisdiction of the Chancery Court and which liability the Chancery Court is alone competent to impose as a condition of redemption. This principle can have no application to India. Having regard, as we said before, to the language of section 72 of the Transfer of Property Act, we are unable to agree with the contention that the only remedy open to the mortgagee is to insist upon being paid at the time of redemption. Moreover, in the present case, it cannot be said that there was no consideration for the bond given by the 2nd defendant to the plaintiff. Undoubtedly money has been spent on her behalf and apparently at her request, and I see no reason for holding that the bond

(1) (1747) 3 Atk. 517; 26 E. R. 1098.
(2) (1843) 6 Beav. 246; 12 L. J. Ch. 309; 49 E. R. 820; 63 R. R. 72.
(3) (1874) 5 P. C. 167; 22 W. R. 562.
(4) 9 M. L. J. 177.
(5) (1884) 25 Ch. D. 175 at p. 177; 53 L. J. Ch. 24; 49 L. T. 499; 32 W. R. 115.

sued on is not supported by consideration. The decision of the Allahabad High Court in *Imdad Hasan Khan* v. *Badri Prasad* (6) impliedly holds that there is an independent cause of action for expenses incurred under any of the clauses of section 72. We must, therefore, overrule this contention.

One other minor contention may be disposed of before dealing with the principal point argued in the case.

The learned Vakil for the appellant argued that, as the 2nd defendant is only the step-mother, she was not the natural guardian of the 1st defendant and, therefore, the bond will not bind him. The question was not very fully argued, and therefore we do not propose to express any definite opinion upon the question whether the step-mother is a guardian under the Hindu Law. There is one case of *Lukmee* v. *Umur Chund Deo Chund* (7) and another in the North Western Provinces in *Nunkoolal* v. *Shoodra* (8) cited in Trevelyan on Minors, 5th edition, page 51, in which it was held that a step-mother is entitled to be the guardian of her step-son. On the other hand, we have *Maharanee Ram Buneee Konwaree* v. *Maharanee Soobh Koonwaree* (9), where it was held that she is not. I do not think the fact that she is not the heir to her step-son is conclusive on the question. As at present advised, we are unable to think that in the absence of nearer relations she is not entitled to act as the guardian of her step-son. In *Sundar Moni Dai* v. *Bangsidhar Patnaik* (10) Mookerjee and Beachcroft, JJ., appointed the step-mother of the minor to be his guardian. In the present case the step-mother was the sister of the 1st defendant's own mother. We, therefore, think that no valid objection can be raised on the ground that she is not entitled to act as guardian.

The main question is whether, on a contract by the guardian of a Hindu, the minor's person or his property can be charged with liability. We feel no doubt that the decree against the 1st defendant personally is wrong. It was pointed out by the Judicial Committee in *Waghela Rajsanji* v. *Shekh Masludin* (11) that a guardian cannot enter into a transaction so as to charge the minor, on attaining majority, with personal liability. Therefore the decree is wrong, in so far as it makes the 1st defendant personally liable. But we have jurisdiction to see that a proper decree is passed, although there is no memorandum of objections or cross-appeal before us. Now the question is whether the property of the minor should be held liable. Mr. Jagannadha Ayyar laid emphasis upon the decision of the Privy Council in *Indur Chunder Singh* v. *Radhakishore Ghose* (12) and argued that unless the guardian created a charge upon the property, no decree should be passed against the estate of the minor. It is necessary to examine this decision very carefully to see what it is that was actually decided by the Judicial Committee in that case. In the first place, the contract, although by the guardian of the minor, was not entered into in that capacity. A renewal of a lease was taken in the name of the mother and grandmother of the infant. The description in the document is that they were the mother and grandmother of the boy. The document does not purport to have been executed as guardians. Further it was a fresh contract entered into by the ladies and in the litigation that ensued, the minor was sought to be charged with liability for this contract. Lord Hannen delivering the judgment of the Board points out, in more than one place, that the transaction was not entered into as guardians of the minor. On page 512 it is said : " The lessees (referring to the mother and the grandmother) undertook themselves to pay the rent." on page 513 it is stated that the plaintiff was asking the minor " to fulfil the obligations entered into by the lessees in their own name." Referring to the earlier case of *Hanoomanpersaud Panday* v. *Musammat Babooee Munraj Koonweree* (13), His Lordship observes: "Further the

(6) 20 A. 401; A. W. N. (1898) 90; 9 Ind. Dec. (N. S.) 617.
(7) 2 Bom. Sud. C. Rep. 144.
(8) (1847) N. W. P. Sud. C. Rep. 115.
(9) 7 W. R. 321.
(10) 16 Ind. Cas. 900; 17 C. L. J. 405.
(11) 11 B. 551; 14 I. A. 89; 11 Ind. Jur. 315; 5 Sar. P. C. J. 16; 6 Ind. Dec. (N. S.) 364.
(12) 19 C. 507; 19 I. A. 90; 6 Sar. P. C. J. 185; 9 Ind. Dec. (N. S.) 782.
(13) 6 M. I. A. 393; 18 W. R. 81*n*; Sevestre 253*n*; 2 Suth P. C. J. 29; 1 Sar. P. C. J. 552; 19 E. R. 147.

managers of an infant's estate were actually dealing by way of mortgage with a portion of that estate." The view taken in *Indur Chunder Singh* v. *Radhakishore Ghose* (12), comes to this, that, with reference to transactions entered into personally by the guardian of the minor, his estate, on his attaining age, should not be held liable. We do not think this decision should be extended to cases which are not covered by the facts proved in that case. After *Indur Chunder Singh* v. *Radhakishore Ghose* (12) this Court had to deal with the question in a number of cases. In *Subramania Ayyar* v. *Arumuga Chetty* (14) it was held that on a bond executed by the guardian the minor's estate can be made liable. *Duraisami Reddi* v. *Muthial Reddi* (15) decides the very question we have now to decide. *Regulla Jogayya* v. *Vencatarathnamma* (16), though it is not a case of minor, enunciates the same principle. In *Sanka Krishnamurthi* v. *Bank of Burma* (17), the present Chief Justice points out that, by applying the principle of subrogation, the estate of the minor can be proceeded against for a proper debt incurred on behalf of the minor. Lastly we have *Padma Krishna Chettiar* v. *Nagamani Ammal* (18). It lays down that a minor's estate can be made liable for a debt contracted by the guardian. Although a great deal may be said in favour of the position that the Hindu Law liability should not be extended to cases under the Negotiable Instruments Act, there can be no question that in case of bonds like the present one, the liability of the minor for debts properly incurred on his behalf can be charged against the estate. We see no reason for not following this catena of decisions in this Presidency and for referring the case to a Full Bench. In a very recent case reported as *Swaminatha Aiyar* v. *Srinivasa Aiyar* (19) Justice Abdur Rahim and Justice Spencer held that on a personal contract entered into by a trustee the minor's estate should not be held liable. This decision has been dissented from by Kumarasami Sastri, J., in *Ammalu Ammal* v. *Namagiri Ammal* (20), but Sadasiva Aiyar, J., is inclined to agree with it. It is not necessary for us to express any opinion one way or the other upon the actual conclusion come to in the case. The learned Judges point out that the case of a guardian of an infant stands on a different footing from the case of a trustee. As Mr. Krishnasami Aiyar suggested, the trustee has a legal estate in him and consequently any contract entered into by him must *prima facie* be taken to be chargeable only against him personally or against the estate in his hands. The guardian of a minor occupies a different position, for, as he enters into a contract on behalf of the minor who is the legal owner of the property, he must be deemed to have intended to charge the estate of the minor with liability. In this view *Swaminatha Aiyar* v. *Srinivasa Aiyar* (19) does not affect the present case. We are, therefore, of opinion that the estate of the minor is liable for the debt sued on. The decree of the Subordinate Judge must be modified by stating that the minor is not personally liable but only his property. With this modification the second appeal must be dismissed with costs.

NAPIER, J.—I agree.

M. C. P.

Appeal dismissed;
Decree modified.

(14) 26 M. 330.

(15) 31 M. 458.

(16) 5 Ind. Cas. 271; 33 M. 492; 7 M. L. T. 112; 20 M. L. J. 412; (1910) M. W. N. 142.

(17) 11 Ind. Cas. 79; 14 Ind. Cas. 389; 35 M. 692; (1911) 1 M. W. N. 385; 21 M. L. J. 620; 11 M. L. T. 56.

(18) 30 Ind. Cas. 574; 39 M. 915; 18 M. L. T. 216.

(19) 38 Ind. Cas. 172; 32 M. L. J. 259; 21 M. L. T. 91; 5 L. W. 323; (1917) M. W. N. 278.

(20) 43 Ind. Cas. 760; 33 M. L. J. 631; 22 M. L. T. 391; 6 L. W. 722; (1918) M. W. N. 110.

LOWER BURMA CHIEF COURT.
FULL BENCH.

CIVIL REFERENCE No. 1 OF 1918.

March 27, 1918.

Present:—Sir Daniel Twomey, KT., Chief Judge, Mr. Justice Ormond, Mr. Justice Maung Kin and Mr. Justice Rigg.

MAUNG HME—PLAINTIFF—APPELLANT

versus

MA SEIN—DEFENDANT—RESPONDENT.

Buddhist Law, Burmese—Divorce—Second marriage, without chief wife's consent, whether entitles chief wife to divorce.

MAUNG HME *v.* MA SEIN.

The chief wife of a Burmese Buddhist may object to her husband taking a second wife, and may claim a divorce if he does so without her consent. Her right, however, is subject to certain exceptions mentioned in sections 219, 232, 265—67 and 311 of the Digest, wherein the husband is allowed to take a second wife when the first wife is barren or has borne only female children, or is suffering from certain diseases. [p. 957, col. 1; p. 958, cols. 1 & 2.]

In the case of such a divorce the property should be partitioned as in the case of divorce by mutual consent. [p. 957, col. 1; p. 958, col. 2; p. 959, col. 1.]

Ma In Than v. *Maung Saw Hla*, L. B. R. (1872-92) 103; and *Ma Ein* v. *Te Naung*, 3 Ind. Cas. 715; 5 L. B. R. 87, dissented from.

JUDGMENT.

RIGG, J.—The question referred for decision in this case is whether the chief wife of a Burmese Buddhist is entitled to divorce her husband if he takes a lesser wife without her consent. It will be convenient first to examine the course of decisions on this point or related points. The earliest case is that of *Ma In Than* v. *Maung Saw Hla* (1), in which the Special Court held in 1881 that the chief wife had no right of objection. This ruling was declared to be still good law in 1909 in *Ma Ein* v. *Te Naung* (2), but doubts as to its correctness had been already expressed in various cases both in Upper and Lower Burma. In *Maung Kauk* v. *Ma Han* (3) Mr. Burgess said that before accepting the rule in *Ma In Than's case* (1) it would be necessary to examine the authorities, as there was much to be said on the other side. In 1893 the same learned Judge said in *Ma Shwe Ma* v. *Ma Hlaing* (4): "Polygamy is said to be lawful by Buddhist Law, but it may be doubted whether this conveys a correct impression unless it is understood in a special or limited sense. The leading principle of Buddhism in this respect is monogamy rather than polygamy." He went on to express the opinion that allusions to a plurality of wives in most of the Dhammathats referred to Hindu laws and customs rather than Buddhist Law. The precise point in issue in this reference has, however, never been decided in Upper Burma. The decision in *Ma In Than's case* (1) has been questiond in three reported cases since the constitution of the Chief Court in 1900. In *Ma San Shwe* v. *Po Thaik* (5) Birks, J., discussed this ruling but did not come to any definite conclusion. In *Ma Ka U* v. *Po Saw* (6) a Full Bench of this Court held that a chief wife could refuse to live in the same house as a lesser wife. Hartnoll, J., dissented from the opinion expressed in *Ma In Than's case* (1), and said that a husband who took another wife without his first wife's consent committed a serious matrimonial fault against her; but he did not come to a finding whether this fault would justify a claim to divorce, as it was not necessary to the decision of the matter in issue. In *Ma Wun Di* v. *Ma Kin* (7) Adamson, J., said: "The learned Advocate for respondents raised a question of Buddhist Law, as to whether a Burman Buddhist can legally marry a second wife, during the lifetime of his first wife, without her consent. I regret.. the question does not require a decision in this case. I may say, however, that the arguments of the learned Advocate, which he has embodied in a very interesting printed pamphlet, appear to me rather to throw doubt on the ruling of the Special Court in *Ma In Than* v. *Maung Saw Hla*(1)...than to prove the broader proposition that a second marriage under these circumstances is null and void."

There is no doubt that polygamy is legal in Burma. In *Ma In Than's case* (1), Jardine, J. C., held that in spite of the existence of some texts of the religious law books, the custom of polygamy is so fully established that it lay upon the objector to show that this custom was limited in its application. He further said that even if the religious law was expressed opposed to polygamy, he would hesitate to suppress by judicial decision an institution which is part of the life of the people. He thought that the whole tenor of the Manugye was in accordance with the custom of polygamous marriages, and should not be set aside on account of the existence of isolated texts. There are indications, however, that the learned Judge was

(1) L. B. R. (1872-92) 103.
(2) 3 Ind. Cas. 715; 5 L. B. R. 87.
(3) U. B. R. (1892-96) Vol. II, 48.
(4) U. B. R. (1892-96) Vol. II, 145 at pp. 149, 150.
(5) 2 Chan. Toon's L. C. 165.
(6) 4 L. B. R. 340; 9 Cr. L J. 25.
(7) 4 L. B. R. 175; 10 Bom. L. R. 41; 3 M. L. T. 93; 18 M. L. J. 3; 12 C. W. N. 220; 7 C. L. J. 112; 35 C 232; 5 A L J. 63; 14 Bur. L. R. 3; 35 I. A. 41 (P. C.).

inclined subsequently to modify the decided opinion he had expressed in *Ma In Than's case* (1). After that decision the Manu Kunnana was translated and at page 30 of his note on Buddhist Law, Mr. Jardine observes that sections 173 and 132 throw some doubt on the right of polygamy. In paragraph 32 of his second note he says: "Throughout the Dhammathat (Manugye) polygamy is treated as lawful but with a feeling that it is a grievance to the first wife." Captain Forbes says: "Even if polygamy is indulged in, the general feeling may be said to be against it. The suppression of the first by the second wife is a serious matter." In *Queen-Empress* v. *Nga Ne U* (8) Mr. Jardine said:—"I am aware that some Burmans think that a man who has a wife may not marry a second time in her lifetime without her consent. The 173rd section of the Wunnana is in favour of this view, but it was not pointed out to the Special Court who held the contrary in *Ma In Than's case* (1)." In *Ma Hun Di's case* (7) their Lordships of the Privy Council quoted with approval the following observations of the learned Chief Justice: "It is not forbidden to a Burman Buddhist to have two wives at the same time, but it is universally conceded that the leading principle of Buddhism is monogamy rather than polygamy, that polygamy is rare and...is considered disrespectable." There can be no doubt that in Lower Burma the position is that polygamy is tolerated but regarded with disfavour and that there has always been a body of opinion that it is only allowed if the first wife consents. Assuming that the Dhammathats only allow it under certain conditions or penalties, I am unable to see why the fact that these penalties have never been enforced in practice, or that it is not possible to point to instances of such enforcement, should preclude this Court from declaring that they exist and can be claimed by the wronged wife. The law to be administered is the Burmese Buddhist Law as laid down in the Dhammathats, unless such law has been clearly modified by custom or is repugnant to equity, justice or good conscience. In *Bhagwan Singh* v. *Bhagwan Singh* (9) their Lordships of the Privy Council pointed out that the judgment in the *Collector of Madura* v. *Mooltoo Ramalinga Sathupathy* (10) gives no countenance to the conclusion that in order to bring a case under the rule of any law, laid down for Hindus generally, evidence must be given of actual events to show that in point of fact the people subject to that general law regulate their lives by it. At page 423 of the same judgment their Lordships said that the general law should be ascertained by reference to the authoritative text books and judicial opinions, and that when the general law has been established any one living where such law prevails and is applicable must be taken to fall under the general law, unless he can show some valid local tribal or family custom to the contrary. The mere fact that the limitations to the license of having more than one wife have not been observed is insufficient to justify the Courts in holding that the law has been abrogated by custom, especially in a country like Burma, where as Sir John Jardine himself observes (notes on Buddhist Law III) the system of compromise based on consent and acquiescence almost supersedes custom. So far had this system of compromise been carried that when British Judges first attempted to ascertain what the Buddhist Law was on any subject, they sometimes found great difficulty in obtaining any information on which a decision could properly be based. It appears to me, therefore, that there is no proof of any custom regarding polygamy which custom overrides the general law laid down in the Dhammathats or precludes us from examining that law with a view to ascertain its scope and provisions. It is true that in Hindu Law, to which to some extent the Dhammathats are indebted for their rules, there is no restriction against polygamy and the rules enjoining monogamy have been held to be merely directory and not mandatory (Cowell's Lecture on Hindu Law, part I, page 164, Mayne, Hindu Law, paragraph 92,

(8) L. B. R. (1872-92) 202.

(9) 21 A. 412 at p. 422; 1 Bom. L. R. 311; 3 C. W. N. 454; 26 I. A. 153; 7 Sar. P. C. J. 474; 9 Ind. Dec (N. S.) 971 (P. C.).

(10 12 M. I. A. 397; 10 W. R. P. C. 17; 1 B. L. R. P. C. 1; 2 Suth. P. C. J. 135; 2 Sar. P. C. J. 361; 20 E. R. 389.

Sarkar's Lectures, page 117). They seem to be of the nature of counsels of perfection rather than absolute prohibitions coupled with a penalty in case of disobedience. But whatever may be the extent to which the Dhammathats are indebted to Hindu Law, there can be no doubt that the Hindu Law regarding marriage and divorce has been profoundly modified by Buddhism, although the compilers of the Dhammathats have in some cases not attempted to distinguish the two systems. Thus the division of the people into castes is recognised by the Dhammathats although a distinction is unknown to Burmans. The Courts have always endeavoured to interpret conflicting passages in the Dhammathats in such a manner as to conform with the existing sentiments and practice of Burmese society, so far as it is possible so to do without usurping the functions of the Legislature. If on examination of the texts, it is found that there is a strong preponderance in favour of restrictions being placed on polygamy, we shall, I think, be taking a proper course in giving effect to those texts in harmony with the prevailing sentiments of the people. I do not attach much importance to the fact that polygamy is recognised in the Dhammathats and that much of their matter is occupied with rules for the division of property between various kinds of wives and their children. Such rules are necessary in view of the structure of society existing then and existing now. They are not necessarily inconsistent with rules tending to discourage polygamy.

In *Ma Nhin Bwin* v. *U Shwe Gone* (11) their Lordships of the Privy Council said that where the Manugye was not ambiguous it should be followed. There is, however, no clear pronouncement in that Dhammathat on the subject of the chief wife's right to object to her husband taking a second wife without her consent. Section 43, Volume XII, deals with the five kinds of wives who may be put away, but it is explained that by putting away is only meant that the husband had the right to take another wife and his first wife is not entitled to oppose him. Section 24, Volume V, refers to a right of separation when the wife has taken a paramour or the husband a lesser wife, the division of property in such cases being made as in the case of divorce by mutual consent. In section 17 of the same chapter a husband whose wife has left him is enjoined to wait for one year before he takes another, under penalty of loss of the property brought to the marriage and the joint property. But the right of the chief wife to demand a divorce is rather a matter of inference than a clear statement of the existence of such a right. Turning now to the Digest of the Kinwun Mingyi, I find that in section 208, three Dhammathats are cited, which laid down fidelity to the first wife as one of the duties of a husband, but these texts are only directory. In the passage from the Dhammathatgyaw cited in section 214 there is a similar admonition to husbands not to be unfaithful. In two of the three Dhammathats cited in section 230, adultery on the part of the husband is placed on the same level as a repugnant disease and gives the wife a right of divorce. The most important section is No. 256, which contains extracts from eight Dhammathats and in no less than six of these a second marriage without the chief wife's consent gives the latter the right to divorce and to retain the whole of the property. These texts seem to me to be very clear and to admit of no doubt as to their construction. In the passage from the Manugye cited in section 303, divorce is permitted if cruelty is coupled with the taking of a lesser wife, but no argument against the right of a chief wife to obtain a divorce on the ground of a second marriage can be founded on this passage, as most of the other Dhammathats quoted in that section give her the right of divorce on the ground of cruelty alone, and this right has been affirmed in *Maung Po Han* v. *Ma Ta Lok* (12). In section 397 the penalty imposed on a husband for taking a lesser wife is expulsion from the house after being compelled to leave behind even his clothes. In section 259 an extract is quoted from the Addasankepa Vanna of the rule relating to husbands and wives who have been previously married. Here too the wife is said to have the right of divorce if the husband takes a lesser wife and

(11) 23 Ind. Cas. 433; 8 L. B. R. 1; 7 Bur. L. T. 105; 16 Bom. L. R. 377; 27 M. L. J. 41; 18 C. W. N. 1121; 16 M. L. T. 142; 20 C. L. J. 264; 40 C. 887; 1 L. W. 914; 41 I. A. 121; (1914) M. W. N. 449 (P. C.).

(12) 20 Ind. Cas. 674; 7 L. B. R. 79; 6 Bur. L. T. 134.

the husband forfeits all claim to the jointly acquired property.

As against these authorities the learned Advocate for the appellant has been able to cite only section 253, which is headed "A man may marry as many wives as he pleases." But this section does not deal with the case of a man marrying when his first wife objects, and there is no doubt that if she consents, there is no impediment to his taking other wives. The other arguments addressed to us were founded on the existence of the custom of polygamy and its recognition in the Dhammathats in the shape of rules for the division of property between more than one wife. These arguments have already been considered in an earlier portion of this judgment.

I think that it is clear that the general rule is that the chief wife may object to her husband taking a second wife and may claim a divorce if he does so, her right is, however, subject to certain exceptions. These are found in sections 219, 232, 265—267 and 311 of the Digest. The husband is allowed to take a second wife when the first wife is barren or has borne only female children or is suffering from certain diseases. In Burmese society a higher value is attached to the begetting of sons than daughters. There is also nothing unreasonable in the exception based on the first wife becoming insane or a leper, maimed, blind or paralysed and thus becoming unable to fulfil the duties of her position. I would, therefore, answer the reference as follows:—Subject to exceptions of the kind mentioned in sections 219, 232, 265–267 and 311 of the Digest, if a Burmese Buddhist takes a second wife without his first wife's consent, she has a right to divorce him.

I may add that if she decides to claim the right of divorce, I think that the division of property should, in the absence of any contract to the contrary, be made as if the divorce were one by mutual consent. This is the rule if the husband commits adultery (section 230) and is the rule given in Manugye where the husband has not only taken a lesser wife but has been cruel (section 303). In section 256 a severe penalty is to be imposed according to some of the Dhammathats, which are, however, not consistent regarding the penalty.

TWOMEY, C. J.—The question referred does not arise directly in the case which was before our learned colleague. But it does arise indirectly. Under the Special Court ruling in *Ma In Than* v. *Maung Saw Hla* (1) a head wife has no remedy if her husband takes a lesser wife without her consent. So long as this ruling is in force, it would be inconsistent to give effect to the provisions of Manukye, V, section 17, and let a deserting wife claim a divorce on her husband re-marrying within a year.

The learned Judges of the Special Court who decided *Ma In Than's case* (1) apparently considered that the provisions of the Manukye debar the Courts from sanctioning any restriction on polygamy among Burmese Buddhists. The pre-eminent authority of the Dhammathat is still recognised, but its provisions have binding force only where they are free from ambiguity. As Rigg, J., points out, the Manukye in addition to the provisions which seem to contemplate unqualified polygamy contains also various passages from which it may reasonably be inferred that the Buddhist Law recognises a head wife's right to demand a divorce if her husband takes another wife without her consent. We are, therefore, justified in turning for guidance to the other Dhammathats cited in the Kinwun Mingyi's Digest and to the same learned author's Atthathankepa, which is the most recent Dhammathat of all. These other Dhammathats are now shown to leave no room for doubt as to the head wife's right in question. Most of the texts became available only after *Ma In Than's case* (1) was decided.

The Special Court regarded the restriction on the taking of a lesser wife as a doctrine which was not shown to be "popularly accepted so as to extinguish the custom", *i. e.*, the custom of polygamy. The existence of a custom of *unrestricted* polygamy was not shown in that case. The fuller investigation of the Dhammathats, which has now been carried out, makes it clear that the restriction in question is an incident of polygamy as

established among the Burmese Buddhists and in these circumstances the question of popular acceptance does not appear to arise.

The texts of the Buddhist Law on the subject of polygamy are undoubtedly inconsistent. The Manukye contains various provisions cited in *Ma In Than's case* (1) which take for granted a plurality of wives, while other provisions clearly contemplate that a man should have but one wife at a time. The explanation is that the Burmese Buddhist Law is largely of Hindu origin coming from a country in which polygamy flourished without restriction, the law had to be adapted to a non-Indian race which followed the Buddhist religion and in which the position of the wife was essentially different from that of the Hindu wife. Thus the texts in the Manukye and the other Dhammathats which deal with a plurality of wives are probably imported from the ancient Hindu Law. Mr. Burgess in *Ma Shwe Ma* v. *Ma Hlaing* (4) remarked as follows :— "It is a remarkable thing that in the 81 sections of the Chapter on Inheritance, X of Manukye, the only provisions regarding contemporaneous wives and their children should be those in sections 37 and and 38 which seem to have special reference to Hindu usages."

Ma In Than's case (1) has been the law in Lower Burma since 1881. But it has not been followed in Upper Burma ; and it is doubtful whether in Lower Burma husbands have availed themselves to any large extent of the additional license given to them by the ruling of the Special Court. A plurality of wives is becoming more and more a rarity and is regarded socially with disfavour. The tendency towards monogamy has no doubt been accelerated by the annexation of Upper Burma. Before that event polygamy was encouraged by the example of the Burmese Kings and many of the higher officials.

In expressing our dissent from the ruling in *Ma In Than's case* (1) and declaring the head wife's right to a divorce if her husband takes another wife without her consent, it is clear that we are only expounding an integral part of the Buddhist Law as laid down in the Dhammathats and we need not fear that we are running counter to any cherished custom of the Burmese people.

I concur in answering the reference in the terms proposed by my learned colleague Mr. Justice Rigg. I agree with him also in holding that the property should be partitioned as in the case of a divorce by mutual consent (in the absence of any contract to the contrary). It would be illogical to exact from the husband who takes a lesser wife a more severe penalty than is provided in the Dhammathats for a husband who commits adultery or who, in addition to taking a lesser wife, treats his head wife with cruelty.

MAUNG KIN, J.—I concur and have very little to add. Unlimited polygamy is expressly allowed only by three Dhammathats, namely, Kaingza, Kandaw and Panam. See section 253 of U Gaing's Digest, Volume II. They are, however, not of much authority. Other Dhammathats speak of polygamy being allowable under certain conditions and penalties and as regards Manukye in particular I agree with Mr. Jardine that, although it treats polygamy as lawful, it does so with a feeling that it is a grievance to the first wife. In addition to the six Dhammathats, cited in section 256 of the above Digest, which lay down the rule that a second marriage without the first wife's consent gives the latter the right to divorce, we have extracts from three other Dhammathats, namely, Vilasa, Dhammathatkyaw and Manuvannana cited in section 397 of the same Digest laying down the same rule. Those six Dhammathats and these three others are well-known legal works. The other Dhammathats cited in section 256 couple the taking of a lesser wife with habitual ill-treatment as ground for a divorce at the instance of the aggrieved first wife. The passage cited from Manukye in section 303 of the Digest would appear to support these Dhammathats. But I do not think that in deciding the points under reference any importance can be attached to the fact that the taking of a lesser wife is thus coupled with cruelty, inasmuch as the Dhammathats agree in allowing a divorce on the ground of habitual cruelty alone. It seems clear that in the passage cited from Manukye

in section 303 of the Digest, the stress is on the husband's cruelty rather than on his incontinence. I am, therefore, of opinion that the taking of a lesser wife must be regarded as an additional ground for a divorce at the instance of the existing wife. As regards the question of partition of property I would treat the divorce as if it were one by mutual consent for the reason stated by the learned Chief Judge, unless there has been a contract to the contrary.

ORMOND, J.—I concur in the judgments that have been delivered.

Answer accordingly.

MADRAS HIGH COURT.

APPEAL SUIT No. 223 OF 1916.

February 12, 1918.

Present:—Sir John Wallis, KT., Chief Justice, and Mr. Justice Krishnan.

VATHIAR VENKATACHARIAR —PLAINTIFF No. 2—APPELLANT

versus

P. PONAPPA AYYENGAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 9, O. XXII, r. 4—Appeal and cross-objections by respondent—Death of respondent pending appeal—Omission of appellant to bring legal representative on record—Legal representative, application by, to be brought on record in memorandum of objections, effect of—Appeal, whether abates—Right to office, suit for declaration of, maintainability of—Teerthakars *in Hindu temple, right of, to recite* prabandam—*Duty not legally enforceable—Jurisdiction of Civil Courts.*

The omission by an appellant to bring on record the legal representative of a deceased respondent will not cause the abatement of the appeal if the latter, on his own initiative, has brought himself on the record in the memorandum of cross-objections filed by the deceased. The effect of the legal representative being added in the memorandum of objections is, in effect, to make him a party to the appeal. [p. 961, col. 1.]

The appeal and memorandum of objections are not disconnected and independent proceedings, but are part of the same proceedings. [p. 961, col. 1.]

Andrew v. *Aitken*, (1882) 21 Ch. D. 175; 51 L. J. Ch. 784; 46 L. T. 689; 30 W. R. 701, distinguished.

Brij Indar Singh v. *Lala Kanshi Ram*, 42 Ind. Cas. 43; 33 M. L. J. 486, 22 M. L. T. 362; 6 L. W. 592; 126 P. W. R. 1917; 15 A. L. J. 777; 19 Bom. L. R. 866; 3 P. L. W. 313; 26 C. L. J. 572; 104 P. R. 1917; (1917) M. W. N. 811; 22 C. W. N. 169; 127 P. L. R. 1917; 45 C. 34 (P. C.), applied.

A suit to establish a right to an office to which emoluments are alleged to be attached is maintainable, when the existence of the office as also the connection between the office and the honour and dignities and perquisites is proved by clear evidence. [p. 961, col. 2.]

Thirumalai Alwar Aiyangar v. *Srinivasachariar Swamigal*, 36 Ind. Cas. 568; 31 M. L. J. 758; 4 L. W. 562; (1916) 2 M. W. N. 327, followed.

To constitute an office, the one, if not the essential, thing is the existence of a duty or duties attached to the office which the [office-holder is under a legal obligation to perform and the non-performance of which is visited by penalties. The rendering of a voluntary service cannot constitute an office. [p. 961, col. 2.]

Plaintiffs sued to establish their right to recite *prabandams* or holy verses in a temple and in the procession of a temple deity and a certain rank or precedence in such procession. They also claimed an injunction restraining the 6th defendant from receiving the *teerthams* and being ranked above them. The Court dismissed the suit as not being one of a civil nature, but disallowed 6th defendant's costs. Plaintiffs appealed and 6th defendant filed cross-objections against the portion of the decree disallowing his costs. The 6th defendant died pending the disposal of the appeal and the plaintiff-appellant did not bring his legal representative on record within the time allowed by law, but the latter brought himself on record in the memorandum of objections. The Appellate Court confirmed the Munsif's decree:

Held, (1) that the appeal did not abate by reason of appellant's omission to bring the deceased respondent's representative on record, as he was on the record in the memorandum of objections which is substantially the same proceeding as the appeal; [p. 961, col. 2]

(2) that as there was no obligatory duty [on plaintiffs to recite the *prabandam*, the suit was not cognizable by the Civil Court under section 9, Civil Procedure Code. [p. 961, col. 2.]

Appeal against the decree of the Court of the Subordinate Judge, Tuticorin, in Original Suit No. 11 of 1913.

FACTS appear from the judgment.

The Hon'ble Mr. *T. Rangachariar* (with him Mr. *N. S. Rangasawmi Iyengar*), for the Respondents, raised the preliminary objection that the appeal had abated under Order XXII, rule 4, Civil Procedure Code. He argued that as the 6th defendant-respondent died and no legal representative of his was brought on record within the time allowed by law, the appeal abated. The fact that the 6th defendant's legal representative brought himself on record in the memorandum of objections filed by the 6th defendant did not cure the defect in the appeal. The proceedings in appeal were entirely different from those in the memorandum of objections, as the latter was separately stamped. Reference was made to *Andrew* v. *Aitken* (1).

The preliminary objection having been overruled, Mr. *K. Srinivasa Aiyangar*

(1) (1882) 21 Ch. D. 175; 51 L. J. Ch. 784; 46 L. T. 689; 30 W. R. 701.

(with him Mr. *V. Vencatachariar*), for the Appellants, argued, that the plaint set forth some perquisites as attached to the office, *viz.*, the right to receive Prasadam or holy food. The rights to receive Teerthms is an honour for the establishment of which an action lies. The evidence is that plaintiffs used to recite the Prabandam and Vedas on specified occasions.

The Hon'ble *T. Rangachariar*, for the Respondents, argued that the recitation of the Prabandam was only a voluntary act and if the plaintiffs were accorded a rank, it was a special privilege and an act of courtesy.

The evidence is that no penalty attached to their refusal to recite the Prabandam. The perquisites alleged to attach to the office are unsubstantial and of no value. The official reciters are the Adyapakamdars. The test to determine whether the right claimed is of a civil nature is to see if there are duties attaching to the office for breach of which the office holders are liable to be penalised, and the evidence was that it was in the option of the plaintiffs to recite the verses or not:

JUDGMENT.

KRISHNAN, J.—This is an appeal from the decree of the Subordinate Judge of Tuticorin, in Original Suit No. 11 of 1913, dismissing the plaintiff's suit on the ground that his claim was not of a civil nature under section 9, Civil Procedure Code. The 1st plaintiff having died, the 2nd plaintiff alone has appealed to us against that decree and his learned Vakil has strongly urged that the finding of the lower Court is wrong.

The plaintiffs' case, as stated in the plaint, is that in the Adniada Alwar temple in Alwar Tirunagari in the Tinnevelly District there is an office called "Teertham or Teerthakar's" office of which they and others, in all 29 in number, are the office holders, that the duty of the said office holders is to recite the Prabandam or Tiruvoimoli and the Vedas in the temple and in places where the idol is taken in procession when the Goshti or group of Teerthakars is formed, that special places are allotted to each of them in the temple for this purpose and that attached to this office as an emolument of it is the right to receive Teertham or holy water and Prasadam or holy food and some other small perquisites in a fixed order of precedence. The rank of the plaintiffs family is stated to be the 14th in what is called the 1st cup group; considerable importance no doubt is attached to this rank by the parties. The plaintiffs complain that the trustees, defendants Nos. 1 to 5, have improperly introduced into their group, in a place above theirs in rank, the 6th defendant who has no right to be there according to the practice in the temple and have thus illegally interfered with their rank or right of precedence.

They do not complain that any portion of the Teertham and Prasadam which have to be given to them has been reduced; but they ask the Court to declare that the 6th defendant is not a Teerthakar officer and is not entitled to any place or Stanam and any honours as such officer, and to restrain him by an injunction from occupying such a place and receiving such honours and the trustees from allowing him to do so. Both the trustees and the 6th defendant have denied the existence of any such office and of any duties or honours attached to it and have pleaded that the suit was not maintainable in a Civil Court. They also alleged that the 6th defendant was entitled to the rank given to him.

Before considering the question whether a civil right has been made out it is necessary to refer to a preliminary objection to the appeal raised by Mr. Rangachariar, *viz.*, that the appeal has abated under Order XXII, rule 4, Civil Procedure Code. The facts in this connection are these. The 6th defendant was made the 6th respondent in the appeal. He filed a memorandum of cross-objections under Order XLI, rule 22, clause 1, for the costs disallowed to him; some time thereafter he died but the appellant took no steps to bring his legal representative on record; and the time for doing it has now expired. If the facts stood there, there would be no answer to the objection. But the 6th defendant's legal representative, who is Mr. Rangachariar's client, applied in time to have himself brought on the record in the memorandum of cross-objections and he was added to the record as prayed. It is argued that this did not make him party to the appeal. Mr. Rangachariar contends that the appeal and the memo. of cross-objections are two

distinct and independent proceedings and, therefore, the addition of the legal representative to the latter will not save the former from abating. He refers to the facts that the memorandum of objections has to be stamped as an appeal and that under Order XLI, rule 22, clause 4, the withdrawal of the appeal does not affect the hearing of the memorandum of objections as supporting his contention. He also relies on the case of *Andrew* v. *Aitken* (1). Rule 22, clause 1, itself furnishes the answer to this argument. That rule requires that a person should be a respondent in the appeal before he can file any cross-objections or be heard on them. It follows, therefore, that when the legal representative of the 6th respondent was allowed to come on the record in respect of the memorandum of objections he was in effect made respondent in the appeal and there can, consequently, be no abatement of the appeal on the ground alleged. Moreover the Privy Council has recently laid down broadly in the case of *Brij Indar Singh* v. *Lala Kanshi Ram* (2) that the introduction of the legal representative of a plaintiff or a defendant for one stage of a suit is an introduction for all stages. Applying this principle to appeals, the preliminary objection must fail as the appeal and the memorandum of objections are only parts of the same proceedings. There is no force in the argument that they are two disconnected and independent proceedings. The English case cited is easily distinguishable, as it refers to a suit and a counter-claim which is treated as an independent suit tried with the 1st suit The preliminary objection must, therefore, be overruled.

Turning now to the main question in the case, it is clear from the plaint itself that the claim refers to a religious honour which consists of receiving Teertham and Prasadam in the temple, in a certain order of precedence. The claim is, therefore, *prima facie* not one of a civil nature. But plaintiffs have tried to bring it within the explanation to section 9, Civil Procedure Code, by alleging that it is attached as an emolument to a religious office. It is conceded by the learned Vakil for the appellant that unless he establishes this, his suit must fail. This High Court recently held in the case of *Thirumalai Alwar Aiyangar* v. *Srinivasachariar Swamigal* (3), on an examination that of the previous authorities on the subject, in a case like the one before us "the existence of the office to which the emoluments claimed are said to attach must be proved and so must the connection between the office and the honour and dignities and perquisites claimed be established by clear evidence." Accepting this statement of the law, we have to consider whether the plaintiffs have established on the evidence in this case the two above-mentioned positions they are bound to establish.

The first question then is whether there is such an office as the Teertham office in this temple. It is clear that, to constitute an office one, if not the essential, thing is the existence of a duty or duties attached to the office which the office holder is under a legal obligation to perform and the non-performance of which may be visited by penalties such as suspension, dismissal, etc. The rendering of any voluntary service cannot of course constitute an office. Ordinarily temple offices have substantial emoluments attached to them in the shape of income from Inam lands and money payments; and though the absence of such emoluments is not necessarily by itself evidence of the non-existence, it makes it necessary to scrutinise carefully the evidence for its existence. Admittedly there is no emolument of any value attached to the so-called Teertham office. Plaintiff alleged that the duties of the Teertham office are to recite the Prabandam and the Vedas on stated occasions. Though the Teerthakars do recite Prabandams and Vedas the evidence does not establish that they are bound to do so as a matter of obligation. It may be mentioned that among the Teerthakars there are some 5 or 7 in number, who are called Adhypakamdars, whose special duty it is to recite these Prabandams and they are remunerated by Inam lands given to them. They are what may be called the official reciters in this temple. Plaintiffs are not such Adyapakamdars. It is, therefore, very unlikely that there would be any other unremunerated office holders for doing the same duty. It should also be remembered that it is not

(2) 42 Ind. Cas. 43; 33 M. L. J. 486; 22 M. L. T. 362; 6 L. W. 592; 126 P. W. R. 1917; 15 A. L. J. 777; 19 Bom. L. R. 866; 3 P. L. W. 313; 26 C. L. J. 572; 104 P. R. 1917; (1917) M. W. N. 811; 22 C. W. N. 109; 127 P. L. R. 1917; 45 C. 94 (P. C.).

(3) 36 Ind. Cas. 568; (1916) 2 M. W. N. 327; 31 M. L. J. 758; 4 L. W. 562.

merely the Teerthakars that recite the Prabandams but all Vaishnavites present join in the recital. The only difference between the outsiders and the Teerthakars, as shown by the evidence, is that the Teerthakars have special places allotted to them in the temple to stand and recite and they are given the honour of Teertham and Prasadam, before the outsider get them; and they have what is called an "Arulapad", that is, their names are called out by the Archaka in a certain order, when, if present, they have to respond by saying "Nayinde", meaning "I am here." This does not seem to show that they are anything more than a recognised and privileged class of worshippers who are shown special consideration by having places allotted to them in the temple and by being given the honours before the ordinary worshippers in an order of precedence fixed by the usage of the temple. Plaintiffs' own witnesses who are mostly Teerthakars admit that no duties are attached to the position of Teerthakars and no penalty has been inflicted on any one of them for not reciting Prabandams. This evidence corroborates that of the defence witnesses to the same effect. Plaintiffs' 1st witness says: "If I do not do my duty, (*i. e.*, reciting) nothing could be done against us by the temple." Second witness says the duty of the office is the getting of Teertham and Viniyogam ; there is no other duty. The 3rd witness confesses that he does not know the Prabandams, and has never recited them, though he was always getting the Teertham like the others and that he has never been asked to explain his conduct or been punished for it for the last 30 years. The 4th witness, who is a cook, says that though he is a Teerthakar, he knows very little of the Prabandam and has never recited any, but he has always been getting his Teertham. Defence witnesses Nos. 3, 4, 5 and 11 say the same thing and two of them, *viz.*, Nos. 4 and 5 are Teerthakars. In Original Suit No. 7 of 1877 one of the then Teerthakars, examined as the then plaintiff's 6th witness and who is now dead, stated categorically that as a Teerthakar he had no duties to discharge in the temple, see Exhibit XXV. There is a list of office holders in this temple produced by the defendants, Exhibit XXVI, in which there is no mention of any Teertham office. Perhaps much reliance should not be placed on this exhibit as it was produced at a late stage of the case, and is not free from suspicion. Exhibit II, a document of 1817, contains the list of persons who are recognised as entitled to Teertham and Prasadam in this temple. There are in it a number of persons who are not office holders at all in the temple. As against all this evidence on the defendants' side the learned Vakil for the appellant has been able to call our attention only to one statement in cross-examination of defence 7th witness and to one document Exhibit C as in his favour. The witness says that the Teerthakars recite Prabandam and that it is their duty. It is not clear in what sense he used the word duty. It may be said in a general way that it is the duty of all persons present to recite the Prabandams if they can, but that does not show that legally enforceable duty exists. The witness is not an important man and his evidence is of little value. Exhibit C is a petition submitted by certain Teerthakars in 1870 to the Dharmakartha to exclude a convicted Teerthakar from joining their assembly. In it no doubt they describe themselves as persons who perform Kainkaryam or service in the temple. The statement is not of much value in this cases as in a way the Teerthakar were doing some work in the temple by reciting the holy verses but it is a different thing to say that it was an obligatory duty. If there is such an office as plaintiffs claim, it would have been easy to give cogent evidence of it. On the evidence as set out it must be held that plaintiffs have not made out the existence of any obligatory duty on the part of the Teerthakars or of any office called the Teertham office.

On the next branch of the case, *viz.*, as to the connection between the honours claimed and the position of the Teerthams, we have been referred to a statement in a petition in 1902 by the whole body of the Teerthakars, the appellant himself being a party to it, that "there is no connection whatever between the said Vrithi" (that is, the work of reciting the Prabandam and the Vedas) "and the Teertham and honours." This is strongly against the plaintiffs on this part of the case and it has not been satisfactorily explained. On a previous occasion when the existence of the Teertham

office and the connection of the honours with it was asserted they were denied and both were found against by the Subordinate Judge and by this Court. See Exhibits XXVII (*c*) and XXVII (*e*). No successful assertion of the right now claimed by the plaintiffs has ever been made up to date. The existence of the Teertham office and the connection of the honours with it must, therefore, be held not to be proved and the appeal fails in consequence and it must be dismissed with costs.

WALLIS, C. J.—I entirely agree both as to the law to be applied and the effect of the evidence.

JUDGMENT IN THE MEMORANDUM OF OBJECTIONS.

We allow the memorandum and award the representative of the 6th defendant his costs of the suit which were disallowed by the lower Court, and also the costs of the memorandum of objections.

Appeal dismissed;
Memo. of objections allowed.

M. C. P.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 3139 OF 1916.

May 6, 1918.

Present:—Mr. Justice Scott-Smith.

SAWAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MEHR DIN AND OTHERS—DEFENDANTS RESPONDENTS.

Landlord and tenant—Occupancy rights—Takiadar, *whether can build* pacca *mosque on* takia *land without consent of proprietors—Suit by proprietors for injunction—Death of some plaintiffs-appellants, pending appeal—Appeal, whether abates* in toto*—Civil Procedure Code (Act V of* 1908), *O. XXII, r.* 3 (2).

A *takiadar* is not entitled to build a *pacca* mosque on any part of the *takia* land in his possession as an occupancy tenant without the consent of the proprietors. [p. 964, col. 2.]

A suit was brought by several proprietors of a village against the defendant for a perpetual injunction restraining him from building a mosque on certain *takia* land of which he was in possession as an occupancy tenant. On the hearing of the second appeal in the Chief Court it appeared that some of the plaintiffs-appellants had died and no application had been made to bring on the record their legal representatives within limitation:

Held, (1) that inasmuch as the suit could in the first instance have been brought without the deceased plaintiffs having been joined at all, the appeal did not abate as a whole but only so far as the deceased plaintiffs-appellants were concerned; [p. 964, col. 1.]

(2) that as the building of a mosque was inconsistent with the purpose for which the land was originally given, the defendant was not competent to build a *pacca* mosque on the *takia* land. [p. 964, col. 2.]

Second appeal from the decree of the District Judge, Gurdaspur, dated the 20th July 1916, reversing that of the Munsif, 1st Class, Gurdaspur, dated the 8th March 1916, decreeing the claim.

Bakhshi *Tek Chand*, for the Appellants.

Mr. *Badr-ud-Din Kureshi*, for the Respondents.

JUDGMENT.—The suit out of which this appeal has arisen was brought by 93 proprietors of Dorangala in the Tahsil and District of Gurdaspur against Malak Shah, defendant, for perpetual injunction restraining him from building a mosque on certain *takia* land of which he was in possession as an occupancy tenant in that place. The first Court found that the defendant had no right to build a *pacca* mosque on the land of which he was an occupancy tenant without the permission of the proprietors and decreed the plaintiffs' claim. The lower Appellate Court held that the land was originally granted to defendant's predecessor for the upkeep of a *takia*, which it described as a *quasi*-religious building, and that there could have been no intention on the part of the original grantor that the grantee or his successors should be prohibited from building a mosque—a wholly religious building—adjacent to the *takia*. It, therefore, accepted the defendant's appeal and dismissed plaintiffs' suit. The plaintiffs have preferred a second appeal to this Court. Malak Shah has died and Mehr Din and others have been brought on the record as his legal representatives.

A preliminary objection was raised by Mr. Kureshi on behalf of the respondents to the effect that the following plaintiffs-appellants had died, namely, Nihala (No. 5), Wasawa (No. 48), Udho (No. 76), Wadhawa (No. 30) and one *Musammat* Jindi more than six months ago and as their legal representatives had not been brought on the record, the appeal abated *in toto*. It

appears probable that these persons did die more than six months ago as the objection was raised at a previous hearing, but even if the appeal has abated as regards them, this is not one of those cases where the appeal would abate as a whole. Order XXII, rule 3 (2), Civil Procedure Code, lays down that in such a case the suit shall abate so far as the deceased plaintiff is concerned. Now, the suit could, in the first instance, have been brought without the deceased plaintiffs having been joined at all. Several of the proprietors could alone have maintained such a suit. The appeal, therefore, in no case has abated as a whole, and I proceed to dispose of it on the merits. The lower Appellate Court in its judgment says that the plaint really disclosed no sufficient cause of action, because it did not state clearly in what way the building of a mosque would affect the plaintiffs' rights. The plaint states that the plaintiffs are proprietors of the land and defendant is an occupancy tenant under them, that the building of a mosque is inconsistent with the purpose for which the land was originally given, that it was never intended that a mosque should be built on the land, and that the building of one would result in bringing the land into the exclusive use of the *takiadar* and would interfere with the rights of the plaintiffs-proprietors and deprive them of the use of the *takia*. If this was not clear enough, the statement of one or more of the plaintiffs should have been taken by the first Court. This was not done. The plaintiffs appear to me to insist on their rights as proprietors of the land and to say that the defendant, who is merely an occupancy tenant, has no right to put the land in his possession to a use for which it was never intended.

The lower Appellate Court was of opinion that the *takia* was a building of a *quasi*-religious character. Fallon's English-Hindustani Dictionary gives the meaning of *takia* to be "an abode of a *faqir*." It does not seem to me to necessarily follow that a *takia* is a building of a *quasi*-religious character merely because a *faqir* lives in it. It is admitted that the *takia* has been kept up as a sort of a rest-house for travellers, who can rest there and obtain fire and water according to their needs. It has been alleged that before Malak Shah began to build a mosque, there had been a prayer *thara* in existence adjoining the *takia* for 40 years and that there is no reason why the *takiadar* should not be allowed to build a *pacca* mosque upon this old *thara*. I do not think that this argument has any force. A prayer *thara* is a small thing to which the proprietors of the village might have no objection, but a *pacca* mosque would be a very different matter. It should be remembered in this case that the proprietors of the village are Jat Sikhs, whereas the *takiadar* is a Muhammadan. One can easily understand that the building of a *pacca* mosque adjacent to the *takia* would make Hindus less inclined to use the *takia*.

A proprietor in the village who is a co-sharer in the *shamilat deh*, would ordinarily not be allowed to build a mosque on the common land without the permission of his co-sharers, and I fail to see how a non-proprietor like the *takiadar* can be allowed to do so without the permission of the proprietors. The following authorities have been referred to by plaintiffs' Counsel. *Kalu* v. *Wasawa Singh* (1), where it was held that "as a *kamin* generally gets land from the proprietary body on the implied understanding that it is only to be used for purposes of residence and for plying his trade, he is not competent to build a mosque or temple on it without the consent of the proprietors." Now the *takiadar* may not be a *kamin* in the ordinary sense but he is certainly a non-proprietor and obtained the land originally for the up-keep of the *takia*. In accordance with this authority, I have no difficulty in holding that he would not be competent to build a *pacca* mosque on any part of the occupancy land in his possession without the consent of the proprietary body. *Allah Dia* v. *Sada Nand* (2). "At one of the corners of an occupancy holding, there stood some huts which the defendant used for his living and for his cattle and *kolhu*. In one of these huts, the Musalmans used to meet for prayers. Subsequently the defendant

(1) 19 P. R. 1904.
(2) 8 Ind. Cas. 732.

began to build a *pacca* mosque on the site of the house in which they used to pray." It was held by the Allahabad High Court that "the building of *pacca* mosque was an act inconsistent with the purpose for which the holding had been let and that the defendant was liable to be ejected for so doing." *Basa Mal* v. *Ghayas-ud-Din* (3). In this case it was held that "a tenant was not at liberty to convert a thatched shed in his courtyard into a *pacca* mosque without the permission of the proprietors." At page 358 the following passage has occurred: "The District Judge says that because there was an old shed used for religious observances, the old shed being of a frail and temporary kind, it could be re placed by a permanent mosque in which the same kind of observances should continue. He holds in effect that the defendants had title to erect such a building. It seems to us that he has not fully considered the nature of the tenure of land of a village site. It is held by tenants for dwelling houses and what are understood to be the ordinary appendages of a dwelling house. Indeed, it seems to us as impossible to contend that a tenant is entitled to erect a permanent mosque as that he is entitled to erect premises for some manufacture."..."This enables a tenant to build a dwelling house in his compound, but in the case of erection of a mosque, which would by dedication become vested in the religious body for whose observances it was used, the contention of the defendants is manifestly baseless in point of law." In accordance with these authorities, I have no difficulty in holding that the *takiadar* is by no means entitled to construct a *pacca* mosque upon the *takia* land in question. I, therefore, accept the appeal, and setting aside the order of the lower Appellate Court, restore that of the first Court, decreeing the plaintiffs' claim with costs throughout.

Appeal accepted.

(3) 27 A. 356; 2 A. L. J. 27; A. W. N. (1904) 276.

CALCUTTA HIGH COURT.

CIVIL RULE No. 640 OF 1917.

February 7, 1918.

Present:—Mr. Justice Teunon and Mr. Justice Newbould.

ANANDIRAM MANDAL—PLAINTIFF—PETITIONER

versus

GOZA KACHORI AND OTHERS—OPPOSITE PARTY.

Contract Act (IX of 1872), s. 23—Public policy—Agreement to serve creditor till debt paid off, whether slavery' bond—Money paid under agreement against public policy, whether can be recovered.

The plaintiff advanced a sum, for marriage expenses to two brothers on their executing a bond, by which they agreed in consideration of the sum advanced that one of them should always work for the plaintiff. It was further stipulated in the bond that interest at the rate of 2½ per cent. per mensem that would accrue on the principal was not to be paid in cash but was to be liquidated by the services of the one or the other of the two brothers whom the plaintiff undertook to feed but not to clothe:

Held, that it was doubtful whether the agreement was opposed to public policy as a slavery bond as under its terms while one brother was working for the plaintiff it would be possible for the other brother to earn money elsewhere and in course of time to pay off the principal debt. [p. 966, col. 1.]

A suit is maintainable for the recovery of a sum of money actually advanced pursuant to an agreement which is opposed to public policy. [p. 966, col. 1.]

Civil Rule against the decision of the District Judge, Assam Valley Districts, dated the 19th April 1917, affirming that of the Munsif, Gauhati.

Babu *Probodh Chandra Ray*, for the Petitioner.

JUDGMENT.—This is a Rule calling on the opposite party to show cause why the judgment and decree complained of should not be set aside and such other order made as to this Court may seem fit and proper.

The plaintiff who is the petitioner before us brought this suit to recover a sum of Rs.147 with interest and costs. The plaintiff's allegations were that he advanced a sum of Rs. 120 for marriage expenses to the two defendants, who are brothers, on their executing a bond by which they agreed in consideration of the sum advanced that one of them should always work for the plaintiff. Interest was agreed on at 8 annas per Rs. 20, *i. e.* 2½ per cent. per mensem, and the sum of three rupees due on this account each month was not to be paid in cash but was to be liquidated by the services of one or

other of the two brothers whom the plaintiff undertook to feed but not to clothe. Both the lower Courts have held that the bond was a slavery bond and not enforceable as being opposed to public policy. The suit has been dismissed on the pleadings without any evidence being taken.

We are doubtful whether the lower Courts were right in holding that the terms of this agreement between the parties were such that it cannot be enforced on the ground of being opposed to public policy. If one of the brothers alone had executed the contract, the case of *Ram Sarup Bhagat* v. *Bansi Mandar* (1), cited by them, would support their view. But in the present case while one brother was working for the plaintiff it would be possible for the other brother to earn money elsewhere and in course of time pay off the principal debt and release them both. But it is unnecessary to discuss this aspect of the case at greater length. In any case the contract for service is not one that can be specifically enforced and even if the agreement be opposed to public policy yet when the facts have been fully ascertained, it may be that on the equitable principles embodied in sections 38 and 41 of the Specific Relief Act, the plaintiff may be found entitled to restitution of the whole or some part of the money advanced. It was held by their Lordships of the Privy Council in *Mohori Bibee* v. *Dharmodas Ghose* (2) that these sections give a discretion to the Court when under the circumstances of the case justice requires the return of money paid in respect of a transaction held to be void. We may also refer to the case of *Bakshi Das* v. *Nadu Das* (3), where following the decisions of this Court in *Juggessur Chuckerbutty* v. *Panchcowree Chuckerbutty* (4) and *Ram Chand Sen* v. *Audaito Sen* (5), it was held that a suit was maintainable for the recovery of the sum actually paid pursuant to an agreement which was opposed to public policy.

We accordingly make this Rule absolute and direct that the case be sent back to the Munsif of Gauhati to be tried according to law. As the opposite party did not appear we make no order as to costs.

Rule made absolute.

(1) 30 Ind. Cas. 955; 42 C. 742; 19 C. W. N. 1118.
(2) 30 C. 539 at p. 549; 30 I. A. 114; 7 C. W. N. 441; 5 Bom. L. R 421; 8 Sar. P. C. J. 374.
(3) 1 C. L. J. 261;
(4) 14 W. R. 154; 5 B. L. R. 395.
(5) 10 C. 1054; 5 Ind. Dec. (N. S) 704.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 2429 OF 1915.

April 5, 1918.

Present:—Mr. Justice Shadi Lal and Mr. Justice Wilberforce.

SAIDE KHAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat AMIR-UN-NISSA AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Succession—Ancestral property—Daughters or collaterals of sixth degree—Manj Rajputs of Talwandi Rai, Tahsil Jagraon, Ludhiana District—Riwaj-i-am, *evidentiary value of entries in—Burden of proof.*

An entry in a *riwaj-i-am* even though unsupported by instances constitutes a strong piece of evidence in support of an alleged custom and it lies upon the party impugning it to rebut the value of this evidence. [p. 968, col. 2.]

Ata Muhammad Khan v. *Jiwani*, 26 Ind. Cas. 492; 34 P. R. 1915; 2 P. W. R. 1915; 33 P. L. R. 1915, *Ranjha* v. *Jindwaddi*, 24 Ind. Cas. 942; 104 P. R. 1914; 221 P.L. R. 1914; 122 P. W. R. 1914 and *Dasaundhi* v. *Chanda Singh*, 13 Ind. Cas. 421; 45 P. R. 1912; 85 P. W. R. 1912; 71 P. L. R. 1912, followed.

Plaintiffs, collaterals in the sixth degree of the last male owner, a Manj Rajput of Talwendi Rai, Tahsil Jagraon, Ludhiana District, sued for a declaration that a gift of his ancestral land made by his widow in favour of his two unmarried daughters should not affect their reversionary rights. It appeared that according to the *riwaj-i-am* the daughters had a prior right of succession to the collaterals:

Held, that in view of the entry in the *riwaj-i-am* it was for the plaintiffs to establish their rights of inheritance as against the daughters of the deceased and that they having failed to do so were not entitled to obtain the relief they claimed. [p. 968, col. 2]

Rustam Khan v. *Musammat Jio*, 139 P. R. 1892, distinguished.

First appeal from the decree of the Subordinate Judge, 1st Class, Ludhiana, dated the 8th July 1915, dismissing claim.

Lala *Moti Sagar*, R. S., and Mr. *Muhammad Rafi* for the Hon'ble Mr. *Muhammad Shafi*, for the Appellants.

The Hon'ble Mr. *Fazl-i-Hussain* and Mr. *Abdul Ghani Khan*, for the Respondents.

SAIDE KHAN *v.* AMIR-UN-NISSA.

JUDGMENT.—Plaintiffs, who are collaterals in the sixth degree of one Rahmat Ali, sued for a declaration that a gift of his ancestral land made by his widow in favour of his two unmarried daughters should not affect their reversionary rights. It was found in their favour by the lower Court that the land was ancestral, but plaintiffs' suit has been dismissed on the ground that plaintiffs could not contest the right of succession of the daughters to Rahmat Ali's estate. The parties in question are Manj Rajputs of the village of Talwandi Rai, Tahsil Jagraon of the Ludhiana District.

A large amount of documentary and oral evidence was produced in the case and has been discussed at length by the lower Court, which has apparently held this evidence somewhat inconclusive. It has, however, based its decision to a very large extent upon the *riwaj-i-ams* of the 1882 and 1909-10 Settlements. Counsel for the appellants argues that the *riwaj-i-ams* in question have been wrongly interpreted and that the weight of evidence, as shown by the instances proved and by the oral statements, is much in his favour. Counsel also questioned the action of the lower Court in relying on instances produced by defendants of succession among other *gots* in other districts. Counsel admits that the daughters have a right by custom to succeed to the estate till their marriage but argues that they have no further rights in the property. It may be stated that since the decision of the first Court both the daughters have married.

The most important point to consider is the correct interpretations and the value of the *riwaj-i-ams*. Mr. Gordon Walker in 1882 recorded his opinion of the customs of Muhammadan Rajputs in the Ludhiana district to the following effect:—

"That ordinarily a daughter could not succeed in the presence of male lineal issue, but that if she had taken a vow to remain single she took a son's share till her marriage or death."

He then proceeded to state that though Hindu Jats were unfavourable to the rights of daughters, Muhammadan Rajputs and some other tribes agreed that if there was no male collateral related through the great-great-grandfather (*nakar dada*), the daughter whether married or virgin succeeds.

Counsel for the appellants contested the interpretation placed on Mr. Gordon Walker's *riwaj-i-am* on the ground that the rights of Muhammadan Rajputs are dealt with in one paragraph and that the second paragraph, in which the rights of a daughter against a collateral in the 5th degree are described, refers to Hindu Jats and tribes other than Muhammadan Rajputs. This contention cannot be upheld in view of the special *riwaj i-am* prepared at the same Settlement for Muhammadan Rajputs of the Manj tribe. This special *riwaj-i-am* provides directly for the succession of a daughter, married or unmarried, as against collaterals of the 6th degree. The *riwaj-i-am* of Mr. Gordon Walker has been somewhat varied in the *riwaj-i-am* prepared in the 1909-10 Settlement, but apparently the compiler, Mr. Dunnett, held the view that the rights of daughters generally had considerably improved. As far as Muhammadan Rajputs of the Manj tribe are concerned the entry in the present *riwaj-i-am* is to the effect that the previous custom as noted by Mr. Gordon Walker continues in force. Mr. Dunnett has also cited some instances in his *riwaj-i-am* of the succession of daughters. It is true that all his examples among Rajputs refer to the succession of virgin daughters, but it appears that in at least two of the instances their retention of the land was not contested by the collaterals when they married. In these two cases the collaterals long after the period of limitation had passed contested the rights of the daughters, but the mere fact that they allowed them to remain in possession unchallenged for a large number of years strongly supports the case set up by the defendants. It must also be noticed that the entries in the *riwaj-i-am* in the present case were compiled especially for the village in which the land in suit is situated, and there is evidence of a respectable witness, which appears to be true, that the original entry was attested by two of the plaintiffs themselves.

Learned Counsel for the appellants admits that an entry in a *riwaj-i-am*, even if not supported by instances, constitutes a strong piece of evidence in support of a custom relied upon, and that it lay upon the plaintiffs to rebut the value of this evidence. [*Dasaundhi* v. *Chanda*

Singh (1)]. Counsel, however, urges that he has succeeded by documentary and oral evidence in proving that the custom cited in the *riwaj-i-am* does not actually prevail among the tribe of the parties. The documentary and orally cited instances have been discussed at length by the lower Court. A large number of these instances are of no value in the present case, as they refer to the succession of collaterals related within five degrees. As far as the succession of more distantly related collaterals against daughters is concerned, only three or at most four instances have been established, and in each of these cases full details are wanting regarding the position of the daughter with regard to her inheritance and also with regard to her collaterals. It may frequently happen that a daughter married in a different village does not care to be burdened with the worry of managing land situated far distant, especially in the teeth of opposition from her collaterals. It may also frequently be the case that the land inherited is of small area or of small value and not worth the expense of litigation. The married daughter, moreover, is dependent on her husband's inclinations and he may be influenced by one consideration or another in such cases. The instances quoted, therefore, by the plaintiffs are, in our opinion, of little value against the recorded opinions of the members of the Manj Rajput tribe at a time when there was no litigation.

Counsel for the appellants also relied upon *Rustam Khan* v. *Musammat Jio* (2) and the enquiry held in connection therewith in support of his claim. That case, however, was one between the collaterals in the 3rd degree and *khana-damad*, and it was the rights of a son-in-law which were specially in question. The case was, to a large extent decided upon the entry in the *riwaj-i-am* which was most unfavourable to the rights of a son-in-law. It is true that in that case some reference was made to the position of daughters, but the entry now relied upon by the defendants was not specially noticed by the Chief Court.

Of a large number of instances quoted by the defendants a considerable proportion were also of little value in this case, as many of these concern collaterals more nearly related than the 6th degree and many others relate merely to the rights of virgin daughters. The value of other instances was contested on the ground that the parties did not belong to the Ludhiana District or that they did not belong to the Manj *got* of Rajputs. We do not consider the latter objection as of any great importance, as according to the Ludhiana Gazetteer the Manj *got* is one of the leading tribes of Rajputs in the Ludhiana District and as tribes of inferior importance would naturally follow their customs. The instances cited from the neighbouring districts of Jullundur, Hoshiarpur, Ferozpore and Patiala appear to us of some value owing to contiguity and the probability that the tribes in question follow a similar custom. In some of the judicial cases cited, for instance Nos. 9 and 10, by the lower Court, the cases were decided in favour of the daughter on account of adverse possession, but as already stated, the fact that such successions were not challenged strongly supports the custom as set up in favour of the daughter.

Finally, we may express our opinion that the entry in the *riwaj-i-am* has special value in that it gives expression to the opinion of males in favour of the rights of females at a time when no litigation was expected. The same view has been held in many rulings of this Court. [See for instance *Ata Muhammad Khan* v. *Jiwani* (3) and *Ranjha* v. *Jindwaddi* (4)].

For the above reasons we consider that in view of the entry in the *riwaj-i-am* it was for the plaintiffs to establish their rights to inheritance as against the daughters of the deceased and we have no hesitation in holding that they have failed to do so. We, therefore, dismiss the appeal with costs.

Appeal dismissed.

(1) 13 Ind. Cas. 421; 45 P. R. 1912; 85 P. W. R. 1912; 71 P. L. R. 1912.
(2) 139 P. R. 1892.
(3) 26 Ind. Cas. 492; 34 P. R. 1915; 2 P. W. R. 1915 33 P. L. R. 1915.
(4) 24 Ind. Cas. 942; 104 P. R. 1914; 221 P. L. R. 1914; 122 P. W. R. 1914.

DASARTHY NAIDU v. PALALA KUMARAMULL.

MADRAS HIGH COURT.

CIVIL APPEAL No. 283 OF 1916.

January 22, 1918.

Present:—Justice Sir William Ayling, Kt., and Mr. Justice Seshagiri Aiyar.

P. DASARTHY NAIDU—DEFENDANT—APPELLANT

versus

PALALA KUMARAMULL RAJA (DEAD) AND OTHERS—PLAINTIFFS AND LEGAL REPRESENTATIVE OF 1ST PLAINTIFF—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11, *O. II, r.* 2, *O. XXIII, r.* 1—Res judicata.—*Dismissal of suit on pleadings without decision on merits, whether operates as* res judicata—*'Withdrawal of suit, leave for, on payment of costs,' meaning of—Costs, payment of, whether condition precedent to grant of leave—Suit on non-existent cause of action, whether bars fresh suit on true cause of action—Power-of-attorney granted to mortgagee for realization of dues to mortgagor—Suit for cancellation of power and accounts, dismissal of—Fresh suit for redemption, maintainability of—Cause of action.*

Where a suit is dismissed on the pleadings without any decision being rendered on the merits, there is no bar of *res judicata*. [p. 970, col. 2.]

Where leave to withdraw a suit is granted on payment by the plaintiff of defendant's costs, the payment of costs is not a condition precedent to the institution of a fresh suit and non-payment will not disable the plaintiff from filing a fresh suit. [p. 971, col. 1.]

The essential thing to be borne in mind in applying Order II, rule 2, Civil Procedure Code, is that the cause of action in the subsequent suit should be the same as the cause of action in the previous suit and not that the cause of action in the subsequent suit should have been made the subject of litigation in the former suit. [p. 971, col. 2.]

Where a suit is brought upon either a non-existent cause of action or upon a false cause of action, it will not bar the institution of a suit upon the true cause of action, because there is no identity of causes of action between the two suits [p. 972, col. 2.]

A right which a litigant possesses without knowing or ever having known that he possesses it cannot be regarded as a 'portion of his claim' within the meaning of rule 2, Order II. [p. 972, col. 1.]

Plaintiff executed a mortgage to one *R.* on 12th July 1892. On 8th July 1898 he executed a power-of-attorney to *R* empowering *R.* to collect rents from plaintiff's tenants and appropriate the net income towards the mortgage-deed. In 1910 plaintiff sued *R.* for cancellation of the power and for accounts. That suit was dismissed on the ground that plaintiff should have sued on the mortgage. Afterwards he filed a suit on the Original Side of the High Court for cancellation of the power and for accounts alleging that the mortgage had become discharged. That suit was dismissed on the ground that it was barred as *res judicata*. On appeal, the Appellate Court permitted the plaintiff to withdraw the suit with liberty to file a fresh suit on payment of defendant's costs. The plaintiff without paying the costs of that suit brought the present suit for redemption of the mortgage:

Held, (1) that the suit was not barred as *res judicata* inasmuch as, in neither of the previous suits, was there any decision on the merits; [p. 970, col. 2.]

(2) that the non-payment of costs in the second of the two prior suits was not a condition precedent to the order granting leave and did not bar the institution of the present suit; [p. 971, col. 1.]

(3) that the suit was not barred under Order II, rule 2, Civil Procedure Code. [p. 972, col. 2.]

Appeal against the preliminary decree of the Court of the Temporary Subordinate Judge, Chingleput, dated the 8th September 1916, in Original Suit No. 57 of 1916.

FACTS appear from the judgment.

Mr. *T. Rangachariar*, for the Appellant, argued that, in the first place, the present suit was *res judicata* by reason of the two previous suits. There was a final decision in both. In the latter of those suits, the Appellate Court permitted the withdrawal of the suit with liberty to bring a fresh suit only on condition of the plaintiff paying defendant's costs within 2 months. That order had not been obeyed and plaintiff was debarred from suing again.

Secondly, the suit offended against the provisions of Order II, rule 2, Civil Procedure Code. The plaintiff having omitted to ask for redemption in the prior suits, it was not competent to agitate for the relief in another proceeding. There was a reference to the mortgage in the plaints in the earlier suits. Reference was made to *Moonshee Busloor Ruheem* v. *Shumsoonnissa Begum* (1), *Rangayya Goundan* v. *Ranjappa Rao* (2), *Abdul Hakim Khan* v. *Karan Singh* (3), *Nayanada Iyer* v. *Krishnamurti Aiyar* (4) and *Akayi Kunhi* v. *Ayissa Bi* (5).

Mr. *T. R. Ramachandra Aiyar*, for the Respondents, argued that there was no *res judicata* as the prior decisions were on preliminary points and were not given on the merits. The order granting leave in the second case was unconditional and defendant could apply in execution for costs.

(1) 11 M. I. A. 551; 8 W. R. P. C. 3; 2 Suth. P. C. J. 59; 2 Sar. P. C. J. 259; 20 E. R. 208.

(2) 24 M. 491; 6 C. W. N. 17; 3 Bom. L. R. 799; 8 Sar. P. C. J. 117; 28 I. A. 22 (P. C.).

(3) 30 Ind. Cas. 951; 37 A. 646; 18 A. L. J. 929.

(4) 6 Ind. Cas. 233; 34 M. 97; (1910) M. W. N. 213; 8 M. L. T. 60; 20 M. L. J. 535.

(5) 26 M. 645.

The suit was not barred by Order II, rule 2, Civil Procedure Code. The fact that the prior suits were based on an unsustainable cause of action and that the plaintiff misconceived his remedy did not bar the present suit.

JUDGMENT.—This is a suit for redemption. The two main defences are that the suit is barred by Order II, rule 2, and also by section 11 of the Civil Procedure Code. The Subordinate Judge overruled these objections and passed a preliminary decree for taking accounts. The defendant has appealed.

In order to understand the contentions in appeal it is necessary to set out the history of the case. The property in suit belonged to the 1st plaintiff. He executed a deed of mortgage in favour of one P. Rajaratnam Naidu on the 12th of July 1892. On the 5th of July 1898 he executed a general power-of-attorney to the same individual to facilitate the collection of rents from the tenants. One of the conditions of the power-of-attorney was that the agent should appropriate the net income towards the mortgage-deed and should also pay to the mortgagor a certain fixed monthly allowance. The relation between the mortgagor and the mortgagee became strained in or about the year 1910. In that year Original Suit No. 36 of 1910 on the file of the District Court of Chingleput was instituted against Rajaratnam Naidu by the plaintiff for the cancellation of the power-of attorney executed in 1898 and for accounts. The defendant pleaded *in limine* to that suit that as the power-of-attorney was part of the mortgage transaction, the plaintiff should sue on the mortgage and not on the power-of attorney. The then District Judge upheld this objection and dismissed the suit. The second suit was filed in the Original Side of the High Court, *viz.*, Original Suit No. 232 of 1914, in which it was claimed that the mortgage has become discharged, that the power-of-attorney should be cancelled and that the defendant should render an account. At the time of this suit Rajaratnam Naidu had died and the present defendant who is his legal representative was impleaded as defendant. Mr. Justice Kumaraswami Sastri who heard the original suit was of opinion that it was barred by *res judicata* and dismissed it. An appeal was preferred against that decree. At the hearing of the appeal, the plaintiff applied for permission to withdraw the suit with liberty to institute a fresh suit. This permission was granted and the present suit was instituted in the District Court of Chingleput for redemption based upon the mortgage of 1892.

The contention that the suit is barred by *res judicata* may be shortly disposed of. It is not denied that at no time was there any decision on the merits. The suits on both the occasions were dismissed on the pleadings. It is, therefore, clear that the present suit is not barred by section 11 of the Civil Procedure Code. Very recently, the Judicial Committee pointed out in *Abdullah Ashgar Ali Khan* v. *Ganesh Dass* (6) that where the matter has not been heard and finally decided there can be no bar of *res judicata*.

One other objection may also be shortly dealt with. It was contended by Mr. T. Rangachariar that the order of the Appellate Court permitting the withdrawal of the suit with liberty to sue again has been contravened by the plaintiff and that consequently the present suit is unsustainable. The order is in these terms: "Leave to withdraw with liberty to bring a fresh suit on payment of defendant's costs here and below, within two months, in view of decision in Original Side Appeal No. 51 of 1914." In order to understand the import of this, it must be stated that in Original Side Appeal No. 51 of 1914, it was held by a Bench of this Court that suits for redemption should be instituted in the Court within whose jurisdiction the mortgaged property is situated. Therefore, what the learned Judges meant in giving leave to withdraw was that as the suit ought to be one for redemption and as the High Court can have no jurisdiction to entertain such a suit, plaintiff will be given liberty to withdraw the suit and to bring a proper suit in a proper forum. In effect the order amounted to saying that the High Court had no jurisdiction to hear the suit, which ought to be filed under the circumstances disclosed in the

(6) 42 Ind. Cas. 959; 34 M. L. J. 12; 128 P. W. R. 1917; 22 M. L. T. 451; 22 C. W. N. 121; 3 P. L. W. 381; 26 C. L. J. 568; 15 A. L. J. 589; 19 Bom. L. R. 972; 7 L. W. 62; 132 P. L. R. 1917; (1918) M. W. N. 7 (P. C.)

District Court of Chingleput and that consequently the plaintiff should not be allowed to go on with the suit in Madras. If that is the correct interpretation of the order, there was no necessity at all for the granting of permission to sue again. We take it that it was given *ex abundanti cautela*. Consequently, the non-payment of costs within the time mentioned in the order would not disable the plaintiff from suing upon the cause of action; moreover on the grammatical construction of the order, we are not prepared to say that the payment of costs was a condition precedent to the institution of the suit within two months. We must, under these circumstances, overrule the objection based upon the withdrawal order.

Now we go to the main objection. Mr. T. Rangachariar conceded at the outset that if the cause of action for the present suit can be held to have been different from the cause of action for Original Suit No. 36 of 1910 on the file of the District Court of Chingleput, he will not be able to maintain his position that Order II, rule 2 of the Civil Procedure Code, barred the present suit. It is clear on examining the plaint in the first suit that although there was a casual reference to the mortgage of 1892 in the plaint, it was solely based upon the power-of-attorney executed in 1898. The cause of action was stated to have accrued on the date on which notice to cancel the power-of-attorney was given, and the prayer was for the cancellation of the power of attorney. What was pleaded in defence was that that was not the proper suit. In the present suit, the cause of action is based on the mortgage document, and the prayer is for redemption. In our opinion, the two causes of action are entirely different. The fact that the plaintiff in the first suit had to rest his case upon an unsustainable cause of action is not a ground for holding that that cause of action is the same as the true cause of action on which the subsequent suit is based It was held in *Pittapur Raja* v. *Suriya Row* (7) by the Judicial Committee with reference to section 7 of the Act of 1859, which corresponded to Order II, rule 2, "that every suit should include the whole of the claim arising out of the cause of action, meaning the whole of the claim arising out of the same cause of action upon which the suit was brought, not that every suit should include every cause of action, or every claim, which the plaintiff had against the defendant." This was followed in *Mahomed Riasat Ali* v. *Hasin Banu* (8) and in *Nagathal* v. *Ponnusami* (9). Reference may also be made to *Khedaroonissa Bibee* v. *Boodhee Bibee* (10). In Order II, rule 2 of the Civil Procedure Code, there are three distinct clauses: Clause (1) deals with the splitting of cause of action, clause (2) deals with the splitting of portions of the subject-matter, and clause (3) to the same process in respect of reliefs arising from the same cause of action. The essential thing to be borne in mind in applying the rule is that the cause of action in the subsequent suit should be the same as the cause of action in the previous suit, and not that the cause of action in the subsequent suit should have been made the subject of litigation in the former suit. If we keep this principle in mind, there will be no difficulty in understanding the various cases that have been quoted at the Bar.

Mr. T. Rangachariar relied upon *Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum* (1). That related to the omission of a portion of the subject-matter in the previous suit. The cause of action for the second suit was a deposit of Government promissory notes; a portion of that same deposit was the subject-matter of the previous litigation. The Judicial Committee pointed out that the word *omission* included both accidental and deliberate omissions, and that consequently the subsequent suit was barred. In *Rangayya Goundan* v. *Ranjappa Rao* (2), another Privy Council case, two reliefs were available on the cause of action as stated in the previous plaint. One relief alone was asked for in the first litigation. The Judicial Committee pointed out that a suit for the other relief based upon that cause of action was not maintainable. The same remarks apply to *Abdul Hakim Khan* v. *Karan*

(7) 8 M. 520; 12 I. A. 116; 9 Ind. Jur. 274; 4 Sar. P. C. J. 638; 3 Ind. Dec. (N. S.) 356.

(8) 20 I. A. 155; 21 C. 157; 17 Ind. Jur. 484; 6 Sar. P. C. J. 374; Rafique & Jackson's P. C. No. 138; 10 Ind. Dec. (N. S.) 737 (P. C.).

(9) 13 M. 44; 4 Ind. Dec. (N. S.) 741.

(10) 13 W. R. 317.

Singh (3). *Naganada Iyyr* v. *Krishnamurti Aiyar* (4), which was strongly relied upon by the learned Vakil for the appellant, proceeded on the footing that the subsequent suit for possession arose out of the cause of action for declaration which was the basis of the first suit. As regards *Akayi Kunhi* v. *Ayissa Bi* (5), another case relied upon by Mr. T. Rangachariar, it is enough to say that that decision does not seem to be reconcilable with the decision of the Judicial Committee in *Saminathan Chetty* v. *Palaniappa Chetty* (11). On the other hand, the decisions to which Mr. T. R. Ramachandra Aiyar drew our attention support the principle we have already enunciated. The decision of the Judicial Committee in *Amanat Bibi* v. *Imdad Hussain* (12) is one of the strongest cases on the point. The Judicial Committee said in that case, "It appears to their Lordships that the fair result of the evidence is that at the date of the former suit the respondent was not aware of the right on which he is now insisting. A right, which a litigant possesses without knowing or ever having known that he possesses it, can hardly be regarded as a 'portion of his claim' within the meaning of the section in question." These words are exactly applicable to the present case. The plaintiff was not aware when he sued in Original Suit No. 36 of 1910 on the file of the District Court of Chingleput that his cause of action was only to sue on the mortgage. *Raghava Chariar* v. *Seshadri Iyengar* (13) follows the decision in *Amanat Bibi* v. *Imdad Husain* (12). A Full Bench of this Court in *Thrikaikat Madathil Raman* v. *Thiruthiyil Krishnen Nair* (14) held that where the first suit is based upon an alleged lease and fails, a subsequent suit on title is not barred, the reason of the decision being that the cause of action for the subsequent suit is not the same as the cause of action for the fresh suit. *Vasudeva Ravi Varma* v. *Athi Kottil Eazhuvan Kannanur* (15) is also to the same effect. It is not necessary to multiply citations. The principle deducible from these various cases is that where a suit is brought upon either a non-existent cause of action or upon a false cause of action, that will not bar the institution of a suit upon the true cause of action, because there is no identity of causes of action between these two suits. The reason of the decision of the Judicial Committee in *Saminathan Chetty* v. *Palaniappa Chetty* (11) is decisive on that matter. That was a suit upon a document which was found to be invalid. The Judicial Committee held that a suit based upon the original title which preceded the document was not obnoxious to the rule similar to Order II, rule 2. The observations of the learned Judges in *Ramaswami Ayyar* v. *Vithinatha Ayyar* (16) are exactly in point. For all these reasons we are of opinion that the decision of the Subordinate Judge is right; and we dismiss the appeal with costs.

Appeal dismissed.

M.C.P.

(11) 26 Ind. Cas. 228; 41 I. A. 142; 18 C. W. N. 617; 83 L. J. P. C. 131; 17 New Law Rep. 56; (1914) A. C. 618; 110 L. T. 913 (P. C.)

(12) 15 C. 800; 15 I. A. 106; 12 Ind. Jur. 255; 5 Sar. P. C. J. 214; Rafique & Jackson's P. C. No. 103; 7 Ind. Dec (N. S.) 1117.

(13) 15 M. L. J. 374.

(14) 29 M. 153; 16 M. L. J. 48 (F. B.).

(15) 26 Ind. Cas. 51.

(16) 26 M. 760 at p. 771; 13 M. L. J. 448.

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL NO. 45 OF 1917.

March 27, 1918.

Present:—Mr. Justice Maung Kin.

MAUNG BA KYAW AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

U LAN—DEFENDANT—RESPONDENT.

Execution of decree—Attachment withdrawn—Declaration, suit for, by creditor that property belongs to judgment-debtor, maintainability of—Specific Relief Act (I of 1877), s. 42, proviso, applicability of.

Independently of the provisions of Order XXI, rule 63 of the Civil Procedure Code, a decree-holder may sue for a declaration that certain property attached in execution of his decree belongs to the judgment-debtor, although at the time of the suit the attachment might have been withdrawn and the property may not be in the possession of the decree-holder. To such a suit the proviso to section 42 of the Specific Relief Act does not apply. [p. 973, cols. 1 & 2.]

Mr. *Ba U*, for the Appellants.

Mr. *Maung Tin*, for the Respondent.

JUDGMENT.—In execution of their decree against one Tun Hla, the plaintiffs-appellants

MAUNG BA KYAW v. U LAN.

attached two bullocks as the property of their judgment-debtor. The defendant-respondent applied for the removal of the attachment. Thereupon the plaintiffs withdrew their attachment and filed the present suit for a declaration that the two bullocks were liable to be attached and sold in execution of their decree.

The trial Court decreed the suit.

The lower Appellate Court held that the suit, not being under Order XXI, rule 63, of the Code of Civil Procedure but under section 42 of the Specific Relief Act, did not lie, inasmuch as there was no prayer for consequential relief. Evidently the learned Appellate Judge thought that, as the bullocks were in the possession of the defendant, the plaintiffs should have asked for their possession.

It has not been contended here that the suit is one under the Civil Procedure Code. That it cannot be held to be such a suit there is no doubt, as there was no investigation of plaintiff's claim in the attachment proceedings owing to the attachment being withdrawn. The wording of rule 63, Order XXI, is quite clear. Nor is it disputed that independently of a suit under the Civil Procedure Code, the decree-holder may sue for a declaration that the property attached belonged to the judgment-debtor. In fact this latter proposition was expressly laid down in *Societa Coloniale Italiana* v. *Shwe Le* (1), following *Raghunath Mukund* v. *Sorash K. R. Kama* (2). I have followed this ruling in *Chan Tat Thai* v. *Ma Lat* (3). But the argument of the defendant's Advocate is that the plaintiff could not sue for a bare declaration, as the bullocks were in the possession of the defendant, and that the proviso to section 42 of the Specific Relief Act applies. Exactly the same argument was advanced in *Allagappa Chetty, P. L. A. N.* v. *Nazamat Ali Chowdhry* (4) and Irwin, J., answered it in these words, "I can see no reason for making any distinction between the mode in which plaintiff must establish his right if he has previously applied for a summary order and the mode in which he must establish his right if he has not applied for a summary order. In either case a declaration is sufficient. When plaintiff obtains a declaration, the Court which executed the decree must respect the declaration and give restitution.... The object of the proviso is to prevent a plaintiff from getting a declaration in one suit, and consequential relief afterwards in another. Here there is no need for any subsequent suit. The relief must be given by the Court which sold the land in execution." It may be noted that the suit in that case was one by the claimant to the property attached but not by the decree-holder. In this case the suit is by the decree-holder. But the remarks of Irwin, J., must apply, *mutatis mutandis*, to this case. When the plaintiff gets the declaratory decree he asks for, he can proceed to attach the same property in execution of his previous decree and the execution Court will be bound to recognize the attachment as being just and proper. The declaratory decree will be binding on the present defendant in the subsequent execution proceedings, and he will not be able to object that the plaintiff has no right to attach the property.

Then there is my own ruling in *K. Y. K. M. Chetty Firm* v. *S. N. V. R. Chetty Firm* (5) in favour of the plaintiff. There I followed *Sappabadi Chetty* v. *Maung In* (6) and *Kristnam Sooraya* v. *Pathma Bee* (7).

I would, therefore, hold that the proviso to section 42 of the Specific Relief Act does not apply.

The appeal is allowed and the case is remanded to the lower Appellate Court to be decided on the merits. Costs will abide the result. The appellant will be granted a certificate for the return of the Court-fee paid on the memorandum of appeal under section 13 of the Court Fees Act.

Appeal allowed;
Case remanded.

(1) 4 L. B. R. 252; 14 Bur. L. R. 135.
(2) 28 B. 266; 12 Ind. Dec. (N. S.) 176.
(3) 33 Ind. Cas. 124; 9 Bur. L. T. 89.
(4) 4 L. B. R. 263.
(5) 34 Ind. Cas. 125; 9 Bur. L. T. 199.
(6) P. J. L. B. 481.
(7) 29 M. 51.

BABU MISAR v. UMBE PARSHAD.

PUNJAB CHIEF COURT.

MISCELLANEOUS FIRST CIVIL APPEAL No. 1547 OF 1917.

April 9, 1918.

Present:—Mr. Justice Scott-Smith.

BABU MISAR AND OTHERS—PLAINTIFFS—APPELLANTS

versus

UMBE PARSHAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Probate and Administration Act (V of 1881), ss. 62, 85—Application for Letters of Administration with Will annexed, nature of—Duty of Court—Court, whether can refuse Letters.

An application for Letters of Administration with the Will annexed stands on the same footing as an application for Probate, and the Court is bound to grant the Letters unless it finds that the Will was not executed by the testator or that he was not of a disposing mind at the time of making it or that the Will was not his own voluntary act. [p. 975, col. 1.]

In an application for Letters of Administration to the estate of one *D.* with a copy of the Will annexed it appeared that *N.*, the husband of *D.*, made a Will dedicating certain property to a temple and directing that his widow be maintained out of his other property. After the death of *N. D.* applied for Letters of Administration to his estate. The executors under the Will appeared in Court and consented to the widow being granted the Letters, which were granted accordingly. Later on *D.* made a Will in which she appointed the applicants as executors, who after her death applied for Letters of Administration with a copy of her Will annexed. The executors under the Will of *N.* lodged caveats urging that *D.* had no power to make a Will:

Held, that as it was proved that *D.* executed the Will and as it was not contested that she was not of a disposing mind at the time she made it, the applicants were entitled to Letters of Administration with copy of her Will annexed. [p. 975, col. 1.]

Miscellaneous first appeal from the order of the Senior Subordinate Judge, 1st class, Delhi, dated the 28th February 1917, dismissing the application.

Lala *Moti Sagar*, R. S., for the Appellant.

Mr. *Manohar Lal*, for the Respondents.

JUDGMENT.—This is an appeal from the order of the Senior Subordinate Judge, Delhi, rejecting the application of Babu Misar and Jhabbu Misar for Letters of Administration to the estate of Bibi Dhanno with a copy of Will annexed. Narain Das, husband of *Musammat* Dhanno, made a Will on the 27th July 1896, Joti Parshad and Umbe Parshad being appointed executors. Under his Will he made certain property *wakf* and dedicated it to a Hindu temple and directed that his widow be maintained out of his other property. He died on the 19th November 1910 and on the 16th of December 1913 *Musammat* Dhanno applied for Letters of Administration to his estate. Joti Parshad and Umbe Parshad appeared in Court and consented to the widow being granted Letters of Administration and they were granted accordingly. On the 15th November 1915 *Musammat* Dhanno made a Will in which she appoined Babu Misar and Jhabbu Misar as executors. She died sometime in December 1915, and on the 5th of August 1916 the said executors applied for Letters of Administration with a copy of *Musammat* Dhanno's Will annexed. Joti Parshad and Umbe Parshad lodged caveats. The main objection urged by them was that *Musammat* Dhanno deceased had no power to make a Will. The Court has rejected the application, on the ground that the widow had no right to make the Will because the Will of her husband confined her rights only to maintenance from certain properties and that the mere fact that she was granted Letters of Administration because the executors did not like to act, did not entitle her to will away the property contrary to the very terms of the Will of her husband in respect of which she was granted Letters of Administration.

Mr. Moti Sagar on behalf of Babu Misar appellant urges that in proceedings under Act V of 1881 where Probate of a Will is sought, the Court is bound to grant the Probate unless it finds that the Will was not executed by the testator or that he was not in a state of mind competent to exercise his testamentary power or that the Will was not the testator's own voluntary act, and that the Court has no concern with the question whether the Will, if proved, will be effectual or valid or whether it can affect certain parts of the property with which it purports to deal. In support of this he relies upon *Indar Narain* v. *Onkar Lal* (1). He also cited *Ochavaram Nanabhai* v. *Dolatram Jamietram* (2), wherein it was laid down that on the hearing of a petition for issue of Letters of Administration to the estate of a deceased person it is not the province

(1) 10 Ind. Cas. 130; 20 P. R. 1912; 141 P. L. R. 1911; 233 P. W. R. 1911.

(2) 28 B. 644; 6 Bom. L. R. 966.

of the Court to go into the question of title to the property to which the Letters of Administration refer. He urges that all the Court had to do was to arrive at a finding whether *Musammat* Dhanno executed the Will in question and whether she was of a disposing mind at the time when she executed it, and that having found these facts in favour of the executors-applicants, it was bound to grant them Letters of Administration. Mr. Manohar Lal on behalf of the respondents does not contest the authority of the rulings cited by Mr. Moti Sagar, but contends that section 85 of Act V of 1881 gives the Court power to refuse Letters of Administration for reasons to be recorded by it. Mr. Moti Sagar replies that this section does not apply to an application for the grant of Letters of Administration with a copy of the Will annexed, which he says stands on the same footing as an application for Probate of a Will. There are, I think, grounds for holding that an application for Letters of Administration with the Will annexed stands on the same footing as an application for Probate, for both applications are grouped together in section 62 of the Act. Be that as it may, I do not think the present case was one such as is contemplated by section 85 of the Act. The real question in dispute appears to be whether the original executors under the Will of Narain Das are now entitled to manage the property or whether they have forfeited their right by not taking out Letters of Administration after Narain Das's death and by assenting to the grant of such Letters to Narain Das's widow. If they are not now entitled, it appears to me that there are no reasons why *Musammat* Dhanno should not have had authority to make arrangements for the management of the property after her death. The question is not devoid of difficulty and is, in my opinion, not one for decision in the present application. It is proved that *Musammat* Dhanno executed the Will and it is not contested before me that she was not of a disposing mind at the time when she made it.

I, therefore, accept the appeal and reversing the order of the lower Court grant the application of Babu Misar and Jhabbu Misar for Letters of Administration to the estate of Bibi Dhanno with a copy of her Will annexed. Parties will bear their own costs. Letters of Administration will be made out by the lower Court.

Appeal accepted.

MADRAS HIGH COURT

SECOND CIVIL APPEAL No. 1301 OF 1915.

December 17, 1917.

Present:—Mr. Justice Seshagiri Aiyar and Mr. Justice Bakewell.

MUTHAYA SHETTI—PLAINTIFF—APPELLANT

versus

KANTHAPPA SHETTI—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), Sch. I, Art. 134, *scope of—Transfer by mortgagee—Redemption, suit for, against transferee—Adverse possession, plea of—Absolute interest, acquisition of, by purchaser—Tests—Burden of proof—Adverse finding on issue, while final decision favourable to party, effect of*—Res judicata—*Civil Procedure Code (Act V of 1908), s.* 11.

Article 134 of the Limitation Act governs only those cases where the transferee from the mortgagee acquires an absolute title to and interest in the property transferred. [p. 978, col. 2.]

Per *Seshagiri Aiyar, J.*—Article 134 of the Limitation Act is only a branch of the law of prescription, and the question to be determined in cases governed by that Article is, what it is that the purchaser prescribed for. If the transferee bargained for and believed he was bargaining only for the interests of the mortgagee, he cannot acquire title as the absolute owner of the property. The fact that he knew his vendor had only mortgagee rights would not be conclusive on the question. The real test would be, did he ask for and obtain an absolute interest in the property and believe himself that he was acquiring an absolute interest in it. [p. 978, col. 2.]

The fact that a party against whom an issue is decided has no right of appeal does not affect the rule of *res judicata*. [p. 977, col. 1.]

Where the decision on an issue is not necessary for the disposal of the case, it will not operate as *res judicata*. [p. 977, col. 2.]

Where an unnecessary decision on an issue is embodied in the decree itself, the matter becomes *res judicata*. [p. 977, col. 2.]

Where a judgment decides more issues than one and it is doubtful on which of those issues the final conclusion was based, the decision on all the issues will be *res judicata*. [p. 977, col. 2.]

Where the decision on an issue is unnecessary and the party against whom it is given cannot appeal

as the final decree is in his favour the decision on the issue would be *res judicata*. The proper procedure for the party adversely affected by the issue is to ask the Court to embody it in the decree. [p. 978, col. 1.]

Per *Bakewell*, J.—A transferee who claims the benefit of Article 134 of the Limitation Act must adduce evidence that he intended to purchase an absolute title, which will be, in the first place, the deed of transfer but may also consist of the contract of sale and the negotiations which preceded it. Evidence as to the documents of title produced by the vendor and the steps taken by the purchaser to ascertain the former's title to the property will be important as showing the interest to be transferred. If the title adduced by the vendor and the deed of transfer to the purchaser are consistent with an intention to transfer an absolute interest, the burden will lie on the plaintiff to show that the circumstances of the transfer negative such an intention. [p. 979, col. 2.]

Second appeal against the decree of the District Court of South Kanara, in Appeal Suit No. 326 of 1914, preferred against the decree of the Court of the District Munsif, Mangalore, in Original Suit No. 19 of 1913.

Mr. *B. Sitarama Row*, for the Appellant.

Mr. *C. V. Ananthakrishna Aiyar*, for the Respondent.

This second appeal coming on for hearing on 29th and 30th March 1917 respectively, and having stood over for consideration till 18th April 1917, the Court delivered the following

JUDGMENT.

SESHAGIRI AIYAR, J.—The predecessors-in-title of the plaintiff executed Exhibit A to one Shankaranaranappayya in 1872. Shankaranaranappayya sold the property comprised thereunder to Venkappayya under Exhibit I in 1879. Venkappayya's widow sold it in 1897 to Puttappayya and Puttappayya's sons sold the same in 1912 to the defendant. The present suit is brought by the plaintiff to redeem the mortgage of 1872. The answer of the defendant is that the suit is barred by Article 134 of the Limitation Act as more than twelve years have elapsed since the date of the transfer by the original mortgagee. Both the Courts have come to the conclusion that the suit is barred by limitation. The judgment of the District Judge is so meagre that we were obliged to hear this case as a first appeal. Mr. Sitarama Row contended before us that under Article 134 the burden of proving that the transferee from the mortgagee had acquired an absolute right in the property lay on the defendant.

Before considering this question, I shall dispose of a preliminary point suggested by Mr. Ananthakrishna Aiyar for the respondent, namely, that Exhibit A is an absolute conveyance with an option to re-purchase, and that consequently his client is the absolute owner of the property. In answer to this suggestion, the learned Vakil for the appellant pointed out that the construction of Exhibit A is *res judicata* by virtue of a decision of the District Court of South Kanara in the year 1886. That decision was given under the following circumstances. A member of the plaintiff's family sued his brothers for partition, and claimed a share in the property in dispute alleging that the alienation of it was not for necessary purposes. The District Munsif held that the plaintiff was entitled to recover a third share of the property on paying a third of the mortgage amount. There was an appeal by the alleged mortgagee, the 9th defendant in that case. His contention was that the transaction was not a mortgage but an absolute sale with an option to re-purchase. Mr. Best, the District Judge, held that it was a mortgage and not a sale. He further held that it was not open to the plaintiff to sue for the redemption of a portion of the property by offering to pay only a portion of the mortgage debt, and that, moreover, as the suit was not one for redemption, it should be dismissed *qua* this property.

The question is whether this conclusion of the then District Judge of South Kanara is *res judicata*. Mr. Ananthakrishna Aiyar strenuously argued that as the suit was dismissed and as the mortgagee could not have appealed against the decision of the District Judge although the finding on the construction of Exhibit A was against him, the matter is not *res judicata*. Upon the question whether a bare finding upon an issue when the final conclusion is in favour of the party against whom the decision on the issue is given, gives a right of appeal to the party, there have been differences of opinion. In *Yusuf Sahib* v. *Durgi* (1) it was apparently held that an appeal lies under the circumstances. In *Ranganatham Chetty* v. *Lakshmu Uammal* (2) the same

(1) 30 M. 447; 17 M. L. J. 269; 2 M. L. T. 368.

(2) 21 Ind. Cas. 15; 25 M. L. J. 379; (1913) M. W. N. 690; 14 M. L. T. 189.

view was taken. Both these cases follow *Krishna Chandra Goldar* v. *Mohesh Chandra Saha* (3). In *Achanta Venkatasaryanarayana* v. *Yellapragada Sivasankaranarayana* (4) the question was left open. There is a decision of Ayling and Spencer, JJ., in *Secretary of State* v. *Swaminatha Koundan* (5) which is inconsistent with *Yusuf Sahib* v. *Durgi* (1) and *Ranganatham Chetty* v. *Lakshmiammal* (2). See also *Brij Behari Lal* v. *Shevanath Prasad* (6). Having regard to the language of sections 96 and 100 of the Code of Civil Procedure which gives a right of appeal only against decrees, it seems doubtful whether the two earlier Madras decisions are correct. If the decision in this case depended solely upon that question, I would have felt bound to refer the matter to a Full Bench; but I think that this case can be disposed of upon other grounds. I agree with Mr. Sitarama Row that the fact that a party against whom an issue is decided has no right of appeal does not affect the rule of *res judicata*. There is nothing in the language of section 11 to suggest such a test. The language of explanation 2 to that section implies that the competence of a Court for the purpose of *res judicata* is not affected by the fact that its decision is not appealable. It is true that this explanation was introduced to put an end to a controversy which existed as to whether when a decree is not appealable to the same Tribunal the Court which decided the earlier claim can be held to have been competent to adjudicate upon the subsequent claim litigated in a superior Court. Nonetheless, the wide language of the explanation shows that the Legislature did not intend that the test of *res judicata* should depend on the right of appeal. I, therefore, overrule the first contention. Mr. Ananthakrishna Aiyar then argued that the decision on Exhibit A was not necessary for the conclusion which was come to in the suit, and that consequently the matter is not *res judicata*. The cases on this point may be grouped under four heads: the first class of cases relates to the decision on issues which are altogether unnecessary for the disposal of the case. For instance, decisions on the character of the defendant's holding where the suit is dismissed on the ground that there has been no notice to quit or that there had been no exchange of *pattas* and *muchilikas*. *Devarakonda Narasamma* v. *Devara Kondakannaya* (7) and *Muttukumarappa Reddi* v. *Arumuga Pillai* (8) represent this class of cases. In these cases as the pronouncement upon the tenure of the defendant was not necessary for the disposal of the case, the decision upon that issue was held not to be *res judicata*. It is to this class of cases the observation of Sir R. Collier in *Run Bahadur Singh* v. *Lucho Koer* (9), that "as the decree was not based upon it, but in spite of it," there can be no *res judicata* applies. See also *Nundo Lall Bhuttacharjee* v. *Bidhoo Mookhy Debee* (10), *Thakur Mugundeo* v. *Thakur Mahadeo Singh* (11) and *Shib Charan Lal* v. *Raghu Nath* (12). The second class deals with cases where although the decision of an issue is unnecessary for the disposal of the case, still for some reasons the Court embodies that decision in the decree itself. Then the matter becomes *res judicata* not on the ground that there has been a decision on the issue, but because there is a decree of the Court which is binding upon the parties: *Kaveri Ammall* v. *Sastri Ramier* (13) and *Mota Holiappa* v. *Vithal Gopal Habbu* (14). The third class relates to judgments which decide more than one issue, but it is doubtful from those judgments on which of these issues the final conclusion was based. In such a case the decision on both the issues will be *res judicata*. See *Peary Mohun Mukherjee* v. *Ambica Churn Bandopadhya* (15) and the recent decision of the learned Chief Justice and Justice Phillips in Appeal No. 62 of 1913. [*Secretary of State* v. *Rajah of Venkatagiri* (16)]. Now I come to the fourth class. In the fourth class, the

(3) 9 C. W. N. 584.
(4) 27 Ind. Cas. 861; 17 M. L. T. 85; 2 L. W. 101.
(5) 12 Ind. Cas. 167; 37 M. 25; 10 M. L. T. 291; (1911) 2 M. W. N. 303; 21 M. L. J. 947.
(6) 35 Ind. Cas. 837; 20 C. W. N. 1354.
(7) 4 M. 134; 5 Ind. Jur. 634; 1 Ind. Dec. (N. S.) 928.
(8) 7 M. 145; 2 Ind. Dec. (N. S.) 686.
(9) 12 I. A. 23; 11 C. 301; 4 Sar. P. C. J. 602; 9 Ind. Jur. 202; 5 Ind. Dec. (N. S.) 960 (P. C.).
(10) 13 C. 17; 6 Ind. Dec. (N. S.) 503.
(11) 18 C. 647; 9 Ind. Dec. N. S.) 432.
(12) 17 A. 174; A. W. N. (1895) 47; 8 Ind. Dec. (N. S.) 437.
(13) 26 M. 104; 13 M. L. J. 58.
(14) 36 Ind Cas. 74; 40 B. 632; 18 Bom. L. R. 712.
(15) 24 C. 900; 12 Ind. Dec. (N. S.) 1269.
(16) 35 Ind. Cas. 266; 31 M. L. J. 97; (1916) 2 M. W. N. 96; 4 L. W. 133; 20 M. L. T. 284.

decision upon the issue is necessary, but unfortunately the party against whom that decision is given could not appeal against it as the final decree is in his favour. In such a case it seems to me that the decision on the issue would be *res judicata*. The proper procedure where the defendant is affected by a decision on an issue which he has not the opportunity of contesting in appeal may be as suggested by Petheram, C. J., in *Jamaitunnissa* v. *Lutfunissa* (17), that is to say, he can ask the Court which has given an adverse decision on a material issue to embody it in the decree so that he may have a right of appeal against such a decision. But if he neglects the opportunity and the decision itself is necessary for the disposal of the case, there seems to be no escape from the bar of *res judicata*. On the whole I have come to the conclusion that the decision of Mr. Best in 1886, which was absolutely necessary for the decision of the case and which has stood unchallenged for thirty years, is binding on the parties, and that Exhibit A should be construed as a mortgage by conditional sale and not as a sale with an option to re-purchase.

This conclusion throws me back upon the question whether the suit is barred by limitation. Article 134 has given rise to conflicting decisions. I do not propose to examine them at any length in the present case. In *Radhanath Doss* v. *Gisborne and Co.* (18), at a time when the corresponding Article of the Act of 1859 contained the words "in good faith," Lord Cairns delivering the judgment of the Judicial Committee held that the burden of proving that the purchaser acquired an absolute interest in the property lay upon such purchaser. In the Acts of 1877 and 1908, in addition to the other changes, the words "in good faith" were omitted. It is unnecessary to canvass the reasons which led the Legislature to omit these words. In *Radhanath Doss* v. *Gisborne and Co.* (18) the Judicial Committee pointed out that it must be shown that the purchaser honestly believed that he was acquiring an absolute right to the property. This deduction was made not because of the existence of the words "in good faith" but because of the use of the expression 'purchaser'. I do not think that the changes introduced by the Act of 1877 and of 1908 have absolved the Court from the necessity of coming to a conclusion upon this question. If the transferee bargained for and believed he was bargaining only for the interests of the mortgagee, he cannot acquire title as the absolute owner of the property. After all, Article 134 is only a branch of the law of prescription, and the question to be determined would be, what it is that the purchaser prescribed for. The fact that he knew that his vendor had only a mortgagee right would not be conclusive on this question. The real test would be, did he ask for and obtain an absolute right in the property and believe himself that he was having an absolute interest in it? In *Pandu* v. *Vithu* (19) that is the test that was suggested; *Kannusami Thonjirayan* v. *Muthusami Pillai* (20) to which Mr. Ananthakrishna Aiyar drew our attention quotes that case with approval. I do not think that *Subbaiya Sandaram* v. *Mahamad Mustapha Maracayar* (21) decides anything to the contrary. *Singaram Chettiar* v. *Kalayanasundaram Pillai* (22) is in favour of this view. See also *Baluswami Aiyer* v. *Venkitaswamy Naicken* (23). The language of the Article is not opposed to this proposition. In the present case this question has not been considered by either of the Courts below. I express no opinion on the question of the burden of proof, bearing in mind the observations of Lord Parker of Waddington that the Courts in this country are too prone to base their decisions on the abstract theory as to onus. But seeing that the plaintiff seeks to disturb a possession which has been with the defendant for a considerable period, *prima facie*, he must be called upon to prove his case. There must be a finding on the following issue:

(17) 7 A. 606; A. W. N. (1885) 89; 4 Ind. Dec. (N. S.) 657.

(18) 14 M. I. A. 1; 15 W. R. P. C. 24; 6 B. L. R. 530; 2 Suth. P. C. J. 397; 2 Sar. P. C. J. 636; 20 E. R. 687.

(19) 19 B. 140; 10 Ind. Dec. (N. S.) 95.

(20) 38 Ind. Cas. 194; (1917) M. W. N. 5; 5 L. W. 250.

(21) 40 Ind. Cas. 50; 32 M. L. J. 85; 21 M. L. T. 62; 5 L. W. 690.

(22) 26 Ind. Cas 1; 1 L. W. 687; (1914) M. W. N. 735.

(23) 40 Ind. Cas. 531; 32 M. L. J. 24; 40 M. 745.

Did the executant of Exhibit I intend to transfer absolute interest in the property? and was it the intention of the parties that there should be an absolute transfer of title to the property?

Finding on the evidence on the record within a month from the date of the re-opening of the Court. Seven days for objections.

BAKEWELL, J.—I agree that the document which forms the root of the respondent's title must as between the parties be held to be a mortgage, and I propose to deal only with the question of limitation. It is, I think, clear from the wording of Article 148 of the Limitation Act, 1908, that it deals with suits in which the cause of action arises upon the contract of mortgage, and the Article applies to a transferee of the mortgagee's interest under that contract: Article 134, therefore, provides for cases where the transfer of mortgaged property by the mortgagee gives rise to a cause of action apart from the mortgage contract. The condition of good faith on the part of the transferee which was contained in section 5 of Act XIV of 1859 has been eliminated from Article 134, but otherwise the Article substantially corresponds with that section read with clause 12 of section 1.

In *Radhanath Doss* v. *Gisborne and Co.* (18) their Lordships of the Privy Council in discussing section 5 of the Act of 1859 considered separately each of the three conditions prescribed thereby, and defined "purchaser" as meaning "some person who purchases that which *de facto* is a mortgage upon a representation made to him and in the full belief that it is not a mortgage but an absolute title." They held that the pleadings did not allege, and that there was no evidence of, any negotiation for such a purchase, and "no evidence of any allegation on the part of the vendor which would lead Messrs. Gisborne and Company (the transferees) to believe that this was an absolute title which they held to the property in question. The only evidence that they were purchasers at all is the production of the purchase deed," which their Lordships held contained "no evidence of a statement on the part of the vendor or of any belief on the part of the purchasers that the property of the Maheeanwan Estate was a property which the vendor claimed to hold by what we should call in this country a fee simple title." The word "transfer" includes a purchase (see Transfer of Property Act, section 5) and the transaction in the present case is alleged to be a purchase, and I think that their Lordships' observations apply to Article 134.

It follows that a transferee who claims the benefit of the Article must adduce evidence that he intended to purchase an absolute title, which will be in the first place the deed of transfer but may also consist of the contract of sale and the negotiations which preceded it. An important preliminary to a sale of immoveable property, which seems, however, to be frequently neglected, is a careful investigation of the vendor's title, and I think that their Lordships had this in mind when in the passage first quoted; they refer to a representation made to the purchaser and to his full belief that he was acquiring an absolute title. Evidence as to the documents of title produced by the vendor, and the steps taken by the purchaser to ascertain the former's title to the property will be important as showing the interest intended to be transferred. If, for instance, it should appear that the purchaser refrained from calling for and examining the title-deeds, and from examining the register of assurances, or from enquiry as to who was in possession of the property, or otherwise abstained from means available to him of ascertaining the title, or that he in fact inspected the mortgage document under which the vendor claimed the property, there would be evidence upon which the Court might hold that the parties did not intend to transfer an absolute property but such interest only as was vested in the transferor, or possibly that the mortgagee intended to commit a fraud upon the mortgagor and that the transferee was accessory thereto or did not act in good faith (see section 18 of the Limitation Act). If, on the other hand, the title adduced by the vendor and the deed of transfer to the purchaser are consistent with an intention to transfer an absolute interest, the burden will lie upon the plaintiff to show that the circumstances of the transfer negative such an intention.

This view appears to me to be supported by the decisions of this Court reported as *Kannusami Thandroyan* v. *Muthusami Pillai* (20) and *Baluswami Aiyar* v. *Venkitaswamy Naicken* (23) and *Subbaiya Pandaram* v. *Mahamad Mustapha Maracayar* (21).

The lower Appellate Court has dealt with the case in a very summary manner and I would remand it to that Court for a finding on the issue framed by my learned brother.

In compliance with the order contained in the above judgment, the District Judge of South Kanara submitted the following

FINDING.—I have been directed to return a finding on the issue "Did the executant of Exhibit 1 intend to transfer an absolute interest in the property, and was it the intention of the parties that there should be an absolute transfer of title to the property?" Exhibit I was executed on 10th January 1879, and of course at this distance of time it is impossible to obtain positive evidence as to what the intention of the parties was. The wording of the sale-deed undoubtedly indicates that the vendor purported to sell the property as his absolute property. Exhibit I is styled "an absolute sale-deed" and the executant says, "I have this day sold you absolutely without a condition." It is urged, however, on behalf of the plaintiff (appellant) that there were no allegations in the written statement that there were any negotiations prior to this sale evidenced by Exhibit I or that there were any representations made by the vendor that he had an absolute title and that the vendee believed he was acquiring an absolute title. I do not think that the omission to make such definite allegations is of much importance. It is said that the conduct of the vendee under Exhibit I shows that he had not purchased an absolute right. The consideration for Exhibit A, it is pointed out, was only Rs. 1,000, whereas the consideration for the absolute sale-deed was only Rs. 1,500 and this included certain rent decrees which had been transferred. Again eighteen years afterwards in 1897 when the property must have increased in value, the vendee's widow sold it for Rs. 1,500 under Exhibit II. There is undoubtedly some force in these contentions, but we do not know what the reasons were which led the vendee's widow to sell the property for what was apparently less than its value. On the other hand, Exhibit A, which was handed over with Exhibit I, is styled a sale-deed (the word absolutely in line 16 at page 1 of the select documents does not appear in the original), though it is now found that the document was a mortgage by conditional sale. The period for redemption fixed in Exhibit A (30th May 1876) had expired when Exhibit I was executed and the vendee would naturally suppose that he was purchasing an absolute title. I do not think that the plaintiff on whom the burden apparently lies has proved his case. I would accordingly return a finding that the executant of Exhibit I intended to transfer an absolute interest, and that the intention of the parties was that there should be an absolute transfer of title of the property.

This second appeal coming on for final hearing after the return of the finding of the lower Appellate Court upon the issue referred by this Court for trial, the Court delivered the following

JUDGMENT.—We accept the finding and dismiss the second appeal with costs.

Appeal dismissed.

M.C.P.

— —

COURT OF THE FINANCIAL COMMISSIONER, PUNJAB.

REVENUE REVISION No 60 OF 1917-18.

March 2, 1918.

Present:—Mr. Maynard, F. C.

Pir MULK SHAH—PLAINTIFF—APPLICANT

versus

NATHU AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Tenancy Act (XVI of 1887), s. 19—Appraisement proceedings—Consent of landlord or tenant, whether necessary—Refusal of tenant to accept appraisement, effect of—Omission of Revenue Officer to vary or confirm appraisement—Financial Commissioner's Standing Order No. 2, para. 12, object of.

The consent of neither landlord nor tenant is necessary for the validity of appraisement proceedings under Chapter II of the Punjab Tenancy Act. [p. 982, col. 2.]

The refusal by a tenant to accept the result of an appraisement is not an adequate reason for declining to confirm it under section 19 (2) of the Punjab Tenancy Act. [p. 981, col. 2.]

MULK SHAH *v.* NATHU.

The failure by a Revenue Officer to give effect to the direction contained in section 19 (2) of the Punjab Tenancy Act, which requires him to make an order either confirming or varying an appraisement, does not affect the admissibility or the value of the evidence contained in the appraisement record. [p. 981, col. 1.]

In suits for the value of produce rents there is no conclusive presumption that produce calculated according to the Financial Commissioner's instructions in paragraph 12 in Standing Order No. 2 is the actual produce of the particular land in the particular harvest in suit. [p. 982, col. 1.]

The object of the executive instructions there given is to provide the Revenue Courts with a means of calculating the *probable* produce and its *probable* selling value, from the records of crop inspection, the Settlement Officer's estimate of average outturns and other available sources, in those cases in which reliable evidence of the *actual* produce and *actual* selling price is not available. [p. 982, col. 1.]

Revision from the order of the Commissioner, Rawalpindi, dated the 19th October 1917.

Mr. *Badr-ud-Din*, for the Petitioner.

Mr. *Diwan Chand*, for the Respondents.

JUDGMENT.—In this group of cases, Nos. 60 to 62, I have heard Counsel for both the parties. The facts are these. The landlord applied for appraisement of the produce, which was made accordingly by Abdulla Khan, Zaildar. There is no suggestion that the appraiser acted otherwise than honestly and with due care. The Revenue Officer should thereupon have made an order, under section 19 (2) of the Punjab Tenancy Act, either confirming or varying the appraisement. He omitted to do so. This was a grave omission, but there is no reason why either of the parties should suffer by reason of the remissness of the Revenue Officer, and the appraisement proceedings can be, and ought to be, considered on their merits, notwithstanding the absence of formal confirmation.

The appraisement took place on April 9th, a date on which it is reasonably to be supposed that, in the Gujrat district, all the principal crops were still standing, and that a capable appraiser, acting in good faith, would have no difficulty in appraising them accurately. There is a subsequent suggestion, in the course of the hearing of the present suits before the Naib Tahsildar, that certain crops had already been cut. *Senji*, *khawid*, coriander seed and *sounf* are specially mentioned. It is quite possible that some crops had already been cut for green fodder. But, if this was so, it was fair, having regard to section 16 of the Act, to assume that the produce was as full as the fullest crop of the same description on similar land in the neighbourhood for that harvest. The areas sown with spices were very small.

There is a note on the appraisement proceedings which appears to show that the Revenue Officer omitted to pass an order under section 19 (2) because the tenant did not accept the appraisement. It is sufficient to say here that the refusal by a tenant to accept the result of an appraisement is not an adequate reason for declining to confirm it. If it were an adequate reason for declining, it would always be in the power of a tenant to stultify appraisement proceedings by merely objecting to them. This is not the intention of the law.

The Naib-Tahsildar did not give a decree for the value of the produce on the basis of the appraisement: but made a calculation of his own, by adding 50 per cent. on some not clearly defined principle, to the normal or average rates (which are intended for application when there is no means of ascertaining the actual produce of a particular harvest). To the result thus obtained he added one anna in the rupee on account of *malikana*, which is due at the rate of 12½ *topas* per *mani* of the produce.

On appeal the Collector, again ignoring the appraisement, which he refers to only to say that it was not accepted by the tenants, made a fresh calculation of his own, in which he omitted, apparently by inadvertence, the item of 12½ *topas* per *mani* for *malikana*. He observed that the *Rabi* of 1916 was a very poor one (though the Naib-Tahsildar had definitely found that on this particular area it was the best harvest for six years). He also drew an inference, unfavourable to the landlord, from the fact that he had not attended on the land to take his share of the produce, although served with a notice to do so. On this point there is some obvious misapprehension. The proceedings were for appraisement and not for the division of the produce, and were already complete before the tenants

asked that the landlord should be required to attend to receive his share. On further appeal, the Commissioner observed that the rates awarded by the Naib-Tahsildar were excessive, because they were not in accordance with "the normal rates laid down in the Financial Commissioner's circular, by which such cases are governed." The reference here is to paragraph 12 of the Financial Commissioner's Standing Order No. 2 and to certain paragraphs of the Land Administration Manual there referred to. The object of the executive instructions there given is to provide the Revenue Courts with a means of calculating the *probable* produce and its *probable* selling value, from the records of crop inspection, the Settlement Officer's estimate of average outturns and other available sources, in those cases in which reliable evidence of the *actual* produce and *actual* selling price is not available. The Courts generally have to calculate the amount and cash value of rents in kind after a crop has been removed, and the oral evidence which is adduced on such subjects is coloured by the predilections of the witnesses. It is, therefore, essential that they should be supplied with the means of arriving at a reasonably equitable estimate, even though it be an estimate for an average or normal crop rather than for the actual particular crop which is the subject of litigation. But if the actual particular crop has been seen on the spot and appraised by a reliable and qualified appraiser, there is no reason for having recourse to a calculation of the kind which is inevitable when no evidence of this character is available.

But in legal form, the mistake made by the lower Courts is this. They have created a conclusive presumption in favour of a calculation, made on the basis of certain executive instructions which were drawn up to help the Courts to frame a reasonably equitable estimate of produce rents in cases in which reliable evidence of actual produce and actual value is not forthcoming: and have conceived themselves precluded from accepting evidence of the actual produce, because it involved a departure from that calculation. But there is no conclusive presumption in favour of the calculation for which the Financial Commissioner's executive instructions provide. There is only a conventional presumption in favour of its accuracy, when reliable evidence of the particular crop cannot be had.

In the present case the evidence, which deserved most weight and which would have been followed but for mistakes in the application of the law, was the record of the appraisement. The mistakes were these. In the first place, it was held that an appraisement under Chapter II of the Punjab Tenancy Act is not valid unless the tenants assent to it, whereas the assent of neither landlord nor tenant is essential to its validity. In the second place, it was held by implication that the record contained in the appraisement proceedings was not admissible in evidence, or at all events not worthy of credence: and it was also held, by implication, that there is a conclusive presumption, in suits for the value of produce rents, that produce calculated according to the Financial Commissioner's instructions in paragraph 12 in Standing Order No. 2 is the actual produce of the particular land in the particular harvest in suit. It is true that the Revenue Officer, dealing with the appraisement proceeding, failed to give effect to the direction in section 19 (2) of the Punjab Tenancy Act, which requires him to make an order either confirming or varying the appraisement. But this omission did not affect the admissibility or the value of the evidence contained in the appraisement record.

Following the appraisement and adding one anna in the rupee on account of the *malikana* due, I accept the applications in cases Nos. 60, 61, 62, and give amended decrees as follows:—

No. 60 (Original Case No. 22) Rs. 26-0-0,
No. 61 (Original Case No. 23) Rs. 100-2-0,
No. 62 (Original Case No. 21) Rs. 30-6-1,

with the costs of the present proceedings in favour of the applicant.

Revision accepted.

SECRETARY OF STATE FOR INDIA *v.* SIBAPROSAD JANA.

CALCUTTA HIGH COURT.

APPEAL FROM ORIGINAL DECREE No. 461 OF 1915.

August 27, 1917.

Present:—Justice Sir Asutosh Mookerjee, Kt., and Mr. Justice Beachcroft.

SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—APPELLANT

versus

SIBAPROSAD JANA—PLAINTIFF—RESPONDENT.

Lease, construction of—Covenant for renewal—Admission of Pleader on point of law, whether binding on party.

Where on a settlement made by the Government the grantee executed a Kabuliyat containing the following clause:—"If I agree to the enhanced rent to be fixed at the time of the next settlement in future, the Government shall have the power to settle the lands with me, or if I do not agree then with others":

Held, that the clause in the lease was in essence a covenant for renewal, under which the lessee became entitled to obtain a renewal of the lease on the same terms as were contained in the original lease, except as to the amount of rent and the covenant for renewal, and that according to the true construction of the original lease the term of the renewed lease would continue till the completion of the next periodical settlement by Government. [p. 984, cols. 1 & 2.]

Where in a suit to obtain a re-settlement the right of the plaintiff to obtain a fresh lease was conceded by the defendant's Pleader in the trial Court:

Held, that it was competent to the defendant's Pleader to urge in the Appellate Court that the plaintiff was not entitled to a re-settlement as a matter of right, as an erroneous admission by a Pleader on a point of law is of no effect and does not preclude a party from claiming his legal rights in the Appellate Court. [p. 983, col. 2; p. 984, col. 1.]

Appeal against the decree of the Subordinate Judge, Midnapur, dated the 13th July 1915.

Babu *Ram Charan Mitra*, for the Appellant.

Babus *Biraj Mohan Mojumdar* and *Kshirod Narayan Bhuiya*, for the Respondent.

JUDGMENT.—This is an appeal by the Secretary of State for India in Council from the decree in a suit instituted by the respondent to obtain a lease from Government in respect of the lands described in the schedule to the plaint. The facts material for the investigation of the rights of the parties are not in dispute at this stage. On the 5th August 1878 a settlement was made with one Radhika Prasanna Chandra (the predecessor of the plaintiff) for a term of 22 years on a progressive rate of rent from 1285 to 1306. The *kabuliyat* executed by the grantee contained a covenant to the following effect:

"If I agree to the enhanced rent to be fixed at the time of the next Settlement in future, the Government shall have the power to settle the lands with me, or if I do not agree, then with others."

When the term of the lease expired in the year 1900, the Settlement operations were still in progress, and annual leases, renewed from year to year, were granted to the successor-in-interest of the original lessee. The last of these annual leases was executed on the 18th January 1909, and was to remain in force from the 1st April 1909 to the 31st March 1910. The Settlement operations were concluded during the course of the year just mentioned, though the Record of Rights was not finally published till the 30th June 1910. The plaintiff thereupon unsuccessfully endeavoured to obtain a re settlement on the same terms as were embodied in the initial lease of the 5th August 1878 except as to the amount of rent payable; the result was that the plaintiff instituted this suit on the 1st March 1913. In the Court below, it was not seriously denied that the plaintiff was entitled to a re-settlement; the controversy really centred round the terms on which the re-settlement should be made, specially whether there should or should not be a covenant for renewal in the new lease. The Subordinate Judge has held that the plaintiff is entitled to obtain a lease for a period of 22 years from the date of execution of the document, containing all the terms of the lease of the 5th August 1878, with the exception of the covenant for renewal. The defendant has appealed to this Court.

In support of the appeal, the Government Pleader has urged that the plaintiff is not entitled as a matter of right to a re-settlement. Notwithstanding the fact that the right of the plaintiff to obtain a fresh lease was conceded in the Court below, it is unquestionably competent to the Government Pleader to take up this line of argument, because as ruled by the Judicial Committee in *Jotendramohun Tagore* v. *Ganendro-*

mohun Tagore (1) and *Beni Pershad Koeri* v. *Dudhnath Roy* (2), an erroneous admission by a Counsel on a point of law is of no effect and does not preclude the party from claiming his legal rights in the Appellate Court. [*Holms* v. *Johnston* (3), *Mitchell* v. *Cotten* (4), *Urquhart* v. *Butterfield* (5), *Abdulullah Sarkar* v. *Asraf Ali Mandal* (6) and *Ramsaran Singh* v. *Khakhan Singh* (7)]. We must consequently consider, whether the plaintiff is entitled to obtain a lease from the Government in respect of the disputed lands. We are of opinion that this question should be answered in the affirmative. In the first place, it is plain that the clause in the lease set out above is in essence a covenant for renewal. It would be meaningless to hold that it was intended merely to confer an authority upon the Government to grant a fresh lease. In the absence of such a clause, the grantor would have been at liberty, on the expiry of the lease, to make a fresh settlement at his choice subject to the provisions of Regulation VII of 1822. The obvious intention was that if the grantee was willing to take a fresh lease at the enhanced rent, he should be entitled to do so. This view is in accord with that adopted in the case of *Secretary of State* v. *Forbes* (8) and *Lani Mia* v. *Muhammad Easin Mia* (9). Consequently, when the term of the first lease expired in 1900, the lessee was in a position to enforce the covenant for renewal. The fact that the lease was not renewed at that time may, in the absence of an explanation, raise a presumption that the lessee abandoned his right in this respect. But the undisputed circumstances of the case leave no room for doubt that the lease was not renewed at that time because the Settlement operations had not been concluded and the amount of the enhanced rent could not accordingly be determined. The lease was thus renewed from year to year at the original rate of rent, and this continued up to the time of the completion of the Settlement proceedings. We can see no escape from the position that at that stage the lessee became entitled to obtain a renewal of the lease on the same terms as were contained in the original lease, except as to the amount of rent and the covenant for renewal, as explained in the case of *Secretary of State* v. *Forbes* (8). His right in this respect was in force at the date of the institution of the suit and the decree must be made accordingly. The Subordinate Judge, however, has made a decree for a lease for 22 years from the date of the execution of the lease. On a true interpretation of the original lease we are of opinion that that lease was essentially for the term of the rent then fixed in the Settlement proceedings. The intention plainly was that the lease should continue so long as the rent was not altered by a Survey and Settlement proceeding, and this happened to be a period of 22 years. Much confusion will obviously result if a lease is now granted for 22 years at the rent fixed at the last Settlement and a new rent roll is prepared during the currency of the lease. The decree of the Subordinate Judge must accordingly be modified by the substitution of the words "for the period extending from the 1st April 1910 till the completion of the next periodical Settlement and at the rent assessed at the last Settlement minus a profit of 20 per cent. and" in place of the words "for a period of 22 years from the date of the execution of the *patta* by the defendant in favour of the plaintiff," and further by omitting the words "for a term of 22 years." As the appeal has succeeded only in part, there will be no order for costs in this Court. A self-contained decree will be drawn up in this Court.

Appeal partly allowed.

(1) 9 B. L. R. 377; I. A. Sup. Vol 47; 18 W. R. 359; 2 Suth. P. C. J. 692; 3 Sar. P. C. J. 82.
(2) 27 C. 156 at p. 163; 26 I. A. 216; 4 C. W. N 274 7 Sar. P. C. J. 580. 14 Ind. Dec. (N. S.) 103.
(3) (1873) 12 Heisk (59 Tenn) 155.
(4) (1850) 3 Fla. 134.
(5) (1888) 37 Ch. D. 357; 57 L. J. Ch. 521; 57 L. T 780; 36 W. R. 376.
(6) 7 C. L. J. 152 at p. 162.
(7) 11 C. W. N. 340.
(8) 17 Ind. Cas. 180; 16 C. L. J. 217.
(9) 33 Ind. Cas. 448; 20 C. W. N. 948.

DHARAM DAS v. PIYARE LAL.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 778 OF 1916.

January 7, 1918.

Present:—Mr. Justice Chevis.

DHARM DAS AND ANOTHER—DEFENDANTS—APPELLANTS

versus

PIYARE LAL—PLAINTIFF—RESPONDENT.

Easements Act (V of 1882), s. 23 · Re-construction involving change in situation of roshandans, *whether fresh easement—Building up wall so as to block* roshandans *– Injunction, suit for, whether maintainable.*

A re-construction of a house involving a change in the situation of the *roshandans* does not mean a fresh easement requiring a fresh period of 20 years for its acquisition.

Plaintiff sued for the issue of a mandatory injunction to the defendants that they should demolish a wall built by them. It appeared that the plaintiff had re-constructed his house and had changed the position of his *parnalas* and *roshandans*. Defendants had thereafter built up their wall so as to block these *parnalas* and *roshandans*:

Held, that the plaintiff was entitled to the relief claimed.

Bai Hariganga v. Tricamlal, 26 B. 374: 4 Bom. L. R. 34, dissented from.

Second appeal from the decree of the District Judge, Karnal, dated the 5th February 1916, reversing that of the Senior Subordinate Judge, Rohtak, dated the 9th March 1915, passing a decree in favour of plaintiff for Rs. 100, and dismissing the rest of the claim.

The Hon'ble Mr. *Muhammad Shafi*, for the Appellants.

Bakhshi *Tek Chand*, for the Respondent.

JUDGMENT.—The facts are given in the judgments of the lower Courts. I had hoped that the parties being neighbours would be able to come to some amicable conclusions which would avoid future disputes, but they cannot agree.

The District Judge inspected the spot, and an affidavit has been put in that he did so before more than a portion of plaintiff's western wall had been dismantled, so he could say that the *parnalas* and *roshandans* which he saw were old, though, of course, mere inspection would not enable him to say they were 20 years' old.

The sale-deed of 1877 mentions *parnalgah* and *daricha*; this does not make it clear whether singular or plural is mentioned. This sale was followed by a pre emption suit, which failed. There was a plan filed in that suit which according to Mr. Shafi shewed only one *parnala*. I have looked at that plan, but am unable to say definitely whether it shews any *parnalas* at all, though a *meri* is shewn though undoubtedly there was at least one *parnala* then. Now we find six *parnalas* and four *roshandans* and no proof of any modern construction. In fact there seems to be nothing to shew that there has been any alteration in the construction since 1877 till just before this suit, when plaintiff began to re-construct the present wall.

As to the argument that any re-construction involving any change in the situation of the *roshandans* means a fresh easement and a commencement of a fresh period of 20 years, Counsel refers me to *Bai Hariganga* v. *Tricamlal* (1). But a different view seems to have been taken in *Framji Shapurji v. Framji Edulji* (2); and with all due respect I think the argument about different "cones of light" seems rather a legal quibble. I am unable then to hold that the lower Appellate Court's decision is incorrect. As to the form of the decree I should have liked, if possible, to re-model it so as to define exactly what plaintiff could or could not do, as I fear there will be more trouble, but the parties cannot agree on anything and I cannot venture without having seen the premises to lay down what limits should be left. But it seems clear that defendant cannot build as he has done right up against plaintiff's wall so as to block his *parnalas* and *roshandans*, and so, I think, plaintiff was entitled to the decree which has been given.

The appeal is dismissed with costs.

Appeal dismissed.

(1) 26 B. 374; 4 Bom. L. R. 34.
(2) 7 Bom. L. R. 73.

GAURI SAHAI v. A. C. BAHREE.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 148 OF 1917.

March 19, 1918.

Present:—Mr. Justice Tudball and Mr. Justice Abdul Raoof.

GAURI SAHAI—PLAINTIFF—APPELLANT

versus

A. C. BAHREE—DEFENDANT—RESPONDENT.

Allahabad High Court Rules (Civil) for Subordinate

SAKHIUDDIN SAHA *v.* SONAULLA SARKAR.

Courts, Ch. XXI, rr. 21, 25—*Plaint returned for presentation to proper Court—Pleader's fee, calculation of, basis of.*

Plaintiff filed a suit in the Subordinate Judge's Court. The defendant pleaded that the Court had no jurisdiction to try the suit. This issue was taken up first at the request of the plaintiff and decided in favour of the defendant. The Court ordered the plaint to be returned and awarded the defendant his costs. In drawing up the decree the Pleader's fee was calculated at 5 per cent. according to rule 21 of Chapter XXI of the General Rules (Civil) for the Subordinate Courts:

Held, that the suit having been decided on contest and on the merits of the contest so far as that contest went, rule 21 applied to the case and the fee was properly calculated.

First appeal from an order of the Subordinate Judge, Budaun.

Mr. *Lakshmi Narain*, for the Appellant.

Mr. *Nehal Chand*, for the Respondent.

JUDGMENT.—The facts of this case are simple. The plaintiff-appellant filed a suit against the defendant. Notice was issued, a written statement filed and issues were framed. One of the issues raised the question of the jurisdiction of the Court. It was pleaded by the defendant that the learned Subordinate Judge had no jurisdiction to try the suit. This issue was taken up first at the request of the plaintiff and decided in favour of the defendant. The Court ordered the plaint to be returned and awarded the defendant his costs. In drawing up the decree the Pleader's fee was calculated at 5 per cent. according to rule 21 of Chapter XXI of the General Rules (Civil) for the Subordinate Courts. The plaintiff objected on the ground that this rule did not apply but that rule 25 of that Chapter did apply. The lower Court has held that the case falls within rule 21. On behalf of the appellant it is urged that the case was not decided on the merits; but it was clearly decided after contest and on the merits of the contest, so far as that contest went. We do not think that rule 25, which applies to appeals from orders and other cases, is intended to cover a case of the present kind. In our opinion rule 21 clearly applies in this case. There is, therefore, no force in the appeal. We accordingly dismiss it with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

APPEAL FROM APPELLATE DECREE No. 230 OF 1915.

February 8, 1918.

Present:—Mr. Justice Richardson and Mr. Justice Beachcroft.

SAKHIUDDIN SAHA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SONAULLA SARKAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage, suit on—Co-mortgagees, interests of, whether severable—Estoppel Some co-mortgagees precluded from enforcing their rights—Rights of others—Transfer of Property Act (IV of 1882), s. 54—*Registration Act (XVI of* 1908), *s.* 17—*Transfer of mortgage-debt—Registration, whether necessary.*

In equity co-mortgagees are presumably tenants-in common of the mortgage debt and their interests are severable or partible among themselves; so that one of them can sue on the mortgage provided those who are unwilling to be joined as plaintiffs are made defendants. [p. 987, cols. 1 & 2.]

Where some of several co-mortgagees have by their conduct precluded themselves on the ground of estoppel from enforcing their rights under the mortgage against purchasers of a portion of the mortgaged property and a puisne mortgagee of the remainder, it is open to the Court to sever their interests from those of the other co-mortgagees who are under no disability or disqualification and to make a decree in favour of the latter in proportion to their interests in the mortgage-debt. [p. 987, col. 2.]

A mortgage-debt is immoveable property both for the purposes of section 54 of the Transfer of Property Act and for the purposes of section 17 of the Registration Act. [p. 988, col. 2.]

Where a mortgage-debt is transferred by an instrument in writing and the value of the right, title and interest transferred is Rs 100 or more, the writing requires registration under the Registration Act. [p. 988, col. 2; p. 989, col. 1.]

Appeal against the decree of the Additional Subordinate Judge, Rungpur, dated the 7th November 1914, affirming that of the Munsif, 2nd Court, Rungpur, dated the 16th August 1913.

Babu *Atul Chandra Gupta*, for the Appellants.

Babu *Satya Charan Sinha* for Babu *Jitendra Nath Roy*, for the Respondents.

JUDGMENT.

RICHARDSON, J.—This is a suit brought by the plaintiffs as mortgagees to enforce their security. Plaintiff No. 12 is one of the two original mortgagees and plaintiffs Nos. 1—11 are the heirs and the successors of the other. The defendants Nos. 1—3 are the mortgagors. Subsequent to the mortgage defendants Nos. 4, 5 and 6 purchased a portion

of the mortgaged property and defendant No. 7 took a puisne mortgage of the remainder. In connection with these transactions, however, it has been found, and cannot now be disputed, that the plaintiffs Nos. 1, 2 and 12 led the defendants Nos. 4—7 to believe that the whole property was unencumbered. The position, therefore, is that the plaintiffs Nos. 1, 2 and 12 are precluded by the doctrine of estoppel from setting up their rights under the prior mortgage as against those defendants.

In that state of things the Courts below have concurred, in dismissing the suit so far as the plaintiffs Nos. 1, 2 and 12 are concerned and in making in favour of the remaining plaintiffs a mortgage decree in the usual form entitling them to sell the whole of the mortgaged property in satisfaction of their share of the original mortgage debt.

The plaintiffs have appealed to this Court and the first point which arises is free from difficulty.

As regards the defendants Nos. 4 to 6, who took an apparently absolute title to the portion of the property which they purchased, the claim of the plaintiffs Nos. 1, 2 and 12 has been rightly dismissed, But as regards the defendant No. 7 the effect of the estoppel, under section 78 of the Transfer of Property Act, is to postpone them (in respect of their share of the original debt) to that defendant. As between the plaintiffs Nos. 1, 2 and 12 and the defendant No. 7, therefore, the suit should not be dismissed and the decree should declare that the property mortgaged to the defendant No. 7 is hypothecated to the plaintiffs Nos. 1, 2 and 12 for their share of the original mortgage-debt and that their rights as mortgagees are postponed to those of the defendant No. 7. The decrees of the Courts below will be modified accordingly.

The further contention on behalf of the plaintiffs, who may be described as innocent plaintiffs, that they are in a position to demand that a decree should be made in favour of the mortgagees as a body for the whole of the mortgage-debt, is untenable. Nor are we obliged to tell the defendants Nos. 4—7 that their only remedy lies in an action for deceit. In equity co-mortgagees are presumably tenants-in-common of the mortgage-debt and their interests are severable or partible among themselves. One of them can sue on the mortgage, provided those who are unwilling to be joined as plaintiffs are made defendants. *Davenport* v. *James* (1). There is nothing to take the present case out of the general rule. The innocent plaintiffs are not damnified by the way in which the case has been dealt with. Some of the mortgagees have by their conduct precluded themselves from enforcing their rights under the mortgage, and it was open to the Court to sever their interests from those of the mortgagees who were under no disability or disqualification and to make a decree in favour of the latter in proportion to their interest in the debt.

The contention last dealt with has been advanced solely for the purpose of evading the ruling of the Courts below on another question which has given rise to some discussion before us. The two original mortgagees were brothers and they each had an eight-annas share in the mortgage. It is said that there was a partition of the joint property by which the bond in suit was allotted to the deceased brother, the predecessor of the plaintiffs Nos. 1—11. On that footing the plaintiff No. 12 was in the first instance made a defendant. He was made a plaintiff by direction of the learned Munsif when he found that the partition had not been proved, a finding which has been affirmed by the learned Subordinate Judge. The objection taken is that in dealing with this part of the case the Courts below have wrongly refused to receive in evidence two documents by which the partition of the bonds in which the brothers had a joint interest was effected. These documents are not registered and have been rejected on that ground on the authority of *Upendra Nath Banerjee* v. *Umes Chandra Banerjee* (2), where it was held that a deed of partition, either declaring certain rights over immoveable property or reciting the allotment of lands and containing an agreement to act accordingly, is compulsorily registrable. In my opinion the rejection of these documents has, as the language of the two judgments shows, largely influenced the conclusion at which the Courts below have arrived on the question

(1) (1847) 7 Hare 249; 12 Jur. 827; 68 E. R. 102; 82 R. R. 98.

(2) 6 Ind. Cas. 346; 12 C. L. J. 25; 15 C. W. N. 375.

of partition or no partition. If the Subordinate Judge intended to say that even if these documents be taken into account, the partition is not proved, he has not expressed himself very happily. The point raised, therefore, seems to me to require consideration.

It is contended for the plaintiffs that the case cited below has no application, because the transfer of a simple mortgage such as the bond in suit or a share in such a mortgage is not a transfer of immoveable property within the meaning of section 54 of the Transfer of Property Act, and the document by which the transfer is effected is not a document which purports or operates "to create, declare, assign, limit or extinguish, whether in present or in future any right, title or interest, whether vested or contingent ...to or in immoveable property" within the meaning of section 17 (*b*) of the Indian Registration Act.

In support of this contention it is said that the transfer of a simple mortgage is merely the transfer of a debt on which the security is attendant, the security passing to the transferee with the debt under section 8 of the Transfer of Property Act.

For authority, reference is made to *Gous Mahomed* v. *Khawas Ali Khan* (3), *Baij Nath Lohea* v. *Binoyendra Nath Palit* (4) and *Ram Ratan Chuckerbutty* v. *Jogesh Chandra Bhattacharya* (5). These cases are perhaps not entirely consistent with the earlier decision of this Court in *Koob Lall Chowdhry* v. *Nittyanund Singh* (6) or with the decision of the Allahabad High Court in *Abdul Majid* v. *Muhammad Faizullah* (7). However that may be, they relate to the transfer of mortgage decrees and the considerations which apply to such transfers may not be altogether applicable to the transfer of mortgage bonds. Order XXI, rule 16, of the Civil Procedure Code appears to contemplate the transfer of a decree "by assignment in writing," though the Code does not say whether the writing must be registered when the decree transferred is a mortgage decree.

(3) 23 C. 450; 12 Ind. Dec. (N. S.) 300.
(4) 6 C. W. N. 5.
(5) 12 C. W. N. 625.
(6) 9 C. 839; 12 C. L. R. 333; 8 Ind. Jur. 38; 4 Ind. Dec. N. S.) 1208.
(7) 13 A. 89; A. W. N. (1890) 186; 7 Ind. Dec. (N. S.) 55.

If, therefore, we confine ourselves to transfers of mortgage bonds or mortgages, it has first to be noticed that "a debt secured by mortgage of immoveable property" is expressly excluded from the definition of "actionable claim" added to section 3 of the Transfer of Property Act by the Amending Act of 1900 (Act No. II of 1900). And inasmuch as section 8 of the Act speaks of "a debt or other actionable claim" (in the clause which deals with the passing of the securities therefor), section 8 can be of no assistance to the appellants for the present purpose, though in other connections the principle underlying the section will, no doubt, be applicable (Ghose's Law of Mortgage in India, 7th Edition, Volume I, pages 70, 71, and Volume II, page 667).

The transfer of actionable claims is governed by section 130 of the Act which requires the execution of an instrument in writing signed by the transferor or his duly authorized agent, and it can hardly be supposed that debts secured by mortgages of immoveable property were excluded from the definition of actionable claims in order that they might pass by word of mouth without any writing. The inference would seem to be that the Legislature regarded such debts as immoveable property within the definition in section 3 (25) of the General Clauses Act of 1897. "'Immoveable property' shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth." For the purposes of the Transfer of Property Act that definition is only qualified by the clause in section 3 of that Act which says that "'immoveable property' does not include standing timber, growing crops or grass."

And if a mortgage-debt is within the definition of immoveable property in the General Clauses Act, it is also within the definition of such property in section 2 (6) of the Registration Act of 1908.

It would follow that a mortgage-debt is immoveable property both for the purposes of section 54 of the Transfer of Property Act and for the purposes of section 17 (*b*) of the Registration Act.

If that be the true view, it would be sufficient in the case before us to say that where a mortgage-debt is transferred

by an instrument in writing and the value of the right, title or interest transferred is one hundred rupees or more, the writing requires registration under the Registration Act.

In the work already referred to the learned author remarks, quite generally and without reference to any statutory definition, that "whatever may be the form of the mortgage, it operates as a transfer of an interest in the land which is given as security." (The Law of Mortgages in India, 4th Edition, Volume I, page 72.) If a mortgage, even a simple mortgage, creates an interest in land, its transfer must be the transfer of an interest in land. In the Second Volume of the same work at page 729, it is said that "a mortgage on land is immoveable property" and reference is made to *Hoyles, In re*; *Row* v. *Jagg* (8).

The learned Pleader for the plaintiff cited the cases of *Malcolm* v. *Charlesworth* (9) and *Gresham Life Assurance Society* v. *Crowther* (10). But those cases turn on the provisions of an English Statute which permit the registration of assurances by which lands are "affected," and have no application to the different language of the Indian Registration Act.

The conclusion at which I arrive is that the cases on which the learned Pleader relies are at any rate distinguishable and that the Courts below have taken a correct view of the requirements of the Registration Act. We are not referred to any decision of this Court precisely in point, but the conclusion is supported by the ruling of the Bombay High Court in *Ganpat Pandurang* v. *Adarji Dadabhai* (11) and see also *Joharmal* v. *Tejram Jagrup* (12).

The result is that in my opinion subject to the modification above directed the decrees of the Courts below should be affirmed and the appeal dismissed. The appellants having substantially failed, the respondents are entitled to their costs of the appeal.

(8) (1911) 1 Ch. 179; 80 L. J. Ch. 274; 103 L. T. 817; 55 S. J. 169; 27 T. L. R. 131.
(9) (1836) 1 Keen 63; 48 E. R. 230; 44 R. R. 19.
(10) (1915) 1 Ch. 214 at p. 225; 84 L. J. Ch. 312.
(11) 3 B. 312; 2 Ind. Dec. (N. S.) 209.
(12) 17 B. 235 at p. 252; 9 Ind. Dec. (N. S.) 154.

BEACHCROFT, J.—I agree that the appeal should be dismissed subject to the modification in the decree proposed by my learned brother for the reason given by him.

But I express no opinion on the question whether the learned Subordinate Judge was right in his view on the question of registration for, as I understand his judgment, he finds as a fact that no partition was made between Bhetu and Netu, whether the evidence which he holds to be inadmissible be excluded from or taken into consideration.

Appeal dismissed; *Decree varied.*

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 2361 OF 1917.

May 6, 1918.

Present:—Mr. Justice Scott-Smith.

LAJJA RAM AND OTHERS—PLAINTIFFS—APPELLANTS

versus

NARINJAN LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Alienation by father—Suit by son for cancellation of deed—Antecedent debt—Family necessity.

Plaintiff sued for cancellation of two mortgage-deeds and a lease alleged to have been illegally executed by his father in favour of defendant. The 1st Court holding that the alienations were tainted with immorality and were not for any family necessity, cancelled the alienations. On appeal the District Judge held that it was not proved that the executant was leading an immoral life and that the debts were not tainted with immorality and dismissed the suit. On second appeal to the Chief Court:

Held, that it was necessary for the lower Appellate Court to decide, whether the debts in question were raised by the executant for some family necessity or to meet antecedent debts and to see whether the antecedency of the debts was real or merely a cover for what was essentially a breach of trust. [p. 990, col. 2.]

Second appeal from the decree of the District Judge, Karnal, dated the 21st June 1917, reversing that of the Senior Subordinate Judge, Karnal, dated the 18th August 1916, decreeing half of the claim in favour of Lajja Ram only.

Bakhshi *Tek Chand*, for the Appellants.

Mr. *Manohar Lal* and Lala *Jagan Nath*, for the Respondents.

JUDGMENT.—The suit out of which the present appeal arises was brought by Lajja Ram, son of Narinjan Lal and by

two widows for cancellation of two mortgages and lease executed by Narinjan Lal in favour of Kasturi Mal, defendant No. 2. The first Court held that Narinjan Lal was profligate, that the alienations were tainted with immorality and were not for any family necessity. It cancelled the alienations *qua* Lajja Ram's half share, and in respect of Narinjan Lal's half share it held that Lajja Ram could redeem that share on payment of Rs. 100 only. It dismissed the suit of the two females. Both parties appealed to the District Judge, who held that it was not proved that Narinjan Lal was leading an immoral life, that the debts were not tainted with immorality and were not such as the plaintiffs could object to. He, therefore, dismissed the plaintiffs' suit with costs. The plaintiffs have filed a second appeal to this Court, though at the hearing it was admitted that the female plaintiffs had no right to sue and the appeal was pressed as regards Lajja Ram only.

The main point urged on behalf of the appellant is that the District Judge was not right in dismissing plaintiffs' suit merely on the ground that the debts were not incurred for immoral purposes and that he should have come to a finding as to whether they were raised for the payment of just antecedent debts or to meet family necessities. In support of this contention Counsel referred to *Chandradeo Singh* v. *Mata Prasad* (1) and *Sahu Ram Chandra* v. *Bhup Singh* (2). The case reported as *Chandradeo Singh* v. *Mata Prasad* (1) was decided by a Full Bench of five Judges, the majority of whom held that a creditor suing to enforce against the sons a mortgage executed by the father in a joint Hindu family over the joint family property is bound to prove that the loan secured by such mortgage was taken to satisfy an antecedent debt or was justified by some family necessity, or at least that he had before advancing the loan made inquiries which reasonably led to the belief that the loan was required for family necessities or to pay off an antecedent debt. This view of the majority of the Full Bench was approved by their Lordships of the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh* (2). On the question of antecedent debt the following passage occurs at page 449* of the report:—

"The argument in support of the validity of the mortgage also took this shape. It was said:—'What difference would it make if the father had contracted the debt an hour, a day, a year before granting the mortgage? Then *de facto* it would be an antecedent debt, and the creditor would have a mortgage good upon that ground.' Their Lordships cannot assent to any such proposition that a mortgage on the family estate would follow the loan. The case as put up might instantly raise the presumption that what occurred was substantially this: that the father contracted the debt knowing that he was at the end of his personal resources and that the creditor advanced the money relying upon an understanding or agreement, express or implied, given to the father. In truth, in order to validate such a transaction of mortgage there must, to give true effect to the doctrine of antecedency in time, be also real dissociation in fact. The Courts in India, wherever such antecedency is found to be unreal and is merely a cover for what is essentially a breach of trust, will not be slow to deny effect to a mortgage so brought into existence."

It was, therefore, necessary in the present case for the lower Appellate Court to decide whether the debts in question were raised by Narinjan Lal for some family necessity or to meet antecedent debts and having regard to the previous litigation between him and Kasturi Mal and to the remarks of the first Court in regard to his extravagance, it was necessary to examine the debts very carefully and to see whether the antecedency of the debts was real or, in the words of their Lordships of the Privy Council, merely a cover for what was essentially a breach of trust.

I, therefore, accept the appeal and setting aside the order of the lower Appellate Court remand the case thereto for re-decision of the appeal with reference to the authorities above cited.

Appeal accepted; Case sent back.

(1) 1 Ind. Cas. 479; 31 A. 176; 6 A. L. J. 263.

(2) 39 Ind. Cas. 280; 39 A. 437; 21 C. W. N. 698; 1 P. L. W. 557; 15 A. L. J. 437; 19 Bom. L. R. 498; 26 C. L. J. 1; 33 M. L. J. 14; (1917) M. W. N. 439; 22 M. L. T. 22; 6 L. W. 213; 44 I. A. 126 (P. C.)

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HAMIDA BIBI *v.* FATIMA BIBI.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER NO. 70 OF 1917.

March 18, 1918.

Present:—Mr. Justice Tudball and Mr. Justice Abdul Raoof.

HAMIDA BIBI—DEFENDANT—APPELLANT

versus

FATIMA BIBI—PLAINTIFF—RESPONDENT.

Limitation Act (IX of 1908), s. 14—Exclusion of time spent in bona fide proceeding in Court not having jurisdiction—Due diligence—Delay, effect of.

A decree for rent was obtained against two co-tenants of a holding and was satisfied by one of them on 9th August 1910. On 20th May 1913 the latter instituted a suit for contribution against the other co-tenant in the Small Cause Court which, holding that it had no jurisdiction to try the suit, directed the return of the plaint for presentation to the proper Court on 27th November 1913. The plaintiff refused to take back the plaint and lodged a revision in the High Court on 19th February 1914, which was dismissed on 16th March 1915. On 15th June 1915 she applied for the return of the plaint which was returned on the 30th June 1915, on which day she presented it in the Court of the Munsif:

Held, that even if it were assumed that the plaintiff was entitled to exclude the period from the 20th May 1913 to the 16th March 1915, she could not in any case be allowed to exclude the period between the 16th March and the 30th June under section 14 of the Limitation Act, inasmuch as she did not prosecute her suit with due diligence in view of the fact that she waited for three months after the dismissal of her application for revision before she asked for the return of the plaint and that, therefore, the suit was barred by time.

Held, further, that the plaintiff was not justified in refusing to take back the plaint from the Court of Small Causes merely because she wished to file a revision in the High Court, inasmuch as if she had taken back the plaint her action could not have prejudiced her application for revision and, on the other hand, she would have been able to present the plaint in the proper Court immediately on the dismissal of the application.

First appeal from an order of the Subordinate, Judge, Allahabad.

Mr. *Mukhtar Ahmad* (for Mr. *Haidar Mehdi*), for the Appellants.

Mr. *S. M. Sulaiman* (with him Mr. *Lalit Mohan Banerji*), for the Respondents.

JUDGMENT.—This is an appeal against an order of remand passed by the Court below. The question was one of limitation and application of section 14 of the Limitation Act. The parties to this suit were co tenants in a holding. A suit was brought against them for rent and a decree was obtained (against them jointly) on the 6th of July 1910. On the 19th of August 1910 the plaintiff paid the decretal debt. On the 20th May 1913, some ninety days before the expiry of the period of limitation which is fixed by Article 99 of the First Schedule, she instituted a suit in the Small Cause Court. An objection was taken that the Court had no jurisdiction, and on the 27th of November 1913, the Small Cause Court held that it had no jurisdiction and directed the plaintiff to take back the plaint and file it in the proper Court. The plaintiff refused to take back the plaint. On the 19th of February 1914, that is nearly ninety days after the order of the Small Cause Court, she filed an application in the High Court for revision of the order. This application was dismissed by this Court on the 16th of March 1915. The plaintiff then apparently took a rest. She waited until the 15th of June 1915, that is for full three months, and then applied to the Court for the return of the plaint. There was some delay and she received it on the 30th of June. On that same date she presented the plaint in the Court of the Munsif. The Court of first instance held that the suit was barred by limitation. The lower Appellate Court has allowed to the plaintiff the period from the 20th of May 1913 to the 30th of June 1915 under section 14 of the Limitation Act and has held that the suit is within time. Assuming without deciding that the period from the 27th of November 1913 to the 16th March 1915 may be allowed to the plaintiff under section 14 of the Act, we fail to see that she has been prosecuting her case with due diligence in view of the fact that she waited for three months after the dismissal of her application for revision before she asked for the return of the plaint. We also cannot agree that the plaintiff was justified in refusing to take back her plaint from the Court of Small Causes because she wished to file an application in revision to this Court. If she had taken back her plaint as she could easily have done without any prejudice to the prosecution of her revision, it would have been in her hands directly the revision was dismissed and she could have at once filed it in the Court of the Munsif. On the contrary she preferred to wait for three months before she asked for the return of it. We do not think that she is entitled to any allowance for any period after the 16th March 1915. If the period up to that time be allowed to her, her suit should have been filed on or before the 16th of June 1915. It was not

so filed and we, therefore, agree with the Court of first instance that the suit is barred by limitation. We allow the appeal, set aside the order of the lower Appellate Court and restore the decree of the Court of first instance with costs in all Courts.

Appeal allowed.

PUNJAB CHIEF COURT.

MISCELLANEOUS SECOND CIVIL APPEAL NO. 3275 OF 1916.

April 25, 1918.

Present:—Mr. Justice Shah Din.

R. K. KAPUR—DECREE-HOLDER—APPELLANT

versus

SHANKAR DASS AND OTHERS—SURETIES—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 145—Surety making himself liable for decretal money in case dispute not settled—Suit compromised—Decree based on compromise, whether can be executed against surety.

In an application for execution of a decree against the sureties of the judgment-debtor, it appeared that the sureties had made themselves liable to pay the decretal amount only in case the defendants did not settle the dispute and judgment was passed against them, but that the plaintiff had entered into a compromise with the defendants according to which the latter had made themselves liable to pay the total amount of money claimed by the plaintiff by certain instalments set forth in the deed of compromise:

Held, that as the decree was passed on the basis of the compromise without any mention being made of the sureties, it could not be executed against them under the terms of the surety bond.

Miscellaneous second appeal from the order of the District Judge, Lahore, dated the 8th June 1916, reversing that of the Senior Subordinate Judge, Lahore, dated the 7th October 1915, allowing the execution proceedings against the sureties.

Mr. *Ganpat Rai*, for the Appellant.

Lala *Moti Sagar*, R.S. (for Mr. *Kirkpatrick*), and Lala *Tirath Ram*, for the Respondents.

JUDGMENT.—The facts of this case are very fully stated in the judgment of the learned District Judge and it is unnecessary to repeat them here. He has decided that the respondents are not liable to be proceeded against by the appellant as sureties for the judgment-debtors in execution of the decree dated the 28th July 1914, which the appellant had obtained against Jowahir Lal and Devi Dass upon the basis of a compromise. The District Judge has given several reasons in support of the view which he has taken; but it is unnecessary for me to deal with all the points discussed by him in his judgment, for I think that his decision can be supported solely on the ground that under the terms of the surety bond, dated the 9th July 1914, which was executed by the respondents in favour of the appellant, the latter, having compromised the claim with the original defendants Jowahir Lal and Devi Dass, is not entitled to execute the decree based on the compromise against the respondents under section 145, Civil Procedure Code. The relevant portion of the surety bond is this:—

Agar muda'a alaihim mudai ke sath faisla na karega aur niz adalat se muda'a alaihim ke barkhilaf faisla hoga to ham har do zamin zimmawar hokar iqrar karte aur likh dete hain keh kul zar-i dawa ma' kharcha ke zimmawar hain.

(If the defendants do not settle the dispute with the plaintiff by compromise and if judgment be passed against the former by the Court, then we the sureties will both be liable, and promise that we will be responsible for the payment of the decretal money with costs.)

Now, it appears from the record that on the 28th July 1914 the plaintiff-appellant entered into a compromise with original defendants Jowahir Lal and Devi Dass, according to which the latter made themselves liable to pay the total amount of money claimed by the plaintiff-appellant by certain instalments which are set forth in the deed of compromise; and it was on the basis of this compromise that the Court passed a decree in favour of the appellant. No reference whatever was made to the respondents who had become sureties for the original defendants, and neither the judgment nor the decree of the Court makes any mention of them. It is quite clear to my mind, as the District Judge has held, that what was contemplated in the surety bond was that if the parties to the suit were to settle the matter by compromise they were not to be liable as sureties at all and that they would be so liable if the claim was contested in Court and a decree was passed after contest as the result of an independent judicial adjudication upon it. Since, therefore, the suit was settled by compromise, the sureties incurred no liability whatever for the satisfaction of the decree under the terms of the surety bond in question.

The appeal fails and is dismissed with costs.

Appeal dismissed.

JANGILAL *v.* EMPEROR.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 24 OF 1918.

April 17, 1918.

Present:—Mr. Kotwal, A. J. C.

JANGILAL—ACCUSED—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 350, 223, 224, 230, 233, 234, 346—Penal Code (Act XLV of 1860), s. 420—Case transferred from one Magistrate to another—S. 350, applicability of—Trial de novo, whether can be claimed by accused—Estoppel—Intention of Counsel, expression of, in High Court not to claim trial de novo, whether estops accused from demanding trial de novo—Cheating, charge of—Omission to specify manner in which cheating effected, whether vitiates charge—Money delivered by some persons but contributed by several persons—Inducements offered to persons contributing—Separate offences—Misjoinder of charges.

The general rule is that the decision as to the innocence or guilt of an accused person must be by the Judge who has heard all the evidence. [p. 996, col. 2.]

Ladya v. *Emperor*, 1 N. L. R. 187 and *Emperor* v. *Ramprasad*, 36 Ind. Cas. 867, 18 Cr. L. J. 35, 12 N. L. R. 146, followed.

Section 350, Criminal Procedure Code, introduces an exception to this general rule and the exception should not receive a more extended interpretation than its actual words clearly justify. [p. 996, col. 2.]

Mohesh Chandra Saha v. *Emperor*, 35 C. 457, 12 C. W. N. 416, 7 C. L. J. 488, 7 Cr. L. J. 220, *Kudratullah* v. *Emperor*, 14 Ind. Cas. 314; 39 C. 781, 13 Cr. L. J. 218, *Palaniandy Gounden* v. *Emperor*, 1 Ind Cas. 54; 32 M. 218, 5 M. L. T. 218, 9 Cr. L. J. 146 and *Ram Dass* v. *Emperor*, 44 Ind. Cas. 682, 16 A. L. J. 217, 19 Cr. L. J. 378, disapproved.

The applicant was *challaned* and convicted on three charges under section 420, Indian Penal Code, which were tried together under section 234 of the Criminal Procedure Code, on the allegation that in his capacity as a Revenue Inspector he cheated three persons by dishonestly inducing them to deliver to him sums of money collected by them from several others, they themselves contributing to the sums their own *quota* of subscriptions. The applicant under orders from the Tahsildar caused a list of the tenants of a certain village to be prepared, showing the amount each of the tenants would have to pay towards the War Loan. Sometime after he offered to some of them within the hearing of others to cut down the subscriptions to half if he was paid Rs. 2 a piece, and to omit altogether the names of persons who were to pay Rs. 7-12-0 if they paid him Re. 1 each. The villagers were then told to bring the money and they met in two groups. Seven out of one group paid Rs. 2 each to *K*, who thus collected Rs 16 including Rs. 2 of his own and paid the amount to the applicant, who made the necessary corrections in the list already prepared. Similarly *C.* collected Rs. 9 from 6 persons including himself out of the other group and paid it to the applicant who, made corrections in the list as promised. The case was originally tried by the District Magistrate but on an application for transfer to the Judicial Commissioner it was sent to the file of a First Class Magistrate in the same District. In the course of his arguments in the proceedings under the transfer application the applicant's Counsel expressed his intention not to apply for a re-hearing of the case. The Magistrate, to whose file the case was transferred, held that this constituted a waiver on the part of the accused and consequently refused to grant the prayer of the applicant for a trial *de novo*. On appeal the Sessions Judge set aside the conviction and sentence on one charge only and upheld those on the other two. The applicant urged amongst others the following grounds:-(1) that there was an illegal contravention of section 350, Criminal Procedure Code, in refusing to grant a trial *de novo*, (2) that there was a non-compliance with sections 223 and 224, Criminal Procedure Code, causing in fact a failure of justice and illegal misuse of section 336 inasmuch as the charges did not give necessary notice of the matter charged, (3) that the charges framed were in contravention of the provisions of sections 233 and 234 of the Criminal Procedure Code, as there were 15 persons cheated and 15 separate offences committed and the offences were wrongly combined in one trial:

Held, (1) that the statement of the applicant's Counsel not to apply for a fresh trial did not operate as an estoppel and the trial Court was wrong in refusing the applicant's demand for a trial *de novo*; [p. 997, col. 1.]

(2) that the omission to specify in the charge the manner in which the applicant cheated, whether by illegal act or omission, could not be regarded as material as it had not misled the accused; [p. 997, col. 2.]

(3) that all or most of the persons who parted with money having been present when the terms were proposed by the accused, the representations made and inducements offered were made and offered to each of the villagers collected there and when the applicant took the money paid by each villager he committed a distinct offence, and the trial of the case was, therefore, bad for misjoinder of charges as under section 234, the applicant could not be tried for more than three charges. [p. 994, cols. 1 & 2.]

If circumstances are deposed to against the accused by a prosecution witness, it is necessary that the Magistrate should let the accused know by questions put to him in examination which of them tell against him in his mind; it is more particularly necessary where the witness has deposed to other circumstances favourable to the accused which nullify the value of the circumstances against him. [p. 999, col. 1.]

Sir *Henry Stanyon*, for the Applicant.

The Hon'ble Mr. *G. P. Dick*, for the Crown.

JUDGMENT.—(1) The applicant Jangilal was the Revenue Inspector of the Bahera Circle in the Bemetara Tahsil, Drug District, till the 9th May 1917, when he was suspended by the Deputy Commissioner, Drug, on Police reports that he was taking money from villagers on the pretence that he could save them from being compelled to subscribe to the war loan. After an investigation by the police the applicant was *challaned* and

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tried and convicted on three charges under section 420, Indian Penal Code. The three charges were tried together under section 234, Criminal Procedure Code. The applicant has been sentenced to rigorous imprisonment for one year and a fine of Rs. 100 on each count, the sentences of imprisonment to run consecutively. On appeal the Sessions Judge, Raipur, has set aside the conviction and sentence on one charge. This latter charge related to the taking of money from the villagers of Mouza Puran. The other two related to the money taken from the villagers of Mouza Bhotidih. I am now dealing with the latter two only.

(2) The case against the accused as disclosed by the evidence is briefly this: Admittedly the accused was directed by the Tahsildar to prepare lists of tenants and other persons in his circle who were likely to subscribe to the loan: (see accused's written statement dated 20th August 1917). On the 1st April 1917 the tenants of Bhotidih were collected at Mouza Pendri and on the same day Chabilal Patwari (P. W. No. 12) prepared a rough list for this village showing the names of the tenants and the rents paid by them, and the applicant filled in the amounts against each tenant's names. From this Chabilal prepared a list Exhibit C. The villagers were then told what sum each would have to pay. They pleaded that they were too poor to pay anything, but they were told by the applicant that they "would have to pay" (P. W. No. 6) or were told to "be off" (P. W. No. 7). They then went home. Seven or eight days afterwards being told by the *kotwar* that they were wanted again, they went to Munderbod, a place about a *kos* from Bhotidih. They saw the applicant in the rest house sitting on a *charpoy*. He told them to wait and after a while got up and went outside the village. The villagers followed him and the applicant then beckoned to them and said that 2 or 3 men only should go to him. Thereupon Karia (P. W. No. 6), Chiraidas (P. W. No. 7), Sakhu (P. W. No. 9), Jadnath (C. W. No. 6) and Ramcharan (C. W. No. 7) went to him. He then offered to look after the villagers' interests—"*Dekh rekh karunga*"—if they would pay him something. He offered to cut down their subscriptions to half if he was paid Rs. 2 a piece, and to "cut off the Rs. 7-12-0 people altogether" if they paid Re. 1 each. The other villagers had by this time come closer and sat down within hearing distance. They were then told to bring the money. The villagers then returned to their village where they met in two groups. Seven persons paid Rs. 2 each to Karia (P. W. No. 6) who thus collected Rs. 16 including Rs. 2 of his own. Similarly Chirai (P. W. No. 7) collected Rs 9 from 6 persons including himself. These two men went to Munderbod to the applicant, and told him they had brought the money from 8 and 7 persons respectively. He told them not to let it chink, and took it, went near a lamp, asked whose money they had brought, wrote something, and said he was cutting out the Rs. 7-12-0 people and reducing the others by half. The two then went home. Ghanaram (P. W. No. 11), the Patwari in whose absence Chabilal (P. W. No. 12, was acting when he prepared the list Exhibit(C), had been cooking his food while this interview was taking place. Before retiring for the night he looked at his Basta and saw that in the list Exhibit (C) there were corrections in red ink which did not exist when that list had been made over to him by Chabilal. Next morning he asked the applicant why the corrections were made, and he replied that he had filled in the amounts without enquiry into the *haisiyat* of the villagers, but as some had begged and prayed he had changed their items. He made a fresh copy of Exhibit (C) as corrected by applicant by his direction (Exhibit D).

(3) The case as detailed above rests principally upon the evidence of P. W. No. 6 and P. W. No. 7 and of P. W. No. 11 and P. W. No. 12, the two Patwaris whose evidence is mainly in connection with the lists Exhibits (C) and (D). One piece of material evidence in the case is that of P. W. No. 10 Bhagirathi, a banker of Raipur who deposes to the accused having paid Rs. 1,600 on account of an outstanding loan on 4th May 1917. The other evidence supports some part or other of the above story and is of minor importance.

(4) Upon this evidence the applicant was charged as follows:—"First head: That you, on or about the 7th day of April 1917, at Munderbod cheated Karia Chamar by dishonestly inducing him to deliver Rs. 16 to you, and thereby committed an offence

punishable under section 420 of the Indian Penal Code, and within my cognizance."

The second and third heads of the charge were in the same terms but referred to the Rs. 9 paid by Chirai Chamar and Rs. 15 paid by Hira at Bhainsa. There were also three alternative charges under section 161, Indian Penal Code, in respect of the three sums named above.

(5) The applicant denied taking any of the above sums, and denied going to Munderbod at any time between the 1st and 10th April 1917. He produced no evidence in defence.

(6) The trying Magistrate came to the conclusion that the evidence justified conviction under section 420, Indian Penal Code. He says in paragraph 7 of his judgment:—

"There is no doubt that the accused obtained money from the above persons by practising a deception on them. He well knew that he had no authority to fix an amount on them or to reduce any amount so fixed. There is also no doubt that the poor credulous villagers made the payments firmly believing that the accused had power to reduce the amounts which he had imposed in the exercise of his authority. Since there was deception it is immaterial in which way it was practised. It may arise even from a dishonest concealment of facts (Explanation to section 415, Indian Penal Code) as in the present case. The accused in receiving the monies from Hira, Karia and Chiraidas undoubtedly acted fraudulently and I accordingly find him guilty of three offences under section 420, Indian Penal Code".

It is not quite clear what persons the Magistrate refers to when he speaks of the "above persons," whether all the fifteen who contributed to the total amount received by the applicant or to Hira, Karia and Chiraidas alone who are named as the persons cheated in the charge. The Sessions Judge has held that the applicant must be taken to have cheated only Karia and Chiraidas. "The essence of his action," he says, "was dealing with collections of people through representatives and realising lump sums of money from the representatives."

(7) It might be mentioned at this stage that the proceedings in this case originally commenced in the Court of the District Magistrate. After the latter had taken down the depositions of nine witnesses the applicant obtained an order from this Court for a transfer of the case, which was then tried by Mr. Smellie, the Magistrate who has given judgment in the case.

Before Mr. Smellie commenced his proceedings the accused applied for a *de novo* trial. This was refused on the ground that the right to claim it had been given up by the accused's Counsel before the High Court when he obtained the order of transfer from the District Magistrate's Court.

(8) The argument in appeal before the Sessions Judge proceeded on grounds substantially the same as those urged in revision in this Court. The grounds are:—

1. That the trial was preceded by such executive action and judicial procedure as operated to prejudice the applicant materially and this Court ought not to allow a conviction so obtained to stand;
2. The trial was illegal in some respects and materially irregular in others;
3. Neither the facts charged, nor the variation of them irregularly introduced by the Sessions Judge, nor the prosecution evidence, if believed, satisfy the definition nor furnish and establish the ingredients of an offence under section 420, Indian Penal Code.

(9) Under the 1st ground it is urged:—

(*a*) that the actions of the Police and the District Magistrate in suspending the applicant in order to obtain evidence with reference to the charge against him, and in making the enquiry behind his back was unfair and prejudicial to his subsequent judicial trial, and the lower Courts have ignored the presumption against the credibility of witnesses which arose from the above executive actions;

(*b*) further that the applicant's suspension by the District Magistrate and the latter's conduct in the course of the proceedings, which took place in his Court before the transfer, showed that he had already condemned the applicant, and this must have unconsciously prejudiced the trying Magistrate.

(10) As regards point (*a*) I notice that the learned Sessions Judge has considered the matter urged therein in paragraph 47 of his judgment. As regards (*b*) the statement, that the trying Magistrate must have been prejudiced, can at the best be only a conjecture. All the circumstances which are relied upon in support of this point had happened before the order for transfer from this Court was obtained and might have been urged then to get the case transferred out of the District, but it is admitted that only a transfer to another Magistrate in the District (who must necessarily be one subordinate to the District Magistrate) was applied for. It is not suggested that the trying Magistrate was particularly prone to such unconscious prejudice.

(11) Under the second ground it is urged that there was :—

(*a*) illegal contravention of section 350, Criminal Procedure Code ;

(*b*) non-compliance with sections 222 and 223, Criminal Procedure Code, causing in fact a failure of justice, and illegal misuse of section 236 ;

(*c*) contravention of section 233 read with section 234, Criminal Procedure Code;

(*d*) failure to comply with section 342, Criminal Procedure Code, to an extent which caused serious prejudice to the accused, and therefore, a failure of justice.

(12) Before the Sessions Judge the argument with reference to section 350 was based on the assumption that it was applicable to the present case, which was one transferred from the Court of one Magistrate to that of another. In paragraph 13 of his judgment the Sessions Judge says :—

"A large number of rulings have been cited to show that section 350 applies to cases in which the trial is transferred from one Magistrate to another as well as to cases in which the Magistrate is transferred, dies or otherwise vacates his office, a proposition of which I needed no convincing."

It is somewhat strange that the applicant should have failed to rely upon the rulings of the Court to the contrary which would have served his purpose better and more fully, and that both the trying Magistrate and the Sessions Judge should have overlooked or ignored the rulings of their own High Court which they were bound to follow. These rulings are *Emperor* v. *Kasim* (1), *Emperor* v. *Gokul* (2), *Ladya* v. *Emperor* (3) and *Emperor* v. *Ramprasad* (4).

(13) In this Court the argument advanced with reference to section 350 is two-fold :

1st. Reliance is placed upon the above rulings to show that the section does not apply to transferred cases and, therefore, the case ought to have been tried *de novo* by Mr. Smellie;

2nd. Even if section 350 applies, there should have been a trial *de novo* as applicant had demanded it at the proper time before Mr. Smellie and the refusal on the ground that the accused had waived his right was illegal.

(14) In my opinion the view taken of the applicability of section 350, Criminal Procedure Code, in the rulings of this Court referred to above is the correct one.

The general rule is that the decision as to the innocence or guilt of an accused person must be by the Judge who has heard all the evidence : See *Ladya* v. *Emperor* (3) and *Emperor* v. *Ramprasad* (4). Section 350, Criminal Procedure Code, introduces an exception to this general rule, and I do not think that the exception should receive a more extended interpretation than its actual words clearly justify. I am not inclined to agree with the more recent view taken in *Mohesh Chandra Saha* v. *Emperor* (5), *Kudrutullah* v. *Emperor* (6), *Palaniandy Gounden* v. *Emperor* (7) and *Ram Dass* v. *Emperor* (8).

(15) If, therefore, section 350 has no application in this case, it is unnecessary for me to discuss the points involved in the alternative argument, but assuming that the section applies and there are no other valid reasons for refusing the applicant's demand for a trial *de novo*, it seems to me that the lower Courts were

(1) 15 C. P. L. R. 66.
(2) 17 C. P. L. R. 159.
(3) 1 N. L. R. 187.
(4) 36 Ind. Cas. 867; 12 N. L. R. 146; 18 Cr. L. J. 35.
(5) 35 C. 457; 12 C. W. N. 416; 7 C. L. J. 488; 7 Cr. L. J. 220.
(6) 14 Ind. Cas. 314; 39 C. 781; 13 Cr. L. J. 218.
(7) 1 Ind. Cas. 54; 32 M. 218; 5 M. L. T. 218; 9 Cr. L. J. 146.
(8) 44 Ind. Cas. 682; 16 A. L. J. 217; 19 Cr. L. J. 378.

not justified in refusing it on the ground of waiver in anticipation before this Court at the hearing of the application for transfer. The circumstances of the case reported as *Kudrutullah* v. *Emperor* (6) were different. Not only was there no demand for a trial *de novo* made: but the transfer had been made to suit the convenience of the accused which would not have been served by a trial *de novo*. In the present case there was a demand made at the proper time, and the only question was whether the applicant's Counsel's previous statement as to the applicant's intention operated as an estoppel as the learned Magistrate seemed to think, and justified him in ignoring it. I do not think that it did. The learned Sessions Judge in discussing the case of *Gomer Sirda* v. *Queen-Empress* (9) says : " In that case the accused had never expressly waived his right to a trial", implying that in this case the accused had done so. The only record of the statement of the applicant's Counsel in this Court is in the last sentence of this Court's order for transfer, which runs thus :— "The applicant's Counsel tells me that he does not intend to apply for a re-hearing of the case." These words do not, in my opinion, amount to an express waiver. In *Ram Dass* v. *Emperor* (8) the transfer was made on the express undertaking that the accused would not ask for the re-hearing of the entire evidence and no demand for a trial *de novo* had been made: yet it was held that if the accused had repudiated the undertaking and offered some explanation of his conduct in doing so, it would have been the Magistrate's duty to consider the application and give such effect to it as he thought just and lawful. Here the application has not been considered on the merits at all.

(16) The second point raised under this ground is that the charges did not give the accused the necessary notice of the matter charged that he was entitled to under the provisions of sections 222 and 223, Criminal Procedure Code. It is said that the charge did not contain any particulars of the manner in which the applicant cheated, whether by act or illegal omission, and if so, what; that the Magistrate's record apart from his judgment does not anywhere specify any act or words by which the accused deceived the men who parted with money or the men who carried it to the accused, or of the illegal omission or dishonest concealment by which the deception was brought about. Reliance is placed on illustrations (*b*) and (*c*) to section 225 in this connection. It would, no doubt, have been better to have set out in the charge the manner in which the cheating was effected, but the omission cannot be regarded as material as it is not alleged, and does not appear to me, that the accused was in fact misled by such error : section 225, Criminal Procedure Code. The *challan* and the evidence in the case must have sufficiently indicated to the accused the manner in which he was said to have cheated the villagers. There is evidence on the record which, if true, goes to show that the applicant by his words and conduct induced a belief that the villagers would have to pay the amounts entered against their names, unless they were reduced or cut off altogether by him. I agree with the Sessions Judge's views on this point expressed in paragraph 11 of his judgment.

(17) It is further urged that the charges of cheating and bribery were based on inconsistent facts, and the trial of those charges together, apart from its not being justified under section 236, Criminal Procedure Code, has been the cause of prejudice to the applicant. It is said that at the stage of argument the Magistrate himself stated to the Pleader for the applicant that no case of cheating had been made out and he confined his argument to the charges of bribery. I cannot decide the question of prejudice to the accused under this head of objection without further inquiry and as I find that the trial is bad on other grounds I think it unnecessary to go any further into this objection. On the record as it is, the charge of bribery was rightly dropped by the Magistrate.

(18) The third point argued under this ground is that the charges framed are in contravention of the provisions of sections 233 and 234 of the Criminal Procedure Code. It is argued that assuming there was cheating, the number of individuals cheated was 15, *i. e.*, 13 from Mouza

(9) 25 C. 863; 2 C. W. N. 465; 13 Ind. Dec. (N. S.) 563.

Bhotidih and 2 from Mouza Puran, that 15 offences were thus committed, that the Magistrate wrongly combined 15 charges in respect of them in one trial, and that the proceedings are irremediably bad in law on account of this error, and the convictions cannot stand. *Subrahmania Ayyar* v. *King-Emperor* (10). It is admitted by the learned Counsel for the applicant as well as the Crown that according to the evidence on the record all or most of the persons from Bhotidih who parted with mony were present at the first interview with the applicant outside the village and heard the terms he proposed. There are witnesses whom the lower Courts have relied on (see paragraph 2 at page 6 of the Magistrate's judgment and paragraph 30 of the Sessions Judge's judgment) who give evidence to the effect that Karia shouted out to the villagers, who were sitting apart, whether they had heard the terms and that they agreed. If this is so, then it appears to me that the representation made and the inducement offered by the applicant were made and offered to each of the villagers collected there, and when the applicant took the money paid by each villager he committed a distinct offence.

(19) Reliance is placed by the Sessions Judge on *Johan Subarna* v. *King-Emperor* (11) and *Girwardhari Lal* v. *Emperor* (12), for holding that there was only one offence in respect of each lump sum paid by Hira, Karia and Chiraidas. I am not prepared to accept the view taken in *Johan Subarna* v. *King-Emperor* (11). The attempt complained of in that case was, in my opinion, nonetheless an attempt to deceive each individual separately, because it was made simultaneously. The last paragraph on page 1063* in *Girwardhari Lal* v. *Emperor* (12) seems to me to go against the view of the Sessions Judge rather than to support it. It is not the case here that the applicant treated the transaction as a single one and was unwilling to reduce or cut off the subscription of any one unless all of them combined and made a combined payment. It is difficult to reconcile the views taken in *Girwardhari Lal* v. *Emperor* (12) with the one taken in *Johan Subarna* v. *King-Emperor* (11), unless we assume that the Judges who decided the former case understood the facts in the latter case to be somewhat different from those stated therein. I hold that the trial of this case is bad on account of misjoinder of charges. Under section 234 the applicant could not have been legally tried for more than three charges.

The fourth point urged under this ground is that there was a failure to comply with the provisions of section 342, Criminal Procedure Code, which has resulted in prejudice to the accused. The Sessions Judge in paragraph 50 of his judgment has found that the applicant paid to his creditor Bhagirathi, P. W. No. 10, Rs. 1,600 on the 3rd or 4th of May 1917 on account of a debt owed on a *hundi*, which had been running for 3 years without any re-payment. He refers to this as a damning piece of evidence against the accused (paragraph 51 of his judgment says, "this evidence has much value as corroborating the prosecution story"). It is urged that when this evidence was tendered the applicant by cross-examination elicited that he had been accompanied by another man when the money was borrowed and also that he had offered to pay off the *hundi* in February 1917. It is said that the object of this cross-examination was to prove that the money was borrowed on the personal security of the accused for a relation who was unknown to the lender, and the borrower had sent the money for payment in February 1917 to the applicant. It is argued that any inference arising from this payment disappeared the moment it was found that the applicant had money to pay off the *hundi* in his possession before the war loan proceedings were set on foot. It is said that the admissions obtained from Bhagirathi in his cross examination were not questioned or explained away by re-examination, nor did the Magistrate ask the witness any further question on the point of the February tender, and wholly omitted to question the applicant about it. Under these circumstances it is urged that the lower Courts were wrong in

(10) 25 M. 61; 11 M. L. J. 233; 3 Bom. L. R. 540; 28 I. A. 257; 5 C. W. N. 866; 2 Weir 271; 8 Sar. P. C. J. 160 (P. C.).

(11) 10 C. W. N. 520; 2 C. L. J. 618; 3 Cr. L. J. 111.

(12) 4 Ind. Cas. 13; 13 C. W. N. 1062; 10 Cr. L. J. 463.

*Page of 13 C. W. N.—*Ed.*

using against the applicant this piece of evidence.

(21) I think there is much force in this contention of the applicant. In the circumstances stated above the applicant would be justified in concluding that the Magistrate did not accept the payment of Rs. 1,600 as a circumstance against the applicant. There was no reason for the applicant to suppose that the statement as to the February tender, coming as it did from a witness produced by the prosecution, would be disbelieved, as the Sessions Judge seems to have done. If circumstances against an accused person are deposed to by a prosecution witness, it is necessary that the Magistrate should let the accused know, by questions put to him in his examination, which of them tell against the accused in his mind, and it is more particularly necessary where the witness has deposed to other circumstances favourable to the accused which nullify the value of the circumstances against the accused. The failure to comply with the provisions of section 342 in this connection may well have prejudiced the applicant by leading him to conclude as above and to ignore the evidence of Bhagirathi so far as his defence was concerned.

(22) The third and the last of the main grounds of appeal urges that neither the facts charged, nor the variation of them introduced by the Sessions Judge—*viz*, that the cheating was practised on Karia and Chiraidas as the representatives of collections of villagers—nor the prosecution evidence, if believed, established a case under section 420, Indian Penal Code. As regards this contention I think it advisable at this stage to do no more than refer to what I have already said in the latter part of paragraph 16.

(23) Holding as I do that the trial is bad for the reasons stated above, I do not think it is open to me to go into the merits as I have been asked to do. I do not see how I can decide on evidence on which it is not open to the lower Courts to decide on account of the contravention of the provisions of the Criminal Procedure Code referred to above. I set aside the applicant's conviction and sentence and order that he be re-tried in accordance with law.

The applicant has been released on bail by an order of this Court passed on the 22nd February 1918. He will surrender before the District Magistrate, Drug, on or before the 22nd April 1918. It will be open to the District Magistrate to make such further order as to bail as he deems proper.

Conviction set aside; Retrial ordered.

CALCUTTA HIGH COURT.

CRIMINAL APPEAL No. 479 OF 1917.

October 9, 1917.

Present:—Mr. Justice Teunon and Mr. Justice Richardson.

AKHOY KUMAR MUKERJEE *alias* BHUTNATH MUKERJEE—ACCUSED—APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 342 (4)—Oaths Act (X of 1873), s. 5—Evidence Act (I of 1872), s. 118—Evidence—Accused, whether competent witness—Two persons tried separately, whether can give evidence against each other.

An accused person actually under trial cannot be sworn as a witness, and if two or more persons are being jointly tried none of them is a competent witness for or against the others. But this exception to the general rule goes no further and has no application to an accused person who is not at the time under trial. Accordingly when two persons though they may be accused of complicity in the same offence are tried separately each is a competent witness at the trial of the other, and the deposition of each may be used against him in his own trial. [p. 1000, col. 1.]

Criminal appeal against the sentence of the Third Presidency Magistrate, Calcutta, dated the 27th July 1917.

Babu *Manmatha Nath Mukerjee*, for the Appellant.

Mr. *Orr*, for the Crown.

JUDGMENT.—The appellant, Akhoy Kumar Mukerjee *alias* Bhut Nath Mukerjee, has been convicted by the Third Presidency Magistrate, Mr. Abdus Salam, in the alternative under section 411 or section 414 of the Penal Code and sentenced to rigorous imprisonment for one year.

The case relates to two currency notes of Rs. 1,000 each which were undoubtedly stolen on the 22nd January 1917, and subsequently on the 26th January presented for encashment at the Paper Currency Office by Sheo Pershad Chatterjee, a clerk of that office,

Sheo Pershad's arrest led to the arrest of the appellant. The Police placed the two men for trial before Mr. Keays, the Second Presidency Magistrate. Mr. Keays, as he was at liberty to do, directed that they should be tried separately. Sheo Pershad's case was taken first and at his trial the appellant was put in the witness box and gave evidence. In the result Sheo Pershad was convicted but the conviction was subsequently set aside by this Court. Now the appellant has been tried and his deposition in Sheo Pershad's case has been used as evidence against himself. His learned Pleader Mr. Manmatha Nath Mookerjee has urged on his behalf that the deposition is inadmissible, mainly on the ground that the appellant was not a competent witness for or against Sheo Pershad.

The general rule on the subject of the competency of witnesses is contained in section 118 of the Evidence Act:

"All persons shall be competent to testify unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind."

The Evidence Act is silent as to accused persons, but section 5 of the Indian Oaths Act (Act X of 1873) provides that "Nothing herein contained shall render it lawful to administer in a criminal proceeding an oath or affirmation to the accused person," and clause (4) of section 342 of the Criminal Procedure Code similarly provides that "No oath shall be administered to the accused." It is undisputed, therefore, that an accused person actually under trial cannot be sworn as a witness, and that if two or more persons are being jointly tried none of them is a competent witness for or against the others. But in our opinion this exception to the general rule goes no further, and has no application to an accused person who is not at the time under trial. Accordingly when two persons, though they may be accused of complicity in the same offence, are tried separately each is a competent witness at the trial of the other.

We are disposed to regard the law as settled in this sense and it is only in deference to the arguments addressed to us that we go further into the matter.

It is hardly contested that the provision in the Criminal Procedure Code, regard being had to its context, applies only to the accused actually under trial, and it appears to us that the language of the Oaths Act is capable of and should receive a like interpretation. The accused person in a criminal proceeding is the accused who is the subject of that particular proceeding.

This view is in accord with English practice [Stephen's Digest of the Law of Evidence, Article 108, Archbold's Criminal Pleading, Evidence and Practice, 23rd Edition, page 394 (note)]. In India the law was laid down as we have stated it so long ago as the year 1868 by Couch, C. J., and Newton, J., in *Reg.* v. *Narayan Sundar* (1). It is true that the Oaths Act had not then been passed but section 204 of the first Criminal Procedure Code (Act XXV of 1861) was to the same effect as the corresponding provision in the present Code to which we have referred. It may be that some difficulty has since been caused in this connection by certain decisions relating to illegal or irregular pardons. The earlier cases are referred to and distinguished or explained in *Queen Empress* v. *Mona Puna* (2). In these and other cases the true question appears to be whether several persons having been placed on their trial together, the proceedings as against one of them have come to an end so as to remove the impediment to his being examined as a witness for or against the others: See *Subrahmania Ayyar* v. *King-Emperor* (3) per Arnold White, C. J., and *Queen-Empress* v. *Hussein Haji* (4). On this question as it has arisen in particular cases or in particular circumstances, there may have been some conflict of opinion and the decisions may not be entirely reconcilable. Possibly, too, traces may be found of some confusion between the competency of a person as a witness and the admissibility of any evidence such person may have to give. However that may be, in the case before us the appellant and Sheo Pershad were never on their trial together. Sheo Pershad was

(1) 5 B H C. R. Cr. 1.

(2) 16 B 661; 8 Ind. Dec. (N. S.) 919.

(3) 25 M. 61 at p. 67 (*et seq*); 11 M. L. J. 233; 3 Bom. L. R. 540; 28 I. A. 257; 5 C. W. N. 866; 2 Weir 271; 8 Sar. P. C. J. 160.

(4) 25 B. 422; 2 Bom. L. R. 1095.

tried separately. In such a case the rule applicable is that laid down in *Reg.* v. *Narayan* (1) already cited and again in *Empress* v. *Durant* (5). The latter case, which was decided by Candy, J., upon the present Code is clearly in point. Full reasons for the decision, with which we generally concur, will be found in the judgment of the learned Judge, and if the decision was not actually approved and adopted by this Court in *Banu Singh* v. *Emperor* (6), it was certainly not dissented from. In fact at page 1357 of the report, the learned Judges (Mitra and Holmwood, JJ.) say this:—

"The law, however, is well settled that an accomplice, if he is not an accused under trial in the same case, is a competent witness, and may, as any other witness, be examined on oath."

That expression of opinion, even if it be nothing more, certainly supports our conclusion that the appellant was a competent witness at the trial of Sheo Pershad, a conclusion which is also supported by the observations of another Bench of this Court in *Amritalal Hazra* v. *Emperor* (7).

We may mention that, as the cases show, it may often be to the advantage of the accused actually under trial that a person alleged to be an accomplice should be put into the witness box.

It was next argued that if the appellant was a competent witness at Sheo Pershad's trial, the evidence he gave was not admissible against himself at his own trial. It was not suggested that the appellant had brought himself within the protection afforded to witnesses by the proviso to section 132 of the Evidence Act. His evidence was voluntarily given. Reference was, however, made to certain observations in *Emperor* v. *Nanda Gopal Roy* (8). There were special facts in that case. Nanda Gopal and others were placed on their trial before a Presidency Magistrate. Nanda Gopal was discharged. The other accused were convicted and appealed to this Court. This Court before disposing of the appeal directed that Nanda Gopal should be examined as a witness. No question was raised as to his competency and his evidence was duly taken by the Magistrate and sent up to this Court. Then the appeal of the other accused was dismissed, and the learned Judges at the same time issued a Rule upon Nanda Gopal to show cause why the case against him should not be further inquired into. The Rule was heard by the Chief Justice and Walmsley, J., and in discharging the Rule the learned Chief Justice incidentally said that "the evidence of Mr. N. G. Roy given under the direction of the Court could not be used against him if he were to be re-tried." But the point was not decided and could not be decided at that stage. The Rule was discharged, because it was considered unfair that the proceedings against Nanda Gopal should be revived upon the strength of statements made by him in the witness box in the course of an examination directed by this Court. The ground taken was quite independent of the further question whether those statements would or would not have been admissible against him supposing he were re-tried. Section 132 of the Evidence Act was not referred to and, apart from that, the case is distinguishable from the present upon the facts. The case of an accused person who is discharged and then gives evidence and against whom an order for further inquiry is then made, may be subject to considerations which are not applicable to the present case. Upon that question we need express no opinion. In the present case, we are unable to say that the Magistrate committed any error of law by admitting the appellant's deposition at Sheo Pershad's trial as evidence against him at his own trial.

It was lastly argued that the Magistrate could not properly find on the materials before him that the appellant "knew or had reason to believe" that the notes were stolen property. Reference was made to *Empress* v. *Rango Timaji* (9). No doubt mere carelessness or suspicion might not amount to criminal knowledge, though the question might be one of degree. But in the present case the accused admits a dishonest mind. He says: I did not know that the notes were stolen. I thought they were forged. There is nothing in the notes themselves to suggest that they were

(5) 23 B. 213; 12 Ind. Dec. (N. S.) 141.

(6) 33 C. 1353; 10 C. W. N. 962; 4 Cr. L. J. 145.

(7) 29 Ind. Cas. 513; 21 C. L. J. 331; 19 C. W. N. 676; 16 Cr. L. J. 497; 42 C. 957.

(8) 35 Ind. Cas. 988; 20 C. W. N. 1128 at p. 1132; 17 Cr. L. J. 428.

(9) 6 B. 402; 6 Ind. Jur. 538; 3 Ind. Dec. (N. S.) 724.

forged. We are of opinion that the evidence, including the statements of the appellant himself and the letter which he placed in his sister's custody, afford ample warrant for the finding that he knew or in fact believed that the notes had been stolen.

For the reasons given this appeal must be dismissed. The appellant, if on bail, must surrender and undergo the remainder of his sentence.

Appeal dismissed.

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 41 OF 1918.

April 29, 1918.

Present:—Mr. Batten, Offg. J. C.

R. B. TIKEKAR—ACCUSED—APPLICANT

versus

PIAREYLAL—COMPLAINANT—NON-APPLICANT.

Penal Code (Act XLV of 1860), s. 504—Insult with intention to provoke breach of peace—Barrister—Privilege—Criminal Procedure Code (Act V of 1898), s. 439—Revision—High Court, power of, to re-examine evidence—Non-appealable sentence.

An intentional insult with intent to provoke a breach of the peace is an offence more cognate to the offence of assault than to the offence of defamation. A Barrister cannot claim privilege in the case of an assault, nor can he claim any privilege if his conduct is calculated to provoke an assault. [p. 1003, col. 2]

A High Court, as a Court of Revision, has power to re-examine the evidence if there are *prima facie* good grounds for doing so, especially where the accused has been given a non-appealable sentence and has no means of vindicating his character except in revision. [p. 1004, col. 1.]

Revision petition against the order of the Magistrate, 1st class, in Criminal Case No. 176 of 1917, dated the 26th January 1918.

Dr. *H. S. Gour*, Messrs. *G. L. Subhedar*, and *Balwant Rao*, for the Applicant.

The Hon'ble Mr. *G. S. Dick*, for the Crown,

ORDER.—The applicant, R. B. Tikekar, a Barrister-at-law, practising at Damoh, has been convicted under section 504, Indian Penal Code, and sentenced to a fine of Rs. 25 or in default to simple imprisonment for a fortnight. The sentence is not appealable and he has, therefore, applied in revision to this Court. The fine has been paid and the punishment is a light one, but the conviction is a serious stigma on a Barrister-at-law, and as a result of it steps were in contemplation against him under the Legal Practitioners Act. On the death of one Ramju Nai mutation proceedings took place before the Tahsildar of Hatta in respect of his Malik Makbuza plot. One of the claimants was Pammi or Param, a nephew of the deceased, and the counter-claimants were the deceased's son's wife *Musammat* Rajrani and her second husband Manhgoo. On the 13th September last the Tahsildar was holding a judicial inquiry into the case; Manhgoo Nai was represented by a Mukhtyar, Narbada Prasad, and Param by the applicant his Counsel. Two witnesses were examined on that date on behalf of Manhgoo, the 1st being the complainant Piareylal Nai and the 2nd Bhawani Nai. Piareylal's allegation is that the Barrister asked Piareylal the name of the grandfather of Manhgoo and Piareylal said that he did not know it. Thereupon the Barrister said to the witness in a threatening tone "why will you not give this information, you pig? If you don't give it I will give you a kick with my boot." It is also alleged that the Tahsildar himself, the presiding officer of the Court, said to the witness: "You are not a Nai but a Chamar." The witnesses for the complainant are the complainant Piareylal himself, his Mukhtyar, Narbada Prasad, the aforesaid Bhawani, one Pakoo Nai (a witness for Manhgoo in the mutation case who was not examined on that day) and Manhgoo's wife *Musammat* Rajrani. The applicant entirely denied the truth of the allegations against him, and called in his defence Mr. Narayan Rao, the Tahsildar who was the presiding officer in the Court, a Tahsil peon, one Gangadhar Rao (a Mulguzar who had another mutation case in the Thasildar's Court that day), and Jawahar Singh, the Malguzar of Barda who was present in the Tahsildar's Court in connection with the war loan. The proceedings were being held at Hatta,

All these witnesses entirely denied the truth of the complainant's story. The Magistrate, Khan Sahib Ishtiaq Ali, says that in the ordinary course he would have believed the Tahsildar, "but for his selfish motive, his personal interest in the accused and his prejudice against the complainant." He says:—

"Mr. Narayan Rao's admission of accused's fault in open Court and his failure to take notice of it and lastly his own unbecoming dealings with Piareylal would simply reflect shameful discredit on him (Mr. Narayan Rao) and consequently for the selfishness he cannot be expected to expose himself and his friend the accused." Piareylal made an application to the Deputy Commissioner against the Tahsildar and the Tahsildar was told to treat witnesses in a proper manner. Piareylal also lodged a complaint of defamation against the Tahsildar and it was dismissed by Mr. Ishtiaq Ali as the complainant had not obtained sanction under section 197, Criminal Procedure Code. The Magistrate observes:—

"Mr. Narayan Rao was fully aware of the above two cases against him, as he himself does not deny in the cross-examination before me. Under such circumstances then Mr. Narayan Rao had already become much prejudiced against Piareylal, when he on the 3rd December last stood up before me to depose directly in favour of the accused. I have also remarked above about the interest of Mr. Narayan Rao in the accused. In this connection I have to state that sometime after the institution of the present criminal proceeding against the accused, Mr. Narayan Rao, accompanied by the accused Raghunath Balwant Tikekar and also a certain Pleader of the Damoh Bar, repaired to Manza Barda and saw Jawahar Singh (D. W. No. 4) there. The latter before me could not satisfactorily account for the joint visit to him of the trio, and the presumption, therefore, is that the said Mr. Narayan Rao had been trying and was anxious to get the accused out of trouble, if it could possibly be done, by getting a few Malguzars like Jawahar Singh who would agree to speak in Court for the accused if it was necessary. For the above reasons I fail to attach any importance to the evidence of the said Mr. Narayan Rao and it is rejected *in toto*."

Later on the Magistrate says:—

"The evidence of this witness (Jawahar Singh) is decidedly the outcome of the aforesaid visits."

The first contention of the learned Counsel for the applicant is that the conduct of the accused in the prosecution of a judicial case was absolutely privileged and that he cannot be prosecuted on account of it. The whole question of absolute privilege is exhaustively discussed in paragraph 212 of Mayne's Criminal Law of India, 4th Edition. There is a conflict of opinion in the Indian Courts as to whether or not the English doctrine of absolute privilege applies in India and whether or not the Courts can go outside the law as laid down in section 499, Indian Penal Code, more specially the ninth exception thereto. The cases apply both to civil actions and to criminal prosecutions, but all the cases relate to the conduct of the Counsel regarded as a defamation. I am of opinion that none of the rulings have any application to an offence under section 504, Indian Penal Code. A Barrister could not possibly plead privilege if he assaulted a witness, and it appears to me that an intentional insult with intent to provoke breach of the peace is an offence more cognate to the offence of assault than to the offence of defamation. A Barrister cannot claim privilege in the case of an assault, nor in my opinion can he claim privilege if his conduct is calculated to provoke an assault.

The next contention for the applicant is that the conduct complained of does not amount to an offence under section 504, Indian Penal Code. I am unable to accept this view. Such conduct out of Court would certainly fall within the section, and I see no reason for making a distinction because the alleged insult was made by a Barrister when cross-examining a witness. The law does not contemplate or take into account such conduct by a Barrister as calling a witness a pig and threatening to kick him, and under section 152 of the Indian Evidence Act the Court is bound to prevent questions put in an offensive form.

The real object of the applicant is to vindicate his character on the merits of the case, and the learned Standing Counsel also is desirous that the case should be disposed of on its merits and not on any technical points, more especially as the conduct of the

presiding officer of the Court has been called in question. The learned District Magistrate in showing cause questions the power of this Court to interfere by re examining the evidence. There is, however, ample precedent for a High Court as a Court of Revision re-examining the evidence if there are *prima facie* good grounds for doing so; more especially is this the case where the accused has been given a non-appealable sentence and has no means of vindicating his character except in revision. The learned Standing Counsel does not support the view of the learned District Magistrate on this point, and fully admits that there are *prima facie* grounds for examining the evidence *de novo* in this case.

I am of opinion that the Magistrate has not given good grounds for disbelieving the evidence of the Tahsildar regarding the conduct of the Barrister-at law, nor has he subjected the prosecution evidence to the criticism to which it is open. He has failed in his judgment to note that all the prosecution witnesses, except Narbada Prasad, are related to each other and partisans of Manhgoo, and that Narbada Prasad cannot be regarded as an unbiassed witness since he appeared as the Mukhtyar of Manhgoo for whom Piareylal was giving evidence. The District Magistrate's observation that Narbada Prasad was not Am-Mukhtyar but held a special power-of-attorney for the case does not appear to me to meet the point.

The following is the passage in the cross-examination of the defence witness Jawahir Singh on which the Magistrate bases his allegations of conspiracy:—

"Yes,—the accused had come to my village Barda in the last week of the month of Kuar last (October 1917). He had come in connection with Girdhari Lal's case. I was also there. The reader was not present at all there. I had met the accused at Barda where he had visited us. He was accompanied by Narayan Rao Tahsildar and one more Vakil, a junior man whom I can identify."

The only deduction that I can draw from this evidence is that the Tahsildar visited the witness' village on duty in connection with the case of Girdhari Lal and that the Barrister and Vakil were also there in connection with some case. I am assured that the applicant went to Barda to conduct the prosecution of Girdhari Lal under section 342, Indian Penal Code, before the Tahsildar who was in camp at Barda and that the other Pleader appeared with him for the defence in a forest case. However this may be, the evidence does not show that the Tahsildar and the Barrister and the Pleader went to Barda otherwise than in the prosecution of their respective duties, and there is no justification on the record for the allegation of conspiracy made by the Magistrate. The Magistrate's observation that Jawahar Singh could not satisfactorily account for the joint visit to him of the trio is not justified by the record, since the witness was not questioned any further on the point than is shown by his answers above set out. There is no basis on the record for the description of the accused as a friend of the Tahsildar except perhaps the Tahsildar's answer, to a doubtfully correct question put to him in cross-examination, that the accused and he are both Mahratta Brahmins. It is also to be observed that the Tahsildar has been condemned unheard on the question of conspiracy. He was not asked a single question about his visit to Barda. It is true that the Tahsildar had gone away before the witness Jawahar Singh was examined, but this would not justify the Tahsildar being condemned on a point regarding which he was not given any opportunity whatever of giving an explanation. The Magistrate is also incorrect in saying that Mr. Narayan Rao was fully aware of the two cases against him as he himself did not deny it in the cross-examination. The Tahsildar distinctly says that though he was aware of the report against him made to the Deputy Commissioner he had no knowledge of the criminal complaint of defamation, and there is no evidence and nothing on the record to show that the Tahsildar had any such knowledge.

The Magistrate has also taken it for granted that the Tahsildar would give false evidence against a man who had made a complaint against him. On looking into the record of the mutation proceedings I find it extremely improbable that the Barrister should have acted in the way he is alleged to have done. I find that at the very beginning of Piareylal's examination he stated that he did not know what was the name of Ramju's father, though he knew that Manhgoo was related to Ramju. It was not in the interest of the applicant's client that Piareylal

should show himself well acquainted with the relationships in the family. The less he knew the less valuable a witness was he for Manhgoo, and it is difficult to believe that the Barrister would wish to elicit information detrimental to his own client. I have to consider the point what object Piareylal could have in bringing a false complaint against the Barrister and the Tahsildar. I find from the records that *Musammat* Rajrani, whose interests were the same as those of Manhgoo, applied for a transfer of the case from the file of the Tahsildar. It is quite probable that it was apparent to Manhgoo and his friends including his Mukhtyar, Narbada Prasad, that the Tahsildar did not regard Manhgoo's claim as a good one, and it is probable that the accusations made against the Tahsildar and the Barrister appearing for the opposite side were made in support of the application for transfer. The mutation proceedings were as a matter of fact concluded by the Extra Assistant Commissioner, Mr. Ishtiaq Ali himself, who decided the case against Manhgoo.

I am of opinion that the Magistrate has been too ready to accept an accusation made by interested persons against the Tahsildar and the Barrister, and has rejected the evidence of the Tahsildar on wholly insufficient grounds which are not justified by the evidence on the record. The conviction cannot be sustained. The conviction and sentence are set aside and the fine, if paid, will be refunded.

Conviction set aside.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 172 OF 1918.

May 4, 1918.

Present:—Mr. Justice Piggott.

RAJA RAM SINGH—APPLICANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), s. 500—Defamation—Using obscene and insulting language in respect of complainant—Offence.

After an altercation between the parties was over, the accused addressing third persons used language of an obscene and insulting nature in respect of the complainant, a respectable Mukhtar:

Held, that the words were calculated to harm the reputation of the complainant and that the accused was, therefore, guilty of an offence under section 500 of the Penal Code [p 1006, col 1]

Obiter dictum.—There is some authority for the proposition that words *prima facie* defamatory used in a street quarrel should be regarded as mere vulgar abuse and that their utterance under such circumstances does not necessarily suggest an intention to harm the reputation of the person to whom they are applied [p. 1005, col. 2]

Criminal revision from an order of the Sessions Judge, Azamgarh.

Mr. *Peary Lal Banerji*, for the Applicant.

Mr. *R. Malcomson* (Assistant Government Advocate), for the Crown.

JUDGMENT.—This is an application in revision by one Raja Ram Singh, who has been convicted on a charge under section 500 of the Indian Penal Code, and sentenced to a fine of Rs. 50, the case against him being that he used language of an obscene and insulting nature in speaking of a respectable Mukhtar of the name of Muhammad Ali Khan. I do not propose to go into the unedifying details of the quarrel between these two gentlemen. The trying Magistrate has gone into the evidence very thoroughly and has written a carefully considered judgment. I accept his finding as to the words used by Raja Ram Singh and the circumstances under which they were spoken. The point taken on behalf of the applicant is that the words used were obviously not intended to be understood literally and amounted to no more than an open expression of the fact that the accused was very angry with the complainant. There is some authority for the proposition that words *prima facie* defamatory used in a street quarrel should be regarded as mere vulgar abuse and that their utterance under such circumstances does not necessarily suggest an intention to harm the reputation of the person to whom they are applied. I am content to refer to the case of *Empress* v. *Behari* (1). I think the present case distinguishable; the words in respect of which Raja Ram Singh has been convicted were not used in the course of a quarrel; they were not addressed to Muhammad Ali Khan at all, but were spoken of

(1) A. W. N. (1883) 33; Ind. Dec. (N. S.) 274.

him after the altercation between the parties was over. Assuming in the applicant's favour that he did not intend that his hearers should take literally the disgusting imputation conveyed by his words, I do not see that he is in any better position than he would have been if he said:—"I wish to convey to you in the most emphatic language at my command that I consider Muhammad Ali Khan a worthless and despicable blackguard." Surely the Sub Inspector would not wish me to hold that his own credit and reputation amongst his acquaintances stands so low that he has himself no "reason to believe" that such an expression of opinion on his part would harm the reputation of the person of whom it was made.

I hold that Raja Ram Singh was rightly convicted on the facts found and I dismiss his application.

Application dismissed.

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 138 OF 1918.

May 4, 1918.

Present:—Mr. Justice Piggott.

MUHAMMAD ALI KHAN—APPLICANT

versus

RAJA RAM SINGH—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 250—Compensation to accused—Charges under different sections—Acquittal on some and conviction on others, effect of.

Section 250 of the Criminal Procedure Code speaks of "the case" as a whole and contemplates a trial or inquiry ending in the unqualified acquittal or discharge of the accused. A complainant who, having a genuine grievance, wilfully exaggerates or distorts the same in order to aggravate the case against the accused is liable, in the discretion of the trial Court, to be prosecuted for any offence against the Indian Penal Code which he may have committed, but the policy of the Legislature seems to be to limit the summary jurisdiction of the Court under section 250 of the Criminal Procedure Code to simple cases, in which the complainant is found to have been wholly in the wrong.

Complainant charged accused under sections 500 and 506 of the Penal Code. The accused was convicted on the former and acquitted on the latter charge and the complainant was ordered to pay compensation to the accused, on the ground that the charge of criminal intimidation was frivolous or vexatious:

Held, that the provisions of section 250 of the Criminal Procedure Code did not apply to such a state of facts, unless the accused was discharged or acquitted altogether.

Criminal revision from an order of the Magistrate, First Class, Azamgarh.

Mr. *Iqbal Ahmad*, for the Applicant.

Mr. *Peary Lal Banerji*, for the Opposite Party.

JUDGMENT.—Raja Ram Singh was tried at one trial by a Magistrate of the First Class on two charges framed under section 505 and section 500 of the Indian Penal Code. He was acquitted on the former and convicted on the latter charge. The complainant Muhammad Ali Khan has been ordered to pay a compensaion of Rs. 25 to Raja Ram Singh, on the ground that the charge of criminal intimidation was frivolous or vexatious. The question I have to determine is whether this order is legal in view of the fact that Raja Ram Singh was convicted on one of the two charges against him. I must take it that the complainant's case was that the two offences in question were committed in the course of one series of acts so connected together as to form the same transaction, otherwise they would have been separately charged and tried separately. The provisions of section 250 of the Code of Criminal Procedure will not apply to such a state of facts, unless the Magistrate who tried the case discharges or acquits the accused altogether. The section speaks of "the case" as a whole, and contemplates a trial or inquiry ending in the unqualified acquittal or discharge of the accused. A complainant who, having a genuine grievance, wilfully exaggerates or distorts the same in order to aggravate the case against the accused is liable, in the discretion of the trial Court, to be prosecuted for any offence against the Indian Penal Code which he may have committed; but the policy of the Legislature seems to be to limit the summary jurisdiction of the Court under section 250 of the Criminal Procedure Code to simple cases in which the complainant is found to have been wholly in the wrong. There is authority for this view in the case of *Mukti Bewa* v. *Jhotu Santra* (1). I think that case

(1) 24 C. 53; 1 C. W. N. 17; 12 Ind. Dec. (N. S.) 700.

was rightly decided and that it covers the facts now before me.

I set aside the order directing Muhammad Ali Khan to pay Rs. 25 as compensation. The money, if paid, will be refunded.

Order set aside.

OUDH JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 123 OF 1917.

August 22, 1917.

Present:—Mr. Lindsay, J. C.

KAYAMUDDIN—APPLICANT

versus

DWARKA AND ANOTHER—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 7 (2)—Notification declaring boundary between two districts, construction of—Transfer of case—District Magistrate, power of, to transfer case outside district.

A notification issued under section 7 (2), Criminal Procedure Code, declared that for the purposes of criminal jurisdiction the deep stream of a river running between two conterminous districts was to be considered the boundary between those districts:

Held, that the intention of the notification was not to define the boundary between the two districts as on the date of the notification, but to declare that until a further notification was made the boundary line between the two districts was to be the deep stream of the river as found at any particular time. [p. 1008, col. 1.]

There is no authority which enables one District Magistrate to transfer a case for trial to another District Magistrate. [p. 1008, col. 2.]

Criminal revision against the order of the District Magistrate, Bara Banki, dated the 29th June 1917.

The Hon'ble Pandit *Jagat Narain Mulla* and Babu *Ajit Prasad*, for the Applicant.

Mr. *H. C. Dutt*, for the Opposite Party.

JUDGMENT.—These two applications in revision are directed against two orders, one passed by the District Magistrate of Bara Banki and the other by the District Magistrate of Gonda. The facts of the case may be briefly stated as follows. It is said that on the 5th of June last a riot took place between persons connected with two estates, namely, the estate of Ramnagar in the Bara Banki district and the Kamiar estate which is situated in the Gonda district. These two estates are divided by the river Gogra. The applicants in the two cases now before me are the persons who belong to the Ramnagar party. The riot is said to have taken place on a piece of alluvial land situated in the bed of the river Gogra. The Ramnagar party, some of whom, it is said, sustained grievous hurts, reported the occurrence at the Thana of Ramnagar. The Police of this Thana investigated into the complaint and the result was that the other party belonging to the Kamiar estate was sent up for trial. Meantime the Kamiar party had made a complaint to the Gonda Police, who investigated their case and ordered the Ramnagar party to be sent up for trial in the Gonda district on a charge of riot. When the case of the present applicants was brought before the Sub-Divisional Magistrate in Bara Banki, a plea was raised that he had no jurisdiction to deal with it inasmuch as the offence had been committed within the boundaries of the Gonda district. This plea was based upon the fact that a notification had been issued by the Local Government under section 7 (2) of the Code of Criminal Procedure on the 1st of December 1914. By this notification it was declared that for the purposes of criminal jurisdiction the deep stream of the river Gogra is to be considered the boundary between the districts of Gonda and Bara Banki. It was represented to the Magistrate that the spot where this riot had been committed was to the north of the deep stream of the river Gogra and this fact indeed seems to have been admitted by both parties. The learned Counsel who has argued the case before me on behalf of the applicants has told me that he does not dispute this proposition. The Sub-Divisional Magistrate then addressed a sort of demi-official note to the District Magistrate, pointing out that he had no jurisdiction to deal with the case and suggesting that the case should be transferred to the Gonda district. Upon this note the District Magistrate recorded a remark to the effect that the case would be transferred. After this the Sub-Divisional Magistrate had an order recorded on the order-sheet declaring that he had no jurisdiction to deal with the case. The Police papers then seem to have been forwarded to the District Magistrate of

Gonda. The latter officer having the papers before him refused to proceed any further with the matter on the ground that the offence having been committed in the Gonda district, the Bara Banki Police had no jurisdiction to make an investigation into the offence. He, therefore, directed the papers to be deposited and told the Ramnagar party that if they wished to proceed they should file their complaint before a competent Magistrate in the Gonda District. The proceedings throughout seem to have been somewhat irregular. I do not know of any authority which enables one District Magistrate to transfer a case for trial to another District Magistrate. As for the order passed by the District Magistrate, Gonda, it has been argued that section 156 of the Code of Criminal Procedure lays down that the District Magistrate of Gonda had no jurisdiction to call in question the propriety of the proceedings taken by the Bara Banki Police, although it turned out that those proceedings had, as a matter of law, been taken without jurisdiction. I think in the circumstances the proper course for the District Magistrate of Gonda, after he had received the Police papers, was to take cognizance of the offence and direct the trial of the persons against whom the Police had made a report. So far as the notification, which I have referred to above, is concerned, it has been argued before me on the authority of a ruling of the Calcutta High Court reported as *Punarlei Narain Singh* v. *Ram Sarup Roy* (1) that the notification only defines the boundary between the two districts as on the date of the notification. But although the Calcutta Court favours this view I am unable to accept it. It appears to me that the intention of the notification was to declare that until a further notification was made the boundary line between the two districts for purposes of criminal jurisdiction was to be the deep stream of the river Gogra. I have no doubt, therefore, on the facts as they have been admitted that this riot did take place within the limits of the Gonda district. Again it was argued that in view of the provisions of section 179 of the Code of Criminal Procedure the case against the Kamiar people was cognizable in the Bara Banki district, and stress has been laid in particular upon Illustration (*b*) appended to this section. It is said that because some of the Ramnagar people sustained grievous hurts, the consequence of the offence ensued in the Bara Banki district within the meaning of section 179. I am very doubtful whether this argument can be entertained, for Illustration (*b*) appears to me to refer to the causing of that particular kind of grievous hurt which is mentioned as the 8th kind of grievous hurt in section 320 of the Indian Penal Code. I am informed that the grievous injuries committed in the course of this riot on some of the Ramnagar people amounted at once to grievous hurt and do not belong to that particular class of grievous hurt which is only established after it is proved that the person who has suffered the injuries has been unable for a period of more than 20 days to follow his ordinary pursuits. I think the correct view is that the offence under investigation was committed in the Gonda district and ought ordinarily to be tried there. It has, however, been represented to me by the learned Counsel for the applicants that in any case it is advisable that this Court should make an order of transfer to another district and should give directions that both parties should be put on their trial. There is a great deal, I think, to be said in favour of this argument. It is obvious that if the Ramnagar party follow the direction given by the District Magistrate of Gonda and lodge a complaint in that district, it will occasion some difficulty if the complaint is referred to the Gonda Police for investigation. As things stand, the Police of this latter district are committed to the theory that the party in fault was the Ramnagar and not the Kamiar party. After a careful consideration of the facts I am satisfied that it will be in the interests of justice for me to make an order transferring both cases for trial to the district of Bahraich. The District Magistrate will make the cases over for trial to a competent Court. Both parties should be put on their trial in accordance with the result of the investigations made by the Gonda and Bara Banki Police respectively. I order accordingly.

Forum changed.

(1) 25 C. 858; 2 C. W. N. 577; 13 Ind Dec. (N. s) 552.

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In a suit under section 156 of the Agra Tenancy Act for the assessment of rent of certain land in the occupancy tenancy of the defendant who had refused to pay rent, the lower Appellate Court held that the plaintiff was not entitled to any remedy under Chapter X of the Agra Tenancy Act, on the ground that the chapter was headed "Resumption of rent-free grants:"

Held, (1) that reliance could not be placed upon the "headings" of chapters or descriptions given of sections in the margin of the same, especially in the case of the Agra Tenancy Act, which could not be said to be a model of good drafting;

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Allahabad High Court Rules (Civil) for Subordinate Courts, Ch. XXI, rr. 21, 25—*Plaint returned for presentation to proper Court—Pleader's fee, calculation of, basis of.*

Plaintiff filed a suit in the Subordinate Judge's Court. The defendant pleaded that the Court had no jurisdiction to try the suit. This issue was taken up first at the request of the plaintiff and decided in favour of the defendant. The Court ordered the plaint to be returned and awarded the defendant his costs. In drawing up the decree the Pleader's fee was calculated at 5 per cent. according to rule 21 of Chapter XXI of the General Rules (Civil) for the Subordinate Courts:

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Held, (1) that the lower Appellate Court in fact reversed the decree of the first Court and should have passed a decree for possession in favour of the plaintiff and sent the case to the first Court for enquiry as to mesne profits;

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———*Right of appeal, when can be exercised.*

In order to entitle a person to appeal, he must be a party to the suit in which he seeks to appeal against a decree and he must be a person aggrieved by the decree.

Plaintiffs sued for a declaration that an alienation of ancestral land made by their father shall not affect their reversionary rights. It appeared that one *K.* had already brought a suit for pre-emption of the land and on the present suit being filed he was made a defendant at his own request. Both suits were tried together and the plaintiff's suit was decreed and *K.*'s suit was dismissed. *K.* appealed in both cases and succeeded. The plaintiffs filed a second appeal:

Held, that inasmuch as *K.* was a party to the declaratory suit and had a right of pre-emption

Appeal (Civil)—concld.

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An Appellate Court has inherent power to consolidate appeals, though it is not conferred by Statute, and Courts can, if necessary, invoke the provisions of sction 151, Civil Procedure Code, for the purpose.

Courts should, however, consider whether there is a fit case for consolidation having regard to the loss of revenue in Court-fees by allowing consolidation.

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In deciding the question of succession to an occupancy holding under section 59 of the Punjab Tenancy Act conjecture must not be allowed to take the place of legal proof.

Where, therefore, in a suit in which the plaintiffs claim to succeed to an occupancy holding on the ground that they are the collaterals of the deceased tenant, the findings of fact arrived at by the lower Appellate Court are based on conjectures, they are not judicial findings and cannot be accepted as final in second appeal. **P** SULTAN AHMAD *v.* PALA, 102 P. W. R. 1918 **800**

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A suit on a hypothecation bond allotted to the holder by an oral award of arbitrators passed on a voluntary submission is maintainable without the execution of further instruments following on the award.

An award may be oral and it is as binding on the parties as a written award.

Per *Seshagiri Aiyar, J.*—An award by arbitrators is as binding in its nature as a judgment of Court and a right of suit accrues to a party to whom a bond is allowed by virtue of such award.

An oral award may also be enforced as an oral partition which is effective without writing or registration.

Per *Napier, J.*—The only method by which an award can be made efficacious for process by the Court is by making the submission a rule of Court, and unless this is done, and enforcement can be had under the processual law, it cannot be said to operate as a judgment of Court. Even if it is equivalent to a judgment for some purposes, in the sense that it may have the same effect in barring suits, it is not a judgment in any real meaning of the word, far less is it a decree.

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Benami transaction—*Mortgage—Tainted origin of money lent, effect of—Fraud, intended but not effected—Suit, maintainability of, by real beneficiary.*

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Benami transaction—concld.

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Per *Oldfield, J.*—That the suit was maintainable, however tainted was the origin of the money lent, and that no further proof was necessary for the claim than that the ostensible mortgagee had the funds, whatever their origin, and invested them for plaintiff's benefit in a manner which was innocent in itself. **M** RAJAGOPALACHAR *v.* SUNDARAM CHETTY, 33 M. L. J. 696 **333**

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Bengal, N.-W. P. and Assam Civil Courts Act—concld.

A suit for recovery of money on the basis of a mortgage valued at more than Rs. 5,000 was instituted in the Court of the Subordinate Judge who decreed it *ex parte* and dismissed an application by the defendant for re-hearing under Order IX, rule 13, Civil Procedure Code. The defendant preferred an appeal to the District Judge against the order dismissing his application under Order IX, rule 3. The parties did not raise any objection as to the jurisdiction of the District Judge, who decreed the appeal:

Held, (1) that under section 21, clause (*a*) of the Bengal, N.-W. P. and Assam Civil Courts Act, the District Judge had no jurisdiction to entertain the appeal and his order was a nullity;

(2) that the fact that the plaintiff did not raise any objection as to jurisdiction in the appeal did not estop him from raising it before the High Court, inasmuch as where there is an inherent want of jurisdiction, the consent of parties cannot confer jurisdiction and objection can be taken at any time. **Pat** RAGHU SINGH *v.* USUF ALI, 4 P. L. W. 445 **920**

Bengal Patni Taluks Regulation (VIII of 1819), s. 14, *proceedings under—Money paid to stop sale, whether recoverable—Collector, powers of.*

In proceedings under section 14 of the Bengal Patni Taluks Regulation, 1819, the Collector acts not in a judicial but in a ministerial capacity. Those who pay money under such proceedings are not to the same position as persons who pay a claim brought against them in an ordinary suit which they have a full opportunity of resisting and who, not having availed themselves of such opportunity then, are debarred from doing so hereafter. Whether or not he contests the claim, a *talukdar* to stop a sale under section 14 has to deposit the full amount claimed and such deposit does not preclude him from thereafter raising the question of title in an ordinary suit. **P C** JOYTI PRASHAD SINGH DEO BAHADUR *v.* KUMUD NATH, 16 A. L. J. 569; 5 P. L. W. 64; (1918) M. W. N. 441; 24 M. L. T. 66; 28 C. L. J. 165; 8 L. W. 186 **827**

Bengal Regulation XVII of 1806, s. 8—*Mortgage by way of conditional sale—Foreclosure, proceedings—Notice, service of—Evidence—Redemption.*

In order to prove that the equity of redemption of a mortgage by way of conditional sale has been extinguished by proceedings taken under section 8 of Regulation XVII of 1806, the mortgagee must establish that he caused the mortgagor or his legal representative to be served with a copy of his own written application for foreclosure and also with a notice or *perwana* under the seal and official signature of the District Judge, warning him that the mortgage would be finally foreclosed in the event of his failing to redeem within a period of one year.

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A mortgage-deed by way of conditional sale dated the 28th June 1898 provided that the mortgage money shall be paid after three years and in case of default the mortgagee shall be at liberty to take possession by issuing foreclosure notice under Regulation XVII of 1806 but that if he did not elect to do so, the mortgagor would continue to pay him interest until the mortgage was redeemed. The mortgagor made default and on the 17th of June 1913 the mortgagee gave him notice of foreclosure, which was served on the 7th of September 1913 so that the year of grace expired on the 7th of September 1914. The mortgagee then brought a suit for possession as owner on the 9th of February 1915:

Held, (1) that the mortgage having continued even after the date of default, the mortgagor's right to possession did not determine and his possession did not begin to be adverse to the mortgagee till the expiry of the year of grace, so that the suit was not barred by time under Article 144 of the Limitation Act;

(2) that Article 135 of the Limitation Act had no application to the case.

Proceedings under Regulation XVII of 1806 are purely ministerial proceedings devised to give warning to the mortgagor of the impending disappearance of his right to redeem the mortgage and avoid a conditional sale, and cannot in themselves confer any new period of limitation on a claim which otherwise would be barred by time. **P** RATAN DAS *v.* GURAN, 52 P. W. R. 1918; 25 P. L. R. 1918 **563**

Bengal Regulation XI of 1825, s. 4 (1)—*Alluvion—Accretion when can be claimed by owner of adjoining land—Boundary line, original ascertainable, effect of.*

Plaintiff sued for possession of some land, on the ground that it had formed contiguous to his fields by alluvial deposits in the bed of the river which adjoined his occupancy holding. The accretions took place in successive steps in four years. It was contended for the defendants that the land could not be claimed by the plaintiff inasmuch as the Bengal Regulation XI of 1825, section 4, did not apply to the case, the accession not having accrued by gradual, slow and imperceptible means:

Held, that the plaintiff must succeed, as the only requirement in section 4 of the Bengal Regulation is that the accretion should be gradual, not that it should be slow and imperceptible. All accessions by gradual alluvion are treated alike irrespective of the rate of formation.

Bengal Regulation XI of 1825—concld.

The fact that the original boundary was known or ascertainable does not render the law of accretion inapplicable. **N** GOVINDRAO *v.* GANPATHI, 14 N. L. R. 97 **425**

Bengal Revenue Sales Act (XI B. C. of 1859), s. 37—*"Protected interests"—Bengal Tenancy Act (VIII B. C. of 1885), s. 1—Settled raiyat holding land at fixed rate of rent under permanent lease, whether can acquire right of occupancy.*

Contract or no contract, every *raiyat* who is a settled *raiyat* of a village and obtains a *raiyati* interest in other lands in that village acquires a right of occupancy in those other lands. Consequently, a settled *raiyat* of a village holding land within the village under the terms of a permanent lease at a fixed rate of rent has a right of occupancy in the land which is not annulled by a sale for arrears of revenue of the estate comprising the village. **C** LAKHI CHARAN SAHA *v.* MOKAR ALI, 27 C. L. J. 293 **25**

Bengal Tenancy Act (VIII of 1885), ss. 5, 104 H—*Landlord and tenant—Tenant, status of—Tenure or raiyati interest—S. 104 H, scope of, suit under.*

The mere fact that a tenant has sub-let his land is not decisive of the question, whether he is a tenure-holder or a *raiyat*.

The test to be applied to determine the status of a tenant is the purpose for which the right of tenancy was originally acquired.

The statutory presumption under sub-section 5 of section 5 of the Bengal Tenancy Act has no application when the terms of the original grant of a tenancy are known.

In cases where the origin of the tenancy is unknown or where the terms of the grant are ambiguous, the mode of user of the land and the evidence of the subsequent conduct of the parties may furnish a valuable clue to determine the original purpose of the tenancy.

In a suit under section 104H, Bengal Tenancy Act, it is not sufficient for the Court to hold that the entry in the settlement rent roll as to the status or the rent is erroneous. The Court must affirmatively determine the exact conditions and incidents of the tenancy as also the rent to be settled on such basis.

Where an *amalnamah*, which sanctioned the entry of the tenant on the land demised, recited that the *mauzas* as mentioned, therein were settled with the tenant for bringing them under cultivation and directed him to extirpate wild beasts and by clearing out judgles and raising embankments at his own expense to carry on cultivation and tillage and enjoy the crops thereof, and the regular lease which followed did not indicate any intention to alter the nature of the tenancy, but authorised the grantee to continue to enjoy the profits of the land by bringing it under cultivation either by himself or by making settlement with tenants for a term of nineteen years at a progressive rate of rent:

Held, that notwithstanding the land settled exceeded 2000 *bighas* in area the settlement was of a *raiyati* holding and not of a tenure. **C** SECRETARY OF STATE FOR INDIA *v.* DIGAMBAR NANDA, 27 C. L. J. 334 **43**

Bengal Tenancy Act—contd.

——— **s. 5**—*Tenure-holder or* raiyat, *test of—Area exceeding* 100 bighas—*Presumption that tenant is tenure-holder—Purpose for which lease is granted—Cultivation by sub-lessee.*

Fixity of rent is no criterion for determination of the question whether a person is a tenure-holder or a *raiyat*, for a tenure may be held at a fixed rent equally with a *raiyati* holding.

In determining the status of a tenant, *viz.*, whether he is a tenure-holder or a *raiyat*, two elements have to be borne in mind, *first*, the purpose for which the land was acquired, and, *secondly*, the extent of the tenure or holding.

Defendant was assignee of a lease of over 100 *bighas* of land granted by plaintiff's predecessor for cultivation, without any restriction as to the agency to be employed in such cultivation:

Held, that under the circumstances of the case the presumption arising under sub-section (5) of section 5 of the Bengal Tenancy Act that the tenant was a tenure-holder and not a *raiyat*, since the area exceeded 100 *bighas*, was not rebutted by proof of the purpose for which the right of tenancy was originally acquired. **P C** DEBENDRA NATH DAS *v.* BIRUDHENDRA MANSINGH BHARAMARBAR ROY, 5 P. L. W. 1; 27 C. L. J. 543; 22 C. W. N. 674; 16 A. L. J. 522; 23 M. L. T. 384; (1918) M. W. N. 379, 20 BOM. L. R. 743; 35 M. L. J. 2.4 **411**

——— **s. 21** **25**

——— **s. 22**—*Lease of share in joint proprietary right—No specific plot mentioned in lease for cultivation—Tenure-holder—Occupancy right, acquisition of, by lessee—Part proprietor, whether can create* ryoti *right.*

Where a lease is executed in respect of a certain share in a Zemindari and no specific land is mentioned in the lease which the lessee has to cultivate, the lease creates only a tenure.

A tenure-holder cannot acquire a right of occupancy in the lands comprised in his *ijara* or farm while holding the village as an *ijaradar* or a farmer.

In order to determine whether the right conferred by a lease is that of a tenure-holder under the Bengal Tenancy Act, the intention of the parties has to be looked into. The principal object of giving the lease of an entire village or a share therein is to enable the lessee to collect rents from tenants. The fact that the lessee may bring under cultivation some lands in the village will not alter the character of the tenure created by the lease. There can be no lease for the purpose of cultivation in a village where no lands to be cultivated are specified in the lease.

A lessor, who is a part proprietor in an *ijmali* or joint village, has no right to create any right in respect of any specific lands in the village to the prejudice of the other co-proprietors without their consent.

A co-proprietor in a village cannot acquire any occupancy or non-occupancy right in the village. **Pat** STONEWIGG *v.* DWARKA SINGH, 4 P. L. W. 428 **706**

——— **s. 46**—"*Agreement*," *meaning of—Tender of agreement, how to be made—Notice accompanying agreement, whether necessary.*

Bengal Tenancy Act—contd.

The word "agreement" in section 46 of the Bengal Tenancy Act does not mean an agreement strictly so called but means an agreement which the landlord proposes that the tenant should execute.

What the landlord has got to do under the section is to tender a document containing the terms of the proposed agreement, but it is not necessary that a notice to the tenant should accompany the document.

Where a landlord filed in Court under section 46 of the Bengal Tenancy Act the draft of a proposed agreement duly stamped, but the Court, thinking it safer not to part with the stamped document, served on the tenant an identical copy but without a stamp on it along with a notice:

Held, that there was perfectly good tender of the agreement as required by section 46 of the Bengal Tenancy Act, even though the notice was not in accordance with the terms of the Act as there is nothing in section 46 which requires a notice to be served along with the agreement. **C** PORT CANNING AND LAND IMPROVEMENT CO. LTD. *v.* NAYAN CHANDRA PARAMANIK, 22 C. W. N. 558; 28 C. L. J. 87 **234**

——— **s. 49**, *whether applies to under-*raiyat *with right of occupancy—Under-*raiyat, *whether can acquir right of occupancy.*

An under-*raiyat* can by usage or custom obtain a right of occupancy.

Section 49 of the Bengal Tenancy Act cannot apply to an under-*raiyat* who has got a right of occupancy. **C** GOPAL MANDAL *v.* TAPAI SANKHARI, 28 C. L. J. 84 **545**

——— **s. 52**—*Additional rent for excess land, suit for—Burden of proof—Conduct of one defendant, whether affects others.*

In a suit under section 52 of the Bengal Tenancy Act for additional rent, the burden of proving an increase in "area for which rent has been previously paid" is on the landlord. Speaking generally, he may discharge the burden in two ways:—

(1) By proving that the tenant is in possession of excess land outside the boundaries of land originally settled with him, for instance, land obtained by encroachment or alluvial increment.

(2) By proving that at the original settlement of the land rent was fixed at a rate per *bigha* or other unit of measurement or at differential rates according to the quality of the land and so forth and that in fact and substance the agreement was that the tenant should pay at that rate or at those rates for all the land of which he was put in possession according to its true area, and by further proving that the existing rent is less than the rent payable under such agreement.

The rent might be a consolidated rent, even if it was calculated at so much per measured or estimated *bigha*. The question would depend on the true intention of the parties, to be gathered in the absence of a written instrument from all the circumstances. Where, however, it is proved that the tenant is holding land outside and beyond the original boundaries, the question as to the rent being a consolidated rent cannot well arise except possibly in connection with land gained by alluvion.

Where several suits instituted by the landlord for additional rent under section 52 of the Bengal Tenancy Act against several tenants were tried

Bengal Tenancy Act—contd.

together without objection by the tenants-defendants, and one of the latter did not produce the *chitta* which was in his possession:

Held, that as the evidence given, so far as it was general in its character, applied to all the suits and all the defendants or sets of defendants were sailing in the same boat, and none of them dissociated himself from the defendant who did not produce the *chitta* or at any rate displayed any anxiety to forego any advantage that might accrue from his conduct, they were all alike affected by his conduct in the suit.

In a suit under section 52 of the Bengal Tenancy Act for additional rent for excess area when the landlord proves the existence of an excess area, a case is made out for the increase of rent which must be met by the tenants. **C** DHRUPAD CHANDRA KOLEY *v.* HARINATH SINGHA ROY, 27 C. L. J. 563; 22 C. W. N. 826 **660**

——— **ss. 52, 195**—Patnidar, *whether can apply for abatement of rent.*

A *patnidar* is entitled to make an application under section 52 of the Bengal Tenancy Act for abatement of rent. Section 195 of the Act does not prevent section 52 from applying to the case of a *patnidar*. **C** RANJIT SINHA *v.* ABDUR RAHIM KHAN CHOWDHURY **190**

——— **s. 67**—*Landlord and tenant—Interest on rent, date of accrual of.*

Under the Bengal Tenancy Act interest on rent accrues, not from the expiration of the dates on which the instalments are payable according to the *kists* stipulated in the contract of lease, but from the expiration of the quarters of the agricultural year in which the instalments fall due. **C** SRISH CHANDRA RAY *v.* JADUNATH KUNDU **532**

——— **ss. 76, 155**—*Landlord and tenant—Improvement, what is - Dwelling house, erection of, by tenant.*

The clauses which specify what constitutes improvements within the meaning of section 76 of the Bengal Tenancy Act are not exhaustive.

A tenant is entitled to effect on his holding any improvement which would add to the value of the holding.

The fact that a tenant has a house in an adjacent *mouza* does not deprive him of his right to erect upon his occupancy holding another house for the purpose of making a residence for himself and his family. **Pat** MAHADEO RAI *v* SHEOGULAM MAHTO, 2 P. L. J. 634 **332**

——— **ss. 88, 188**—*Division of holding—Recognition of division by landlord—Rent receipt given by gumashta, whether binding on landlord—Burden of proof—Express consent in writing', meaning of—Contract of division between co-sharer and tenant, whether binding on entire body of landlords—Distribution of rent, recognition of- Estoppel.*

The mere acknowledgment of receipt of rent less than the total *jama*, without any indication that it is in respect of a portion only of the holding, cannot constitute a consent to a division of the holding within the meaning of section 88 of the Bengal Tenancy Act even when continued over a number of years; but if it should clearly appear on the face of the receipt itself that the rent is paid in respect of a particular portion only of the holding this may be sufficient acknowledgment to bind the landlord.

Where a landlord repudiates the authority of a *gomashta* to give a receipt which recognises the sub-division of a tenure or holding, the onus of proof is ordinarily upon the landlord inasmuch as the relations between himself and his servant are a matter peculiarly within his knowledge under section 106 of the Evidence Act.

The "express consent in writing" required by section 88 of the Bengal Tenancy Act may be given by means of a rent receipt, and in each case the adequacy of the consent must be gathered from all the circumstances. A reciept showing the area of the transferred portion and the rent paid therefor should be sufficient to constitute express consent within the meaning of the section.

Section 88 of the Bengal Tenancy Act refers to a sole landlord or the entire body of joint landlords where there are more landlords than one. A division which does not bind the whole body of landlords does not come within the scope of the section.

There is no provision in the Bengal Tenancy Act which requires a landlord to recognize a distribution of rent. The landlord is authorised to do so, but the authority is derived not from the Act but unde the general law as an incident to the ownership of property. **Pat** SRIKISHUN PRASAD *v.* JEOHASI KUER 4 P. L. W. 316; (1918) PAT. 210 **294**

——— **ss. 102 (dd), 106**—*Suit under s. 106—Dispute between neighbouring proprietors—Question for determination.*

In a suit under the provisions of section 106, Bengal Tenancy Act, to amend a Record of Rights in which the dispute is between two neighbouring proprietors, and which comes within the provisions of section 102 (*dd*), the only question between those rival proprietors that can be gone into, is the question as to which of them was in possession of the land in question at the date of the final publication of the Record of Rights. **C** MAHARAJ BHADUR SINGH *v.* BHAGWAN DAS **781**

——— **s. 103 B** **65**

——— **s. 104 H** **43**

——— **s. 106** **781**

——— **s. 116**—Khudkasht, *whether zerait.*

Khudkasht does not necessarily mean *zerait* or private lands of the proprietor within the meaning of section 116 of the Bengal Tenancy Act. **Pat** DEONATH MISRA *v.* AMAR SINGH **418**

——— **s. 148 A**, *suit under, form of—Suit by co-sharer landlord for separate share of rent, or in the altrenative for total rent, nature of—Decree, form of.*

Co-sharer landlords, who by arrangement with the tenants collect their shares separately and have in previous years brought separate suits for recovery of their dues, are competent to sue jointly for the total amount due to them under the terms of the original lease, which can be enforced by all the co-sharers together without the consent of the tenants. But if a plaintiff seeks to avail himself of the special provisions of section 148A of the Bengal Tenancy Act, he must in his plaint seek to recover the entire amount due to himself and his co-sharers.

Bengal Tenancy Act—concld.

A co-sharer landlord sued for rent and alleged, in the first paragraph of the plaint, that he had separately collected his share of the rent from the tenant-defendant in previous years. In the second paragraph he stated that he had demanded his separate share of the rent from the tenant but to no avail. He added, in the third paragraph, that he was not aware whether his co-sharers (whom he joined as defendants) had separately realised their shares of the rent. In the first clause of the fourth paragraph he prayed that a decree might be made in his favour for his share of the rent; then followed a second alternative clause to the effect that if it was found that the tenant had not paid the rent due to his co-sharers, he might be granted leave to amend the plaint so as to secure a decree for the entire sum:

Held, that this was not a suit contemplated by section 148 A of the Bengal Tenancy Act.

The nature of the decree to be made in the suit depends upon its true character. If it is a suit for the share of the rent recoverable by the plaintiff separately by reason of the fact that he has on previous occasions collected that share of the rent separately from his co-sharers, the decree will be a money decree if, on the other hand, it is a decree in a suit properly framed under section 148A, the decree will operate as a rent decree capable of execution under the special procedure prescribed by the Bengal Tenancy Act. **C** BAIKANTHA NATH SEN *v.* RAMAPATI CHATTERJEE, 27 C. L. J. 101 **767**

——**s. 155** **332**

——**s. 181**—*Jagir, whether service tenure.*

The words "*Jagir khudkasht* land" do not necessarily mean a service tenure within the meaning of section 181 of the Bengal Tenancy Act. **Pat** DEONATH MISRA *v.* AMAR SINGH **418**

——**s. 188** **294**

——**s. 195** **190**

——**Sch. III, Art. 3**—*Dispossession of tenant by landlord—Limitation for suit to recover possession of holding—Recognition of* ryot's *interest in holding, effect of.*

After the dispossession of a *ryot* by some of the co-sharer landlords, his right to redeem the holding was recognised by the Court in a mortgage suit by another of the co-sharer landlords:

Held, that such recognition by the Court did not extend the period of two years' limitation which the *raiyat* had under Article 3, Schedule III, of the Bengal Tenancy Act for bringing a suit for recovery of possession of the holding. **C** GIRISH CHANDRA MITRA *v.* GIRIBALA DEBI **937**

——**Art. 6** **712**

Bombay Bhagdari and Narvadari Act (V Bom. of 1862), s. 3—*Award dividing recognised sub-division of Bhag, validaty of.*

An award the result of which would be to effect further division in a certain recognised sub-division of a Bhag is void under section 3 of the Bombay Bhagdari and Narvadari Act.

The substance and effect of the transaction is what must be looked to for the purpose of determining, whether it is within the mischief which the Legislature had in view in passing the Bombay Bhagdari and Narvadari Act. If the transaction clearly amounts to an alienation of an unrecognised sub-division of a share in a *narva*, its real nature cannot be disguised by calling it a compromise. **B** NAGAR KASHI PATIL *v.* BAI DHULI, 20 BOM. L. R. 342 **577**

Bombay District Municipalities Act (III Bom. of 1901), ss. 113, 122—*Bye-laws of Surat City Municipality, Ch. XIV, Bey-law* 10 (3), *whether* ultra vires—*Municipality, power of, to charge fees for shop-boards projecting over public street.*

Under section 113 of the Bombay District Municipalities Act it is open to a Municipality to prescribe the extent to which and the conditions under which shop-boards may be allowed to project over public streets. Bye law 10, sub-clause (3), of Chapter XIV of the Bye laws framed by the Surat City Municipality, therefore, which provides that projections over public streets may be permitted on payment of a prescribed fee is not *ultra vires* of the Municipality. **B** NAGINDAS CHHAMLDAS *v.* EMPEROR, 20 BOM. L. R. 338; 19 CR. L. J. 599 **503**

——**s. 122** **503**

Bombay District Police Act (Bom. IV of 1890), s. 43—*District Magistrate, order by, under s.* 43—*Revision—High Court, power of interference of.*

An order passed by a District Magistrate under section 43 of the Bombay District Police Act is an executive order and not the order of an inferior Criminal Court, and consequently cannot be interfered with by the High Court in revision even though it is *ultra vires*.

The aggrieved party has in such a case a remedy under sections 13 (2) and 50 of the Bombay District Police Act by petition to the Commissioner.

A District Magistrate has no jurisdiction to eject any person from property under section 43 of the Bombay Distrirt Police Act without first taking temporary possession himself and his order of ejectment or exclusion can only operate for the period of his temporary possession. **S** DHARMIBAI *v.* EMPEROR, 11 S. L. R 113; 19 CR. L. J. 588 **396**

Bombay Land Revenue Code (Bom. V of 1879), s. 74 **492**

——**s. 76** **492**

——**s. 203**—*Executive order of Revenue Officer—Appeal, right of, by aggrieved person not party to inquiry—Bombay Revenue Jurisdiction Act (X of* 1876), *s.* 10.

Under section 203 of the Bombay Land Revenue Code, the right of appeal against an executive order of a Revenue Officer is vested in every person aggrieved by the order, irrespective of his being a party to the inquiry wherein the order was passed. **S** MULCHAND TILOKCHAND *v.* MURADALI, 11 S. L. R. 124 **335**

Bombay Revenue Jurisdiction Act (X of 1876), s. 10 **335**

Buddhist Ecclesiastical Law, *questions of, decision of*—Vinaya—Atthagatha.

Questions of Buddhist Ecclesiastical Law which come before the Civil Courts must be determined not merely by the canonical text of the Vinaya, *i. e.*, the Palidaw, but the Atthagatha and other commentaries must also be considered and the provisions of

Buddhist Ecclesiastcial Law—concld.

the Dhammathats should also be taken into account as throwing a valuable light on the established custom of the country. **L B** U AWBATHA *v.* U THU DATHANA **923**

Buddhist Law, Burmese—*Adoption—Divorced woman, whether can adopt.*

Under the Buddhist Law as regards the power to adopt, a woman who is divorced from her husband and has divided the joint property with him is in the same position as a single woman.

An adoption is to a great extent a matter of intention and where an attempted adoption by a married woman causes a divorce between her and her husband but the intention to adopt continues after the divorce and full effect is given to it, there is a good adoption without any formal declaration. **L B** AUNG MA KHAING *v.* MA AH BON, 9 L. B. R. 163 **737**

———*Divorce—Second marriage, without chief wife's consent, whether entitles chief wife to divorce.*

The chief wife of a Burmese Buddhist may object to her husband taking a second wife, and may claim a divorce if he does so without her consent. Her right, however, is subject to certain exceptions mentioned in sections 219, 232, 265—67 and 311 of the Digest, wherein the husband is allowed to take a second wife when the first wife is barren or has borne only female children, or is suffering from certain diseases.

In the case of such a divorce the property should be partitioned as in the case of divorce by mutual consent. **L B** MAUNG HME *v.* MA SEIN **953**

———*Marriage of minor girl—Consent of father, whether necessary.*

There cannot be a valid marriage of a minor Burmese Buddhist girl without her father's express consent. **L B** MAUNG BA HAN *v.* MA TIN **831**

———Religious gift, whether requires registration **926**

Burden of proof **294, 550, 888**

Bye-laws of Surat City Municipality **503**

Carriage of goods—*Non-delivery of goods, action for—Landing agent or carrier, liability of—Privity of contract—Limitation Act (IX of 1908), Sch. I, Art. 31, applicability of.*

In the case of continuous carriers the authorities establish (1) that when goods have to be carried with the aid of different transport agencies in order to arrive at the destination to which they are booked, the carrier with whom the contract is made at one end is, in the absence of any contract limiting his liability to his own transport system, liable for the loss or destruction of the goods on portions beyond his own system or in consequence of acts or default of persons other than his own servants; (2) that in the absence of a contract to the contrary, the consignor cannot hold the company with whom he does not contract liable for damages when all that can be complained of is non-feasance, though such company may be liable in tort for breach of duty arising from the mere fact that it has undertaken the liability of carrying goods or property belonging to another; (3) when there is an agreement between two companies the effect of which is to constitute one company the agent of the other and the traffic is carried for the joint benefit of both the companies, either company may be sued at the option of the consignor

Carriage of goods—concld.

The 'carrier' in its general sense means a person or company who undertakes to transport the goods of another person from one place to another for hire.

Article 31 of the Limitation Act is not restricted in its application to common carriers. It applies to carriers who come within the above definition. **M** MYLAPPA CHETTIAR *v.* BRITISH STEAM NAVIGATION CO. LTD., 34 M. L. J. 553; 8 L. W. 46 **485**

———*Railway Company, whether bound to re-weigh goods and give certificate of shortage—Consignee's refusal to take delivery—Damage to goods after refusal, liability for.*

A Railway Company is not bound to re-weigh the goods and give a certificate of shortage on the demand of the consignee. If the consignee refuses to take delivery on the Company declining to re-weigh the goods and give a certificate of shortage, the goods remain at his risk so that any deterioration or damage caused to the goods after the date of his refusal to take delivery falls on him. **C** JAGAN NATH MARWARI *v.* EAST INDIAN RAILWAY COMPANY, 22 C. W. N. 902 **933**

C. P. Court of Wards Act (XXIV of 1899), s. 16 (2), (b), *interpretation of—Contract by guardian, not for benefit of minor, whether can be specifically enforced.*

The words "for the preservation and benefit of such property" in section 16 (2) (*b*) of the Court of Wards Act should be interpreted in the light of the usual powers of guardians to bind the estates of minors.

No decree for specific performance of an agreement for transfer made by his guardian should be passed against a minor unless the Court is quite certain that the agreement was for the benefit of the minor and that it would be for his benefit that it should be enforced. **N** PURANLAL *v.* VENKATRAO GUJAR **192**

C. P. Land Revenue Act (XVIII of 1881), s. 39 **470**

——— **ss. 82, 83, 39**—Record of Rights, whether complete before notification under section 39—Ejectment, suit for, against recorded tenant—Burden of proof **470**

C. P. Tenancy Act (XI of 1898), s. 70 **669**

——— **s. 94,** *scope of—Dispossession by non-mortgagee—Limitation for suit.*

lambardar-

One *K.* who was the owner of a 13-annas 4-pies share in a village mortgaged the share on 18th February 1895 with the defendant who obtained a sale decree and put the mortgaged property to sale and having himself purchased it obtained possession thereof in 1909. The plaintiff who was the owner of the remaining share, had already sold it to *B.* on 7th May 1907. The plaintiff filed the present suit on 4th May 1912 to recover possession of the land on the ground that by the transfer of his 2-annas 8-pies share he became an occupancy tenant of the village *sir* and ordinary tenant of the *khudkasht*. It was contended for the defendant that the right of the plaintiff as an occupancy tenant, if any, had become extinguished under sections 35 (4) and 94 of the C. P. Tenancy Act

C. P. Tenancy Act—concld.

Held, that as the defendant took possession in 1909 *qua* mortgagee and not *qua lambardar*, section 94 of the C. P. Tenancy Act, which has reference only to relations between landlords and tenants, did not apply to the case. **N** BHIKAMCHAND GOKALCHAND *v.* HARPRASAD **184**

——— **s. 97**—*Jurisdiction of Civil Courts—Suit between landlord and tenant—Person other than landlord joined as co-defendant.*

The policy of the C. P. Tenancy Act, as declared by section 97 of the Act is that all questions concerning the right of a tenant as such of an agricultural holding which arise out of the relationship of tenant and landlord should, except so far as appeals are concerned, be tried by a Judge who is also a Revenue Officer.

The mere fact that some one who is not a landlord is joined as a co-defendant in a suit between a landlord and tenant does not take away the operation of section 97 of the C. P. Tenancy Act and such a suit is triable only by a Judge who is also a Revenue Officer. **N** KAMA *v.* BHAJANLAL CHANTANLAL **654**

Chota Nagpur Encumbered Estates Act (VI of 1876), *applicability of, to immoveable property outside Chota Nagpur.*

The Chota Nagpur Encumbered Estates Act, 1876, has no application to immoveable property outside the limits of Chota Nagpur. **P C** JOYTI PRASAD SINGH DEO BAHADUR *v.* KUMUD NATH, 16 A. L. J. 5t9; 5 P. L. W. 64; (1918) M. W. N. 441; 24 M. L. T. 66; 28 C. L. J. 165; 8 L. W. 186 **827**

Chota Nagpur Tenancy Act (VI B. C. of 1908), ss. 4, 68, 139—Prodhan, *whether tenant—Suit for ejectment of* prodhan—*Jurisdiction—Estoppel, whether cures want of jurisdiction.*

The holder of a *prodhani pattah* is not in the position either of a non-occupancy *raiyat* or of an occupancy *raiyat*. He is in the position of a *quasi* service tenure-holder, that is, he is a tenure-holder of a kind but not one within the definition of the Chota Nagpur Tenancy Act.

There is no provision in the Chota Nagpur Tenancy Act to justify a Court, constituted to hear suits under that Act, to eject a tenure-holder.

Section 139 (6) of the Chota Nagpur Tenancy Act gives jurisdiction to the Deputy Commissioner to deal with disputes as between parties claiming the office of *prodhan* coupled with possession of land attached to such office in a civil proceeding between parties other than landlord and tenant, which would otherwise be apparently outside the scope of the Act.

A suit to eject a *prodhan* does not fall within the provisions of this sub-section nor is it covered by sub-section (8) of section 139. The Deputy Commissioner has, therefore, no jurisdiction under the Chota Nagpur Tenancy Act to hear such a suit.

In cases where there is an inherent absence of jurisdiction no subsequent action or conduct of the parties can validate the proceedings. **Pat** TATA IRON AND STEEL CO., LTD. *v.* RAGHUNATH MAHTO, (1918) PAT. 65 **72**

——— **ss. 68, 139** **72**

Christian Marriage Act (XV of 1872), ss. 3, 68—*'Professing Christian religion', meaning of—Act, scope of—S. 68, applicability of—Christian marrying according to Hindu rites—Offence.*

Per *Knox, J.*—The Christian Marriage Act has to be so construed that no case be held to fall within it which does not fall both within the reasonable meaning of its terms and within the spirit and scope of the enactment. No violence must be done to its language in order to bring people within it, but rather care must be taken that no one is brought within it who is not within its express language.

It is not competent to a Court to extend the words of an enactment by construction.

The interpretation to be placed upon the words of section 68 of the Christian Marriage Act must be one which harmonises with the context and promotes in the fullest manner the policy and object of the Legislature.

The word 'means' in section 3 of the Christian Marriage Act is an inclusive term and, therefore, no one except a person who professes the Christian religion, comes within the purview of section 68 of the Act.

A person is not a 'person professing the Christian religion' within the meaning of Act XV of 1872, simply because he is baptised as an infant, when he has no possibility of saying to the world what is the faith to which he belongs, nor can any importance be attached to the fact that he attends a Christian school. The dressing as a Christian, especially in the *Bhangi* class, is not conclusive on the point either.

A person cannot be said to profess the Christian religion if at the time of his marriage he performs *devi ka puja*.

Quære.—Whether section 68 of Act XV of 1872 was intended to penalise marriages other than those intended to be or purporting to be marriages under the Act .

Per *Walsh, J.*—A person, who on the eve of his marriage resists all pressure and persuasion to be married as a Christian by a Christian ceremony and who, having by birth and connection other religious associations, deliberately decides to marry a sweeper according to sweeper rites and does public worship to Hindu gods in the presence of his relatives and friends, is not 'a person professing the Christian religion' within the meaning of section 3 of the Christian Marriage Act.

The object of Act XV of 1872 is not to prevent people marrying as they wish, but to enable them to protect themselves and their posterity by a lawful and binding marriage if they wish to be married as Christians.

There is no express prohibition preventing a professing Christian from doing violence to his faith and marrying a non-Christian by a non-Christian ceremony.

Section 68 of the Christian Marriage Act does not make it criminal for a professing Christian to marry by a ceremony which is void under section 4 of the Act.

It refers to a class of persons who solemnize or profess to solemnise a Christian marriage under the Act not being authorized by section 5 to do so. **A** MAHA RAM *v.* EMPEROR, 16 A. L. J. 414; 19 CR. L. J. 615 **519**

——— **s. 68** **519**

City of Bombay Police Act (IV Bom. of 1902), ss. 106, 107 511
Civil Procedure Code (Act XIV of 1882), s. 17, Exp. III 900
——— **s. 257 A** 16
——— **ss. 313, 315** 109
——— **s. 335**—*Court sale—Resistance to possession by third party—Delivery, order for, to purchaser, without enquiry into merits, effect of—Non-enforcement of order within statutory period, effect of - Suit for possession—Title based on sale certificate, whether liable to question—Estoppel.*

An order under section 335, Civil Procedure Code of 1882, is final, if no suit is instituted questioning its correctness within a year, in the sense that it cannot be re-opened after a year, that is, in cases where the order upholds the auction-purchaser's right to possession, if there is an application for delivery within the time allowed by law, the party against whom the order is passed cannot be heard to say that he will not deliver possession as he has a better title. But where the order is unexecuted and the resister remains in possession, he is not estopped from pleading, in defence to a suit for possession, that the plaintiff has no title to recover.

The Civil Procedure Code of 1908 does not provide for the investigation of the claim of an objector who does not derive title under the judgment-debtor. The provision to that effect in section 335 of Act XIV of 1882 has not been reproduced in the new Code. **M** YAMAJALA SANJEVUDU *v.* NAKKA VENKADU, 23 M. L. T. 233 24
——— **s. 617** 201
Civil Procedure Code (Act V of 1908), ss. 2 (2), 47, 109 (a)—*Appeal to His Majesty in Council—'Decree', meaning of—Execution, determination of question in, whether final order or decree—Remand, order of, whether appealable to His Majesty in Council—Interlocutory order.*

Per *Dawson Miller, C. J.*—A decision on a question relating to the execution, discharge or satisfaction of a decree and which is a matter in controversy in the suit, must be deemed to be included in the definition of a decree given in section 2 (2) of the Civil Procedure Code provided the judgment conclusively determines the rights of the parties in that matter.

An order of remand can be a subject of appeal to His Majesty in Council provided the question involved in the order is a cardinal point in the case.

Plaintiffs obtained an Order in Council for possession of certain shares in a *mahal*. In the meantime, however, the *mahal* had been partitioned and the plaintiffs had been allotted shares other than those for which they were suing. They prayed for execution against the substituted shares but the executing Court rejected their application on the ground that they could not ask for the ascertainment of the shares allotted to them in the execution department. On appeal, the High Court directed the executing Court to hold the necessary enquiries and to execute the order with reference to the substituted shares:

Held, that the order of the High Court conclusively determined the rights of the parties in a matter which went to the whole root of the proceedings and was, therefore, a decree within the meaning of section 109 (*a*) of the Civil Procedure Code.

Civil Procedure Code—1908—contd.

Per *Chapman, J.*—The order of the High Court was an interlocutory order directing procedure and was, therefore, not a final order within the meaning of section 109 *a*) of the Civil Procedure Code. **Pat** BAIJ NATH GOENKA *v.* RAMESHWAR SINGH, (1918) PAT. 81; 3 P. L. J. 239; 5 P. L. W. 45 192
——— **ss. 2 (2), 100, O. IX, r. 8**—*Decree—Dismissal in presence of one of several plaintiffs, whether decree—Appeal, whether lies—Appeal, second, maintainability of.*

On a date fixed for the hearing of a case one of the plaintiffs appeared and made an application for adjournment. The Court rejected the application and on the same day passed the following order "No further step is taken. The case is dismissed with costs":

Held, that as one of the plaintiffs was present the order of dismissal amounted to a decree and was not one of dismissal for default and an appeal lay against it to the District Judge and from the latter's order a second appeal lay to the High Court. **Pat** JUGESHAR RAI *v.* RAILAL BAHADUR, 4 P. L. W. 366 189
——— **s. 2 (2), O. XVII, rr. 2, 3**—*Suit dismissed for plaintiff's failure to produce evidence, whether decree or order.*

An application for adjournment on the part of the plaintiff having been refused, the Court passed the following order:—"As there is no evidence on the side of the plaintiff and some of the defendants, and though other defendants are ready but adduce no evidence, let the suit be dismissed:"

Held, that the order was a decree inasmuch as it was a final decision of the suit so far as the Court was concerned. It was nonetheless so because the suit was dismissed in consequence of the plaintiff's failure to produce evidence. **C** PRAMOTHA NATH SAHA *v.* SASHIMUKHI DEBI 200
——— **s. 2 (15), Sch. II, paras. 1, 3**—*Arbitration—Reference by Pleader, validity of—Pleader, authority of.*

The position of a Pleader is that of an agent in relation to his client and his power is, therefore, created entirely by the *vakalatnamah* given to him by his client.

A Pleader has no right to compromise on behalf of his client unless expressly authorised to do so; nor is he empowered to refer a matter to arbitration except by an express authority in that behalf. A *vakalatnamah* in general terms is wholly insufficient.

The words "all the parties interested" in paragraph 1 of Schedule II of the Civil Procedure Code mean that all the parties interested in the litigation only need be parties to the application for reference to arbitration.

It is a question of fact in each case as to who are the parties interested in the litigation. **Pat** JAIPAL TEWARY *v.* TAPESWARI TEWARY 321
——— **s. 9, O. XXII, r. 4**—*Appeal and cross-objections by respondent—Death of respondent pending appeal—Omission of appellant to bring legal representative on record—Legal representative, application by, to be brought on record in memorandum of objections, effect of—Appeal, whether abates—Jurisdiction of Civil Courts.*

The omission by an appellant to bring on record the legal representative of a deceased respondent will not

Civil Procedure Code—1908—contd.

cause the abatement of the appeal if the latter, on his own initiative, has brought himself on the record in the memorandum of cross-objections filed by the deceased. The effect of the legal representative being added in the memorandum of objections is, in effect, to make him a party to the appeal.

The appeal and memorandum of objections are not disconnected and independent proceedings, but are part of the same proceedings.

Plaintiffs sued to establish their right to recite *prabandams* or holy verses in a temple and in the procession of a temple deity and a certain rank or precedence in such procession. They also claimed an injunction restraining the 6th defendant from receiving the *teerthams* and being ranked above them. The Court dismissed the suit as not being one of a civil nature, but disallowed 6th defendant's costs. Plaintiffs appealed and 6th defendant filed cross-objections against the portion of the decree disallowing his costs. The 6th defendant died pending the disposal of the appeal and the plaintiff-appellant did not bring his legal representative on record within the time allowed by law, but the latter brought himself on record in the memorandum of objections. The Appellate Court confirmed the Munsif's decree:

Held, (1) that the appeal did not abate by reason of appellant's omission to bring the deceased respondent's representative on record, as he was on the record in the memorandum of objections which is substantially the same proceeding as the appeal;

(2) that as there was no obligatory duty on plaintiffs to recite the *prabandam*, the suit was not cognizable by the Civil Court under section 9, Civil Procedure Code. **M** VATHIAR VENKATACHARIAR *v.* PONAPPA AYYENGAR, 7 L. W. 614 **959**

——— s. 11 **406, 975**

——— s. 11, O. II, r. 2, O. XXIII, r. 1—Res judicata—*Dismissal of suit on pleadings without decision on merits, whether operates as* res judicata—*'Withdrawal of suit, leave for, on payment of costs,' meaning of—Costs, payment of, whether condition precedent to grant of leave—Power-of-attorney granted to mortgagee for realization of dues to mortgagor—Suit for cancellation of power and accounts, dismissal of—Fresh suit for redemption, maintainability of.*

Where a suit is dismissed on the pleadings without any decision being rendered on the merits, there is no bar of *res judicata*.

Where leave to withdraw a suit is granted on payment by the plaintiff of defendant's costs, the payment of costs is not a condition precedent to the institution of a fresh suit and non-payment will not disable the plaintiff from filing a fresh suit. 1

Plaintiff executed a mortgage to one *R.* on 12th July 1892. On 8th July 1898 he executed a power-of-attorney to *R* empowering *R.* to collect rents from plaintiff's tenants and appropriate the net income towards the mortgage-deed. In 1910 plaintiff sued *R.* for cancellation of the power and for accounts. That suit was dismissed on the ground that plaintiff should have sued on the mortgage. Afterwards he filed a suit on the Original Side of the High Court for cancellation of the power and for accounts alleging that the mortgage had become discharged. That suit was dismissed on the ground that it was barred as *res judicata*. On appeal, the Appellate Court permitted the plaintiff to withdraw the suit with liberty to file a fresh suit on payment of defendant's costs. The plaintiff without paying the costs of that suit brought the present suit for redemption of the mortgage:

Held, (1) that the suit was not barred as *res judicata* inasmuch as, in neither of the previous suits, was there any decision on the merits;

(2) that the non-payment of costs in the second of the two prior suits was not a condition precedent to the order granting leave and did not bar the institution of the present suit;

(3) that the suit was not barred under Order II, rule 2, Civil Procedure Code. **M** DASARTHY NAIDU *v.* PALALA KUMARAMULL, 7 L. W. 557; (1918) M. W. N. 427 **969**

——— s. 11—Res judicata—*Erroneous decision on question of law, whether* res judicata.

An erroneous decision on a question of law between the parties to a suit may nevertheless amount to *res judicata* in a subsequent suit between the same parties.

In a previous suit between the parties it was decided on an issue of law that the defendants were liable to pay interest on arrears of rent. In a subsequent suit for arrears of rent and interest the claim for interest was resisted on the ground that the defendants were *thikadars* and were, therefore, not liable under the provisions of section 141 of the Oudh Rent Act to pay interest on arrears:

Held, that the matter, having been in issue in the former suit and having been heard and finally determined, was conclusive in the subsequent suit as to the liability of the defendants to pay interest, even although the earlier decision was a wrong decision in law. **O** BHAGWATI PRASAD SINGH *v.* PARMESHWAR DUTT, 5 O. L. J. 16 **252**

——— s. 11—Res judicata *in execution proceedings—Objection not taken at one stage, whether can be taken at later stage.*

An objection that a decree is barred by limitation cannot be taken in an execution proceeding if it was not taken in a previous execution proceeding when it could and should have been raised, provided the judgment-debtor had been properly served with notice of execution in the previous proceeding. The objection, for instance, would not be *res judicata* as against a judgment-debtor who was a Ward of Court and who was not properly served with notice of the previous proceeding as required by section 54 of the Bengal Court of Wards Act. **Pat** JANKI KUER *v.* BANWAMALLE RAMANAUJIAR, 3 P. L. W. 218 **404**

——— s. 11, O. IX, r. 13—Res judicata—*Fraud—Suit to set aside decree obtained by fraud—Question of fraud already considered in proceedings to set aside* ex parte *decree, effect of.*

The decision on the question of fraud in a proceeding under Order IX, rule 13, Civil Procedure Code, for setting aside an *ex parte* decree will operate as *res judicata* on the question of fraud raised in a subsequent suit between the same parties for setting

aside the *ex parte* decree in only so far as that fraud consisted in the suppression of service of summons. C CHANDRA KUMAR ROY CHOWDHURY *v.* ASWINI KUMAR DAS 250

——— **s. 11**—Res judicata—*Mortgage—Redemption suit by one co-mortgagor—Subsequent suit by another co-mortgagor—Co-mortgagor suing to redeem share of mortgaged property.*

A decree was passed in a suit for redemption by one of several co-mortgagors, in which the other co-mortgagors were impleaded as defendants. The decree directed that if the plaintiff failed to pay the money within a period of six months the decree would become a nullity. It did not provide for redemption by the defendants-co-mortgagors in case the plaintiff made default. The plaintiff failed to comply with the order of the Court, and subsequently some of the other co-mortgagors brought a suit for redemption:

Held, that the suit was not barred by the rule of *res judicata* inasmuch as the plaintiffs in the subsequent suit were not claiming under the plaintiff in the previous suit. O BHAIRON BAKHSH SINGH *v.* RAGHUBANSA KUNWAR, 5 O. L. J. 43 300

——— **ss. 11, 47**—Res judicata—*Civil Procedure Code (Act XIV of 1882), s. 617—Partition decree—Accounts, whether can be claimed in execution—Reference, invalid, opinion expressed in, whether binding on parties.*

In a suit for partition the parties believed that some of the villages which were the subject-matter of the suit could not be partitioned. A consent decree was passed under which some of these villages were left under the management of the plaintiff and others under that of the defendant. The decree also contained the following direction: "Accounts should be rendered once in a year and that in the month of April and the produce shall be divided according to the shares at the time." The parties had been seeking accounts from each other year after year in execution:

Held, that accounts could not be claimed in perpetuity in execution of a decree in evasion of the law of procedure and in evasion of the Court Fees Act.

In the year 1904 on the objection of one of the parties to render accounts, a reference was made to the Judicial Commissioner in which he expressed an opinion that it was too late to re-open the interpretation of the decree:

Held, (1) that as the reference was incompetent, under section 617 of the Code of Civil Procedure 1882, any opinion expressed upon such a reference could not operate as *res judicata*, and did not amount to an adjudication binding on the Courts in subsequent stages;

(2) that even if it was an adjudication the Court was not bound to perpetuate an error N YESHWANTRAO *v.* DATTATRAYA KRISHNA 201

——— **s. 11**—Res judicata—Pro forma *defendant against whom no relief is claimed, position of.*

The decision in a case does not operate as *res judicata* against a *pro forma* defendant who was not a necessary party to the suit and who was impleaded not because any relief was claimed against him, but because he might assist the Court in the adjudication

of the claim against the real defendant. Pat SUCHIYE MISSER *v.* JOGI MISSIR 318

——— **s. 11**—Res judicata—*Refusal of Court to decide issue.*

There can be no *res judicata* under section 11 of the Civil Procedure Code unless the issue was heard and finally decided by the Court.

The refusal of the Court to determine an issue raised in a case does not operate as *res judicata* in a subsequent suit. Pat DHAKESWAR PRASAD NARAIN SINGH *v.* POOKHAR PANDAY, 4 P. L. W. 299; (1918) PAT. 152 326

——— **ss. 13 (b), (d), 44**—*Foreign Court, judgment of—Execution in British India—Mistake of law, effect of—Burden of proof, wrong view of, whether 'opposed to natural justice.'*

A wrong view of a Foreign Court as to onus of proof will not have the effect of rendering its judgment one 'not given on the merits' within the meaning of section 13 (*b*), Civil Procedure Code, or of rendering the judgment erroneous on the face of it.

A foreign judgment is not liable to be vacated merely on the ground of its containing a mistake of law There must be something in the procedure anterior to the judgment which is repugnant to 'natural justice'. A mere incorrect view of law by a foreign Court will not give the British Indian Courts jurisdiction to say that the judgment is opposed to 'natural justice' within the meaning of section 13 (*d*), Civil Procedure Code. M RAMA SHENOI *v.* HALLAGNA, 34 M. L. J. 295; 41 M. 205 703

——— **ss. 19, 20, 21**—*Contract for supply of goods—Goods not ordered sent with goods ordered—Return of goods not ordered by buyer—Claim for value of goods ordered and damages for negligent re-transmission of goods not ordered—Place of suing—Cause of action—Jurisdiction—S. 21, applicability of, to usurpation of jurisdiction of foreign Courts.*

Defendants, who were residents of Sagaram in the Mysore State, contracted with the plaintiffs, residing at Kumbakonam in British India, for the supply of certain articles by the latter. The plaintiffs sent the goods ordered by the defendants along with goods not ordered. The defendants having returned *all* the goods, the plaintiffs instituted the present suit at Kumbakonam for the value of the six articles ordered and of the other articles also on the ground that they were negligently retransmitted causing loss to the plaintiffs:

Held, (1) that the cause of action arose at, and the suit was properly filed, at Kumbakonam in respect of the goods ordered, as the proposal by defendants was impliedly accepted at that place;

(2) that the cause of action in respect of the other articles was distinct, and the defendants' liability being for damages for alleged negligence, the cause of action arose at Sagaram and it was not competent for the Kumbakonam Court to take cognizance of that portion of the claim;

(3) that section 21, Civil Procedure Code, did not apply to usurpation of the jurisdiction of a foreign Court. M MANJAPPA *v.* RAJAGOPALACHARIAR, (1918) M. W. N. 378; 24 M. L. T. 95 779

——— **s. 20**—*Civil Procedure Code (Act XIV of 1882), s. 17, Exp. III—Cause of action—Place of suing—Money payable on death in Lahore—Death occurring at another place—Jurisdiction.*

Plaintiff's mother who resided in Lahore became a member of the Punjab Mutual Hindu Family Relief Fund, Lahore. She died at Lyallpur where the plaintiff resided. The Fund's moneys which went to relieve distress on the death of members, were payable under the rules in Lahore. The Fund also carried on business at Lyallpur through an agent. Plaintiff brought a suit to recover the moneys from the Fund at Lyallpur:

Held, that the Lyallpur Court had jurisdiction to hear the suit against the Fund on the grounds, (1) that the death of its member which was part of the cause of action occurred at Lyallpur, and (2) that the defendant Fund carried on its business at Lyallpur through an agent. **P** PUNJAB MUTUAL HINDU FAMILY RELIEF FUND, LAHORE *v.* SARDARI LAL, 29 P. L. R. 1918 **900**

——— **s. 21**, applicability of **401**

——— **s. 24, cl. (1) (b) (ii), O. XLVII, r. 2**—*'Competent to try and dispose of the same,' meaning of—Jurisdiction of Courts, territorial changes in—New Courts, establishment of, with jurisdiction over cases from specified date—Review, petition for, to Court exercising jurisdiction before establishment of new Court—Transfer to new Court, power of District Judge to—New Court, whether 'successor' of Court which entertained petition—Transfer, whether ultra vires.*

The Court of a District Judge has no power to transfer suits or petitions filed in a Court subordinate to it to another subordinate Court newly established thereafter, which is only empowered to hear cases presented to it from a specified date after its establishment.

The latter Court is not a Court 'competent to try and dispose of the same' within the meaning of clause (1) (*b*) (*ii*) of section 24, Civil Procedure Code, nor can it be regarded as 'successor' to the Court which originally entertained the suit or petition within the meaning of Order XLVII, rule 2, Civil Procedure Code.

The Subordinate Judge of Kumbakonam issued notice, on a review petition presented to him, on 19th November 1915, to the opposite party to appear on 27th November 1915. The petition not having been disposed of on the latter date, the District Judge transferred the petition to a new Small Cause Court established at Kumbakonam on 1st January 1916 with jurisdiction to try all Small Cause suits *from that date*:

Held, that the order of transfer was *ultra vires*. **M** VAITHILINGAM CHETTY *v.* KALIAPERUMAL MUDALI, (1918) M. W. N. 291; 24 M. L. T. 32 **13**

——— **s. 44** **703**

——— **s. 47** **192, 201**

——— **s. 47**—*Defendant exonerated wrongly described as party in decree, whether party to suit—Separate suit, right of.*

A defendant, whose name appears in the decree without having been struck off previously from the record, is a party with respect to whom the prohibition of a separate suit enacted in section 47 of the

Civil Procedure Code applies, notwithstanding that he has been exonerated by the decree passed in the suit without an adjudication on the controversial questions between him and the plaintiff. **M** MEDISETTI VENKATASAMI *v* KUNCHALLA CHIDAMBARAM, 23 M. L. T. 206 **671**

——— **s. 47, O. XXI, r. 32**—*Injunction, suit to enforce, whether lies—O. XXI, r 32, cl. (5), whether applies to mandatory and prohibitory injunctions—Limitation, whether applicable to application for enforcement of injunction.*

The enforcement of an injunction is a question relating to the execution, discharge or satisfaction of the decree by which the injunction was granted; therefore, a separate suit for enforcement of an injunction is prohibited by section 47, Civil Procedure Code.

The plaintiff brought a suit against the defendants for the demolition of a wall in so far as it was above the height limited by a permanent injunction awarded against the defendant by a decree made in the plaintiff's favour:

Held, that the suit was not maintainable and that the remedy of the plaintiff was by an application for execution of the decree under rule 32, clause (5) of Order XXI, Civil Procedure Code.

The expression "the act required to be done" in clause (5) of rule 32, Order XXI, Civil Procedure Code, means what has to be done to enforce the injunction.

The power given by clause (2) of section 47, Civil Procedure Code, is a discretionary power which may not be exercised by the High Court in certain cases.

Per *Richardson, J.* (*Beachcroft, J. dubitante*)—Clause (5 of rule 32, Order XXI, Civil Procedure Code, clearly applies to injunctions, both mandatory and prohibitory. **C** SACHI PRASAD *v.* AMAR NATH RAI, 27 C. L. J. 506 **864**

——— **s. 47, O. XXI, r. 96**—*Sale in execution of mortgage-decree—Properties not included in sale-certificate, delivery of, to purchaser—Suit by mortgagor for re-delivery, maintainability of—Suit, whether can be converted into application under s. 47.*

Where, under a sale held in execution of a mortgage decree, lands not included in the sale certificate but which by mistake are assumed to be so included are delivered to the purchaser, the mortgagor cannot claim their re delivery by a separate suit. The question whether the lands so delivered are correctly included in the sale certificate or not can only be determined by the executing Court on an application under section 47, Civil Procedure Code.

An order directing delivery of possession to a purchaser under Order XXI, rule 96, Civil Procedure Code, is a judicial order.

A suit cannot be treated as an execution application where the effect of doing so would be to prejudice the defendant in his plea of limitation. **M** KATHIRAYASAMI NAICKER *v.* V. RAMABADRA NAIDU, 35 M. L. J. 27 **608**

——— **s. 48** **494**

——— **s. 48**—*Limitation Act (IX of 1908), Sch. I, Art. 182 (7)—Execution—Mortgage decree directing mortgaged properties to be sold and in case of deficiency balance to be realised from other properties and persons of judgment-debtors—Limitation, commencement of.*

Civil Procedure Code—1908—contd.

A mortgage decree directed that the mortgaged properties should be sold and that if the sale-proceeds proved insufficient, the balance should be realised from the other properties and the persons of the judgment-debtors. An application for execution of the latter part of the decree was made more than twelve years after the date of the decree:

Held, (1) that under section 48 of the Civil Procedure Code time began to run from the date of the decree, and not from the date when the mortgaged properties were sold and that the application was, therefore, barred by time;

(2) that the direction in the decree was not a direction to pay money at a certain date within the meaning of clause (7) of Article 182 of Schedule I of the Limitation Act, as the date of the sale of the mortgaged properties was not certain. **P C** KHULNA LOAN COMPANY, LIMITED *v.* JNANENDRA NATH BOSE, 22 C. W. N. 145 **436**

——— **s. 54**—*Bengal Estates Partition Act (V B. C. of 1897), ss. 10, 11, 12—Partition of revenue-paying estate—Civil Court decree for partition, execution of—Collector, power of—Partition, whether can be re-opened.*

A Civil Court has jurisdiction to execute a decree for partition of a revenue-paying estate, provided that it does not assume jurisdiction to partition the liability for the land revenue. In the event of a party applying to the Collector for a partition of the land revenue after partition has been effected by the Civil Court, it would be open to the Collector to re-consider the allotment of the shares granted in the Civil Court proceeding.

There is no principle of law which enables a Civil Court to re-open a partition properly made under a Civil Court decree otherwise than by proceedings by way of review. The effect of the final decree of a Civil Court for partition is to put an end to the co-tenancy and to vest in each person or group a sole estate in a specific property or allotment. The law does not provide for a suit in the Civil Courts under which these separated estates can be divested and a co-tenancy re-created for the purpose of making a fresh partition. **Pat** DEBI SARAN SINGH *v.* RAJBANS NATH DUBEY, (1918) PAT. 134; 5 P. L. W. 9 **895**

—— — **s. 60** **46**

——— **s. 60 (c)**—*Agra Tenancy Act (II of 1901), ss. 20, 21—Occupancy holding—Agriculturist, house of, whether transferable—Execution.*

The house of an agriculturist is liable to sale in execution of a decree on foot of a mortgage made by him, when such house is not an appurtenance of his holding which he is forbidden by law to transfer. **A** NIRBHAY LAL *v.* KALLIN **546**

—— — **ss. 64, 73, O. XXI, r. 89**—*Sale in execution, setting aside of, effect of, on creditor claiming rateable distribution—Decree-holder, whether can use attachment for execution of another decree—Alienation before re-attachment, effect of.*

Where a sale is set aside under Order XXI, rule 89, Civil Procedure Code, the result is that there are no assets realised under which other creditors of the judgment-debtor can claim rateable distribution.

The attaching decree-holder in such a case cannot use the attachment for the satisfaction of other decrees obtained by him. He can only bring the property to sale a second time, if there has been no alienation of it by the judgment-debtor in the meantime. **M** GOTATAI VIGNESWARUDU *v.* VENKATA SURYANARAYANAMURTHY, 7 L. W. 573 **782**

—— — **s. 65** **46**

——— **s. 65**—*Auction-purchaser, right of, to claim profits from date of sale.*

An auction-purchaser of a share in a village is entitled to claim profits from the date of the sale, and not only from the date when mutation is effected in his name in the village papers. **O** HASHMAT ALI *v.* MAHEWA ESTATE, 5 O. L. J. 31 **248**

—— — **s. 73** **782**

—— — **s. 73**—*Rateable distribution—Sale-proceeds of moveables realised by Nazir, whether assets received by Court.*

Moveables belonging to a judgment-debtor were sold by auction by the Civil Nazir on different dates, and on each of these dates the Nazir drew up a list of the goods sold and of the prices realised showing the total receipts for each date separately:

Held, that the sale-proceeds realised on each date became assets received by the Court within the meaning of section 73 of the Civil Procedure Code, so that an application for rateable distribution could take effect only in respect of the sale-proceeds realised *after* the date of such application. **P** SURJAN SINGH-BUDH SINGH *v.* PRAG DAS-MANGAL SAIN, 33 P. R. 1918 **108**

——— **s. 92**—*Trust, public, for religious purposes—Endowment, deed of, silent as to nature of trust—Circumstantial evidence, weight of—Proof, nature of—Persons having right to worship in public temple, position of—Trustee not guilty of mismanagement or misappropriation—Scheme for better management of trust—Court, discretion of.*

Where a deed of endowment did not expressly state whether the temple built by the executant was intended for private or for public worship, but it was found from extrinsic evidence that the executant was anxious to obtain religious benefit for her soul, that the temple had been from its very beginning open to the public for worship and that the customary religious festivals had been celebrated therein in a public manner:

Held, that under the above circumstances, the trust must be taken to be a public trust created for religious purposes.

Persons having a right to perform worship in a temple intended for public worship, are competent to institute a suit under section 92, Civil Procedure Code.

Where a Court does not find a trustee to be guilty of neglecting the trust or misappropriating its property, it has nevertheless full discretion to frame a scheme for the better management of the trust if under the circumstances such a course is deemed to be in the interests of the trust. **O** LAKSHMI KUNWAR *v.* MURARI KUNWAR, 5 O. L. J. 97 **213**

——— **ss. 97, 99** **24**

——— **s. 100** **189**

——— **s. 101** **24**

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——— s. 102—*'Cognizable,' meaning of—Provincial Small Causes Courts Act (IX of 1887), Sch. II, Art. 35, effect of amendment of 1914 upon—Suit for value of trees, carried away—Trial as regular suit—Appeal, second, maintainability of—Amendment of Art. 35 before filing of second appeal, effect of.*

A suit to recover the value of trees cut and carried away was filed in the Small Cause Court and was afterwards transferred to the regular file as a question of title was involved in the suit. Against the decree of the trial Court there was an appeal to the District Court, and from the decree of the latter Court a second appeal was filed in the High Court. It was objected that, under section 102, Civil Procedure Code, no second appeal lay. It was contended in answer that as the second appeal was filed after the amendment of Article 35 of Schedule II of the Provincial Small Causes Courts Act in 1914, the second appeal was maintainable:

Held, that, as the appeal was against a decree in a suit of the nature cognizable by Small Cause Courts, no second appeal lay.

The word 'cognizable' in section 102, Civil Procedure Code, is restricted to the nature of the proceeding prior to decree and not to its character at the time of the second appeal.

The principle of law that a right to prefer an appeal, being a vested right cannot be affected by legislation, is equally applicable to parties who have acquired a right to a judgment being regarded as final and conclusive. **M** SUBRAMANIA AIYAR *v.* NAMASIVAYA ASARI, 23 M. L. T. 255; (1918) M. W. N. 238 **11**

——— s. 104 (2), O. XLIII, r. 1 (J)—*Petition by auction-purchaser to set aside sale, dismissal of, in appeal—Appeal, second, whether lies.*

No second appeal lies against an order passed in appeal upon a petition by an auction-purchaser to set aside a sale on the ground that the judgment-debtor had no saleable interest in the property. **M** SUNDARA SINGH *v.* PAZHAMALAI PADAYACHI **701**

——— s. 109, O. XLI, r. 23—*Decree reversed on preliminary point—Remand for re-trial on merits, whether "final order"—Leave to appeal to Privy Council.*

An order of the High Court, setting aside a decision of the lower Court that the trial of the suit is barred by *res judicata* and remanding the suit for re-trial on the merits, is an ordinary order of remand which does not decide any of the questions between the parties, except that the suit is not barred by the rule of *res judicata*, and is not a "final order" within the meaning of section 109 of the Civil Procedure Code in respect of which leave to appeal to the Privy Council can be granted. **Pat** DANBY *v.* TAFAZUL HUSSAIN, (1918) PAT. 1; 4 P. L. W. 342 **290**

——— s. 109 (a) **192**

——— s. 110—*Limitation Act (IX of 1908), s. 10, applicability of, to suit for accounts by minor against Administrator, whether substantial question of law.*

In view of the state of authorities in India on the question of the applicability of section 10 of the Limitation Act to a suit by a minor against the administrator of his estate for accounts, the question is a substantial question of law within the meaning of section 110 of the Civil Procedure Code. **Pat** JANANDAN PRASAD THAKUR *v.* JANABHATI THAKURAIN **182**

——— s. 115 **653, 834**

——— ss. 115, 151, O. XLI, r. 23—*Court Fees Act (VII of 1870), s. 13—Remand, order of—Refund of Court-fee—Court, duty of—Revision—High Court, powers of—Scope of s. 151.*

Where an Appellate Court disposes of an appeal under rule 23 of Order XLI of the Civil Procedure Code, the provisions of section 13 of the Court Fees Act automatically come into operation and the Court is bound to grant a certificate under that section. The refusal of the Court to grant the certificate amounts to a refusal to do what the law specifically says the Court must do and is either an illegality or a material irregularity within the meaning of section 115 of the Civil Procedure Code.

Per *Beaman, J.*—Section 151 of the Civil Procedure Code is intended to empower Courts to deal with their own decrees and orders and is not intended to give authority to superior Courts by way of conferring supplemental jurisdiction to that conferred by section 115 of the Code. **B** BHAUSING RAGHO *v.* CHAGANIRAM HARCHAND, 20 BOM. L. R. 348 **552**

——— s. 115—*Revision—Jurisdiction—Mistake of law, whether ground for revision.*

Where a Court has jurisdiction to determine a matter and in the exercise of its jurisdiction it makes a mistake in law, that does not entitle the party against whom the decision is given to come to the High Court in revision.

Plaintiff brought a suit on a promissory-note executed by the defendant. Defendant pleaded infancy, whereupon the Court of first instance dismissed the suit On appeal the Subordinate Judge found that the plaintiff was a minor but that he had fraudulently misrepresented his age, so that he was estopped from setting up his minority as a defence. It, therefore, decreed the suit. The suit being of small cause nature, the defendant applied in revision to the High Court:

Held, that the lower Appellate Court was wrong in holding the minor liable on the finding of fact arrived at by it, but that the mistake being a mere mistake of law the High Court could not interfere in revision. **A** DHARA SINGH *v.* GAYAN CHAND, 16 A. L. J. 441 **761**

——— s. 145—*Surety making himself liable for decretal money in case dispute not settled—Suit compromised—Decree based on compromise, whether can be executed against surety.*

In an application for execution of a decree against the sureties of the judgment-debtor, it appeared that the sureties had made themselves liable to pay the decretal amount only in case the defendants did not settle the dispute and judgment was passed against them, but that the plaintiff had entered into a compromise with the defendants according to which the latter had made themselves liable to pay the total amount of money claimed by the plaintiff by certain instalments set forth in the deed of compromise:

Held, that as the decree was passed on the basis of the compromise without any mention being made

of the sureties, it could not be executed against them under the terms of the surety bond. **P** R. K. KAPUR *v.* SHANKAR DASS, 9J P. W. R. 1918 **992**

——— s. 151 552, 468

——— s. 151, O. XLV, r. 4—*Consolidation of appeals to Privy Council - High Court, power of, to consolidate—Security for costs.*

It was not intended by Order XLV, rule 4, to limit the powers of the High Court to consolidate cases to the purposes mentioned in that rule alone.

The power of consolidation is an inherent power of the High Court, which can be exercised in consolidating appeals to the Privy Council for the purpose of security for costs and to save expenses. **Pat** HAR PRASAD RAI *v.* BRIJ KISHEN DAS, 3 P. L. J. 44"; (1918) Pat. 259 **551**

——— s. 151, O. XXI, rr. 18, 19—*Execution of decree for smaller sum, whether can be issued against party to whom larger sum is payable by applicant.*

By a decree in a partition suit *A* became entitled to recover the sum of Rs. 2,130 from *B*. *A* preferred an appeal against that decree, which was dismissed and he became liable to pay to *B* Rs. 506 by way of costs of the appeal. Thereafter *A* applied for leave to appeal to His Majesty in Council but this application was rejected and he was directed to pay to *B* further costs to the extent of Rs. 80:

Held, that on the principles embodied in Order XXI, rules 18 and 19, and in section 151, Civil Procedure Code, *B*. was not entitled to take out execution for the smaller sums of Rs. 506 and Rs. 80 payable to him by *A* when a larger sum payable by him to *A* against whom he sought execution was due and remained unpaid. **C** BEPIN BEHARI SEN *v.* KRISHNA BEHARI SEN **246**

——— O. I, r. 8—*Representative suit, leave for—Damages, claim for, maintainability of, in representative suit—Form of order—Objectors, position of—Leave, grant of, without reference to objectors—Scheme of management of trust, prayer for, validity of.*

Leave to file a representative suit under Order I, rule 8, Civil Procedure Code, may be granted as on behalf of a community or body of persons even though some persons object to it. The order need not be restricted to the grant of leave on behalf of the persons not opposing.

Though leave cannot be granted to file a representative suit for damages, the prayer may be allowed in combination with other reliefs sought. The plaintiffs may be allowed to claim damages, not in their representative capacity but on account of the acts by which they were individually aggrieved.

A scheme of management of trust property may be prayed for in a representative suit, subject to objections when the scheme is actually framed.

Leave was granted under Order I, rule 8, Civil Procedure Code, to the plaintiff, a leading Mirasidar, to file a suit on behalf of 200 co-Mirasidars as trustees of a forest land for a declaration that the property belonged in common to them on trust, for an injunction restraining the defendants from trespassing on it, for damages and, if necessary, for a scheme of management. **M** KATHA PILLAI *v.* KANAKASUNDARAM PILLAI, 24 M. L. T. 20; 8 L. W. 160 **423**

——— O. II, r. 2—*Cause of action—Suit on non-existent cause of action, whether bars fresh suit on true cause of action.*

The essential thing to be borne in mind in applying Order II, rule 2, Civil Procedure Code, is that the cause of action in the subsequent suit should be the same as the cause of action in the previous suit and not that the cause of action in the subsequent suit should have been made the subject of litigation in the former suit.

Where a suit is brought upon either a non-existent cause of action or upon a false cause of action, it will not bar the institution of a suit upon the true cause of action, because there is no identity of causes of action between the two suits.

A right which a litigant possesses without knowing or even having known that he possesses it cannot be regarded as a 'portion of his claim' within the meaning of rule 2, Order II. **M** DASARTHY NAIDU *v.* PALALA KUMARAMULL, 7 L. W. 557; (1918) M. W. N. 427 **969**

——— O. V, r. 15, O. XXX, r. 3—Munim, *whether a member of family—Direction by Court to issue notice to party and his Pleader—Service on party's* munim, *whether sufficient.*

A *munim* is not a member of the family of his employer within the meaning of Order V, rule 15, Civil Procedure Code

In a suit for recovery of money the Court directed that notice should issue to the parties and their Pleaders that they should attend on a certain date. It appeared that no notice was served on the plaintiff's Pleader, but one was served upon the *munim* of the plaintiff's firm. The plaintiff not having appeared on the date fixed the suit was dismissed in default:

Held, that inasmuch as the Court actually directed that the notices should be served upon the plaintiffs themselves as well as upon their Pleaders, the service on the *munim*, even if he was the person having the control or management of the plaintiff's business, was not sufficient and that the Court had no power to dismiss the suit for default. **P** FIRM, RAM GOPAL-KANHIA LAL *v.* NARAIN DAS **932**

——— O. VI, r. 17—*Amendment of plaint, when to be allowed.*

An application for amendment of a plaint in second appeal was refused by the High Court on the ground that if the amendment were granted, the plaintiff would be able to start afresh on allegations wholly inconsistent with those made in the original plaint. **C** PADMA LOCHAN PATAR *v.* GIRIS CHANDRA KIL, 27 C. L. J. 392 **241**

——— O. VI, r. 17—*Amendment of plaint, whether permissible on verbal suggestion in final reply.*

An amendment which would have the effect of altering the nature of the suit, cannot be allowed upon a verbal suggestion made in final reply. **S** LOUIS DREYFUS & Co. *v.* SECRETARY OF STATE, 11 S. L. R. 103 **173**

——— O. VI, r. 17—*Amendment of pleadings—Case closed for judgment.*

Plaintiff brought a suit for possession of a site on the ground of his having been the owner of the same. The case was closed for judgment for 30th November 1916. The plaintiff applied to the Court on 25th November 1916, praying that a right of way six cubits broad should be given to him. The Trial

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Court held that the plaintiff was not the owner of the site, but it directed the defendant to remove his hut so as to allow a right of way as claimed by the plaintiff:

Held, that the plaintiff should not have been allowed to amend the plaint after the case had closed for judgment. **N** CHAINU *v.* MANBODH **894**

——— **O. VI, r. 17**—*Amendment of pleadings —Discretion of Court, principles governing.*

Amendments of pleadings should be allowed when asked for by a party, provided the opposite party is not taken by surprise or precluded from adducing evidence or raising the necessary issues. Where, however, a party is agitating only a technical claim or the character of the suit is likely to be altered or where there is inordinate delay in asking for amendment, the Court would be justified in refusing to grant an amendment. The main considerations to be borne in mind are that multiplicity of suits should be avoided and the interests of substantial justice should be advanced.

Plaintiff sued for recovery of 2 out of 5 shares in one plot or in the alternative 2 out of 12 shares in that and another plot. Mesne profits were reserved for a separate action. The trial Court decreed only the first prayer, but on appeal the District Judge granted the second prayer. Before the appeal was heard, plaintiff had filed a suit to recover mesne profits in respect of the property decreed to him. After the disposal of the appeal, he applied for amendment of the plaint by substituting a claim for mesne profits of 2 out of 12 shares in both plots:

Held, that the amendment should be allowed. **M** RAMASWAMI REDDI *v.* GENGA REDDI **649**

——— **O. VI, r. 17**—Plaint, amendment of, for enhanced damages **556**

——— **O. VII, r. 10** **471**

——— **O. VII, r. 10**—*Plaint, return of, for presentation to proper Court—Presentation to Court indicated, whether bars right of appeal—Pre-emption, suit for, valuation of—Suits Valuation Act (VII of 1887), s. 3 (1).*

A party who complies with an order of Court returning a plaint to be filed in the proper Court by filing it in the Court indicated in the order does not forfeit his right of appeal against the order returning the plaint. **M** NARAYAN NAIR *v.* CHERIA KATHIRI KUTTY, 34 M. L. J. 397 **89**

——— **O. VIII, r. 5**—*Written statement—Omission to deny allegation of title in plaint, effect of.*

Where, in a suit for possession of land, the defendant in his written statement did not specifically deny the allegation made by the plaintiff in his plaint that the property sued for formed a portion of a certain *talug* and the Munsif, holding that there was a constructive admission by the defendant of the plaintiff's title as alleged in the plaint, decreed the suit without considering the evidence adduced on both sides on the question of title:

Held, that the lower Appellate Court was justified in reversing the decision of the Munsif on the ground that there was no such admission on the part of the defendant as would warrant a decision in favour of the plaintiff's title, specially as the trial Court had required proof of the plaintiff's title in spite of the so-called admission by the defendant. **C** NAJA MIA *v.* ABDUL KADAR **878**

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——— **O. IX, r. 8** **189**

——— **O. IX, r. 13** **250**

——— **O. IX, r. 13, O. XLIII, r. 1 (d)**—*Compromise decree, application to set aside, by person not party to decree, nature of - Application rejected—Appeal, whether lies.*

Per *Curiam* (*Richardson, J., dubitante*).—An application to set aside compromise decree on the ground that the applicant was no party to the compromise and that he had given no authority to file the petition of compromise, is an application within the scope of Order IX, rule 13, Civil Procedure Code. An appeal lies from an order refusing such application. **C** BASIRUDDIN *v.* SADHU TANTI, 22 C. W. N. 571 **690**

——— **O. XVII, r. 1 (1)**—*Adjournment, power of Court to grant—Order refusing adjournment, whether appealable - Appellate Court, discretion of, to interfere with order refusing adjournment.*

Under rule 1 (1), Order XVII, of the Civil Procedure Code, a Court may at any time grant an adjournment if sufficient cause is shown; but no appeal is allowed from an order refusing adjournment and even where the refusal is impeached in an appeal from the decree, an Appellate Court is generally disinclined to interfere with the trial Judge's exercise of his discretion. **N** LAXMAN RAO *v.* VITHOBA **898**

——— **O. XVII, rr. 2, 3** **200**

——— **O. XVIII, r. 5**—*Deposition not read out in presence and hearing of Judge, admissibility of—Evidence Act (I of 1872), ss. 80, 91.*

The provisions of Order XVIII, rule 5, Civil Procedure Code, are adequately complied with if the depositions of witnesses are read over to them in a place within the sight of the presiding Judge and from which the witnesses can draw the attention of the Judge to any mistakes or omissions discovered by them.

Where, therefore, the deposition of a witness was read out by the Court clerk in a room next to the Court and at a distance of 30 feet from the Judge's seat:

Held, that the deposition was admissible in evidence and complied with the provisions of Order XVIII, rule 5, Civil Procedure Code.

An irregularity in recording a deposition may be considered in determining the value of the document as evidence but it is not a sufficient ground for shutting it out altogether.

Neither section 80 nor section 91 of the Evidence Act renders such documents inadmissible in evidence. If the document is not in all particulars what it purports to be, the presumption permitted by section 80 would be rebutted **M** MEANGO *v.* BAVIAH, (1918) M. W. N. 239; 7 L. W. 435; 19 CR. L. J. 603 **507**

——— **O. XVIII, r. 5,** *non-compliance with provision of, whether makes deposition inadmissible—Object of provision—Deposition not read over to witness, whether admissible in evidence—Evidence Act (I of 1872), s. 80.*

The provision in Order XVIII, rule 5, Civil Procedure Code, requiring a deposition to be read over to the witness is in its nature directory; non-compliance with it does not make the deposition entirely inadmissible in evidence (even in a prosecution for perjury in respect of the deposition) and the

deposition can be proved in some way other than by calling in aid the provisions of section 80 of the Evidence Act.

Per *Beachcroft, J.*—The object of the provision of rule 5 of Order XVIII, Civil Procedure Code, requiring a deposition to be read over to a witness is to ensure accuracy. Non-compliance with it may create doubts as to whether the record correctly represents what the witness said, but it cannot affect the admissibility of the document in evidence if the making of the document is otherwise proved. **C** ELAHI BAKSHA *v.* EMPEROR, 27 C. L. J. 377; 22 C. W. N. 646; 19 CR. L. J. 498 **258**

——— **O. XX, r. 15**—*Partnership—Death of partner—Accounts, suit for, by surviving partner against representative of deceased partner, maintainability of.*

The personal representative of a deceased partner is bound to give an account of what has been received on behalf of the partnership, but he will only be liable for the person he represents to the extent of the assets he receives. The mere fact that a minor representative is personally unable to give the accounts will not absolve him from the obligation of getting the accounts prepared by the persons who were conversant with what took place and what money was received and spent and who were acting either for the deceased partner during his life or for the minor and the estate of the partner after his death.

Where a surviving partner sued the representative of a deceased partner for accounts, alleging that a much larger sum in connection with the partnership business was received by the deceased partner's estate than the plaintiff had received and that there would be a balance payable to him upon taking accounts:

Held, (1) that the suit was maintainable;

(2) that the proper procedure for the Court was to pass a preliminary decree directing that each party should furnish an account of what had been received and what had been spent. **A** SHANKAR LAL *v.* RAM BAHU, 16 A. L. J. 305 **31**

——— **O. XX, r. 15**—*Partnership, suit for dissolution of—Decree—Time from which partnership is declared dissolved—Discretion of Court, nature of—Date of judgment, whether dissolution can commence from.*

The discretion given to a Court by Order XX, rule 15, Civil Procedure Code, to fix a date from which a partnership is to be declared dissolved is a judicial and not an arbitrary discretion.

Ordinarily the Court should direct dissolution from the date of any notice 'given' in that behalf by one of the partners or from the date of the plaint, and where the parties have been at arm's length since the filing of the plaint, it should not declare that the partnership should stand dissolved from the date of the judgment. **M** SAMBASIVA AYYAR *v.* GANAPATHI AYYAR **727**

——— **O. XXI, r. 2**—*Civil Procedure Code (Act XIV of 1882), s. 257A—Agreement by decree-holder to give time for discharge of decree not certified to Court—Breach of contract—Execution of decree in violation of agreement—Damages, suit for, maintainability of.*

No suit lies for damages for breach of an agreement by a decree-holder to give time to the judgment-debtor for satisfaction of the decree where the agreement has not been certified to Court under Order XXI, rule 2, Civil Procedure Code, and there is no consideration to support it. **M** SISTU SEETRAMAYYA *v.* TADAPALLI SODEMMA, 7 L. W. 503; 24 M. L. T. 16; (1918) M. W. N. 292 **16**

——— **O. XXI, r. 2**—*Execution—Satisfaction of decree not certified to Court—Decree-holder purchasing property at auction sale—Purchase, validity of—Fraud.*

During the course of an execution proceeding the decree was satisfied out of Court but the satisfaction was not certified to or brought to the notice of the Court. The decree-holder brought an equity of redemption belonging to the judgment-debtor to sale and purchased it himself. The judgment-debtor then brought a suit for redemption in respect of the property without having got the sale set aside:

Held, that the execution sale was a nullity inasmuch as by failing to certify the satisfaction of the decree to the Court, the decree-holder had committed a fraud on the Court, and that, therefore, the judgment-debtor was entitled to redeem the property. **O** GHASI RAM *v.* DALEL SINGH, 5 O. L. J. 92 **222**

——— **O. XXI, r. 7, O. XXII, r. 6**—*Execution—Decree passed against deceased defendant, validity of—Decree, whether can be executed.*

No Court can make a decree against a dead man, and a decree so made is a nullity. No question of the jurisdiction of the Court to make the decree arises in such a case.

It is a good answer to an application for execution against the alleged representatives of a judgment-debtor to show that the judgment-debtor was dead at the time the decree was made, and that such a decree is void and incapable of execution as against the deceased. **A** SRIPAT NARAIN RAI *v.* TIRBENI MISRA, 16 A. L. J. 327 **21**

——— **O. XXI, rr. 17, 22**—*Sale in execution without notice to or substitution of legal representative of deceased judgment-debtor, whether invalid against other judgment debtor—Sale of part of attached properties—Proceeds sufficient to satisfy decree—Subsequent sale of other lots, validity of.*

One of several judgment-debtors died after their properties were duly attached in execution of an *ex parte* decree passed against them. The widow of the deceased judgment-debtor made an application for setting aside the *ex parte* decree, which was dismissed for default. Thereafter the decree-holder, without making an application to execute the decree against the widow of the deceased judgment-debtor and without serving a notice on her under Order XXI, rule 22, Civil Procedure Code, put up the attached properties to sale after due publication of sale processes, and they were sold to a stranger to the decree on two successive days. An application made by all the judgment-debtors including the widow of the deceased judgment-debtor to set aside the sale having been dismissed, an appeal was preferred to the High Court by the judgment-debtors excepting the widow:

Held, (1) that as the widow of the deceased judgment-debtor was not a party to the appeal, the mere fact that the sale might have been capable of

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being avoided or void against the widow on account of the failure of the Court to issue a notice under Order XXI, rule 22, Civil Procedure Code, could not affect the sale as against the other judgment-debtors—more especially when the appeal was preferred only on their behalf and the widow was satisfied with the judgment of the lower Court, holding that the interest of her husband was liable to be sold in execution of a decree according to which each of the judgment-debtors was liable to pay the whole decretal amount;

(2) that the question whether the sale was invalid was *res judicata* between the purchasers in execution and the widow of the deceased judgment-debtor by reason of the decision of the Courts below, namely, that the interest that her late husband had in the property was liable to be sold in discharge of his judgment-debt so that it could not be re-opened by the other judgment-debtors in support of their contention that the whole sale was invalid on account of irregularity in conducting it as against the widow.

Order XXI, rule 17, Civil Procedure Code, has nothing to do with the invalidity of the sale made to a stranger who bought without notice of the fact that the amount realised by a previous sale of other lots of the property attached was more than sufficient to satisfy the decree in execution. **C** SURENDRA NATH SAHA *v.* BOLA RAM PODDAR **699**

——— **O. XXI, rr. 18, 19** **246**

——— **O. XXI, r. 22** **699**

—— **O. XXI, r. 32** **864**

—— **O. XXI, rr. 32, 34**—*Compromise decree, breach of terms of—Damages, suit for, maintainability of—Cause of action.*

A judgment-debtor, who does not voluntarily satisfy a decree, does not commit an actionable wrong for which the decree-holder can recover compensation by a separate suit.

Where, therefore, the defendant, who was under an obligation under the terms of a compromise decree to endorse certain promissory notes in plaintiff's favour, failed to do so, with the result that the promissory notes became barred:

Held, that plaintiff's remedy was to proceed in execution under Order XXI, rule 32 or rule 34, and not to seek compensation by a separate suit. **M** MUTHU KARAU VENA ALAGAPPA CHETTIAR *v.* KANAKABAI PILLAI, (1918) M. W. N. 333; 7 L. W. 563; 24 M. L. T. 34 **689**

——— **O. XXI, r. 34** **689**

——— **O. XXI, r. 35 (1)**—*Execution—Application for actual possession, maintainability of, after dismissal of execution case granting formal possession—Partition suit.*

A decree-holder in a partition suit, who has been given formal possession of the portion of the properties allotted to him in an execution case which was dismissed after the delivery of the formal possession, can maintain a fresh application in execution for actual possession of the property under sub-rule 1 of rule 35 of Order XXI, Civil Procedure Code. **C** KHETRA MOHAN KUNDU *v.* JOGENDRA CHANDRA KUNDU **7**

——— **O. XXI, r. 57**—*Attachment in execution—Sale proclamation, improper statement of value in—Sale set aside—Attachment, whether revives.*

Where a sale is set aside for any reason other than default on the part of the decree-holder, the attachment, which has been obtained prior to the first sale being set aside, revives to support a second or subsequent application for execution and no fresh attachment is necessary. In other words, once an attachment is properly and legally obtained and the property attached is put to sale and the sale is afterwards set aside, the antecedent attachment revives and by reason of its revival supports a second application for leave to issue execution, unless the ground upon which the sale was set aside was default on the part of the decree-holder.

Obiter dictum.—When the parties are seriously at issue with regard to the valuation of the property offered for sale, it is the duty of the Court to go into the matter and determine the value in a judicial manner. **Pat** MAHABARAT DUTTA *v.* SURJA KANTA, 3 P. L. J. 310 **589**

——— **O. XXI, r. 63** **494**

——— **O. XXI, r. 63**—*Execution—Attachment—Claim.*

Under Order XXI, rule 63, Civil Procedure Code, the burden is on the plaintiff to establish his claim. **M** RAMA SHENOI *v.* HALLAGNA, 34 M. L. J. 295; 41 M. 705 **703**

——— **O. XXI, r. 89** **782**

——— **O. XXI, rr. 89, 90, 91, 92** **46**

——— **O. XXI, rr. 89, 92**—*Sale in execution, setting aside of—Deposit by judgment-debtor in treasury, whether deposit in Court—'Court', meaning of.*

The deposit under Order XXI, rule 89, of the Civil Procedure Code of the purchase-money *plus* 5 per cent. compensation to the auction-purchaser, is an indulgence to the judgment-debtor. The auction-purchaser is entitled to the benefit of his purchase, unless the rule is strictly and completely complied with. Whether or not the section has been completely complied with, is a question which the Court has jurisdiction to decide and if in the exercise of such jurisdiction, it comes to an erroneous conclusion, the High Court is not entitled to interfere with its order in revision

A judgment-debtor deposited the sum necessary for getting a sale set aside under Order XXI, rule 89, in the treasury owing to the Civil Court being closed on that day. On the re-opening of the Court he applied under the above rule, stating that he had already deposited the money in the treasury. The Court refused to set aside the sale on the ground that the deposit had not been made in the Civil Court:

Held, that as the word 'Court' in Order XXI, rule 89, means Civil Court, the Court had jurisdiction to decide whether the deposit had been made in Court and that the order of the Court, even if it was erroneous, could not be interfered with in revision.

The Code gives a right of appeal to an auction-purchaser against an order setting aside a sale, as he is the party mainly affected by the order. **A** FAZAL RAB *v.* MANZUR AHMAD, 16 A. L. J. 433 **773**

—— **O. XXI, r. 90** **46**

——— **O. XXI, r. 90**—*Execution—Sale—Irregularity, effect of—Sale, whether can be set aside.*

An execution sale cannot be set aside on the ground of irregularity under Order XXI, rule 90, Civil Procedure Code, if there is nothing to warrant the necessary or at least reasonable inference, that the

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inadequacy of price was the result of the irregularity.
C TAIMUDDI BEPARI *v.* SHEIKH LAKPAT BEPARI **212**
——— **O. XXI, r. 91** **46**
——— **O. XXI, r. 92** **46, 773**
——— **O. XXI, r. 93**—*Auction-purchaser, remedy of, for recovery of purchase-money, on failure of suit for possession—Suit for possession under Act XIV of 1882, dismissal of, after repeal of Act, effect of—Suit for purchase-money, maintainability of—Interest, rate of, proper.*

A Court-sale purchaser, whose suit for possession of the property put up for sale has failed, is not entitled to recover the purchase-money by suit, but can do so only by petition under Order XXI, rule 93, Civil Procedure Code.

Where, however, the suit for possession was instituted while Act XIV of 1882 was in force and was dismissed after its repeal by Act V of 1908, the plaintiff's right to re-payment of his purchase-money must be deemed to have accrued to him before the change in the law and the right having been preserved to him under the new enactment, a suit to enforce that right is maintainable.

The right dates from the purchase of the property and is primarily to the property, and secondarily in the alternative and contingently to re-payment, the latter branch of it becoming enforceable only on failure in respect of the former. The alternative and contingent right is preserved to the purchaser under section 6 (c) of Act X of 1897.

A new rule of limitation must be read subject to an implied exception in cases where its provisions would absolutely destroy the right of suit which was in existence when that rule came into force.

In a suit for recovery, by a Court-sale purchaser, of the purchase-money, the Court should not award a higher rate of interest than six per cent. up to date of suit. **M** TIRUMALAISAMI NAIDU *v.* SUBRAMANIAM CHETTIAR, 40 M 1009 **109**
——— **O. XXI, r. 96** **608**
——— **O. XXI, r. 96**—*Formal possession, effect of, against stranger to decree.*

Formal possession, the nature of which is described in Order XXI, rule 96, of the Civil Procedure Code, is no possession at all against any party whose rights are not affected by the decree. **O** TASADDUQ HUSAIN *v.* ASGHAR HUSAIN, 21 O. C. 70 **606**
——— **O. XXI, rr. 100, 101**—*Dispossession from immoveable property - Application for restoration of possession, dismissal of, for applicant's failure to produce evidence - Order, whether under r. 101—Suit, regular, brought more than one year after date of order, whether barred.*

The defendants obtained possession of the fields in suit in execution of a decree for foreclosure. Plaintiff's predecessors applied to the executing Court complaining of their dispossession by the defendants and asking to be restored to possession. The application was dismissed as applicants failed to produce or summon witnesses. More than one year after they instituted a regular suit for possession:

Held, that no order had been passed under Order XXI, rule 101, of the Civil Procedure Code which would be conclusive in the absence of a suit instituted within the period allowed by Article 11 (*a*) of the Limitation Act.

However short and summary the investigation may be, an order under rule 101 of Order XXI of the Civil Procedure Code must be based upon the merits of the application, that is, an opinion on such facts as are before the Court as to whether the applicant was in possession or not. A mere dismissal in default or for non-prosecution is not an order under rule 101.

The test as to whether an order has properly been passed under rule 101, Order XXI, is whether there was an investigation and the order was passed as the result of the investigation. **N** BHIMRAO PATEL *v.* MARTAND, 14 N. L. R. 66 **102**
——— **O. XXII, r. 3 (2)** **963**
——— **O. XXII, r. 4** **959**
——— **O. XXII, rr. 4, 9**—*Appeal—Death of respondent—Legal representative not brought on record—Abatement of appeal—Application to set aside abatement—Sufficient cause—Ignorance of appellant.*

It is the duty of a person who is prosecuting an appeal to keep himself informed of the existence of his adversary, and unless special reasons are shown why this duty has not been performed, an application to set aside an abatement of the appeal by reason of the legal representative of a deceased respondent not having been brought upon the record within the period of limitation allowed for that purpose should not be entertained.

A mere plea of the ignorance of the appellant that a respondent had died is not a sufficient cause for setting aside an order of abatement under Order XXII, rule 9 of the Civil Procedure Code.

In cases of this kind the question of sufficient cause should be determined with reference to the facts of each case. **O** MOHAMAD ASKARI *v.* LALU, 21 O. C. 68 **594**
——— **O. XXII, r. 6** **21**
——— **O. XXII, r. 9** **594**
——— **O. XXIII, r. 1** **969**
——— **O. XXIII, r. 1**—*Withdrawal of suit, leave for—Judgment, statement in, concerning point not raised, desirability of.*

A suit brought to recover a *jote* on the footing that it was a *kaemi jote* was dismissed by the trial Court as well as by the Appellate Court on the ground that the *jote* was not *kaemi*. The question whether the plaintiffs had acquired an occupancy right was left open by the trial Court but the Appellate Court, while affirming the decision of the trial Court, stated in its judgment that if the question of occupancy right had been before it the plaintiff's suit would be barred by limitation:

Held, that the question of limitation as well as of the right of occupancy should be left open, as the plaintiffs might be prejudiced by the statement in the judgment of the lower Appellate Court in case they brought a suit to enforce the right of occupancy.

Held, also, that the plaintiffs could not be allowed to withdraw the suit with liberty to bring a fresh suit. **C** AMBIKA CHARAN CHAKRAVARTY *v.* SARAT CHANDRA BASU **913**
——— **O. XXIII, r. 1**—*Withdrawal of suit with liberty to bring fresh suit, application for—Defect curable by amendment of pleadings—Leave, whether should be granted.*

An application for leave to withdraw a suit with liberty to bring a fresh suit under Order XXIII, rule 1,

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of the Civil Procedure Code should not be granted if the defect on the basis of which the leave to withdraw is asked for can be cured by amendment of the pleadings. **O** RAMESHWAR BAKHSH SINGH *v.* RASUL BEG, 21 O. C. 66 **603**

——— **O. XXIII, r. 3** **230**

——— **O. XXIV, r. 2** **638**

——— **O. XXX, r. 3** **932**

——— **O. XXX, r. 9,** *applicability of—Partnership—Suit by one partner against another or between firms having common partners for recovery of monies due on accounts, maintainability of.*

No suit lies as between partners or between firms having common partners for recovery of monies without asking for accounts.

Order XXX, rule 9, Civil Procedure Code, contemplates the possibility of suits between a firm and one or more of the partners therein and suits between firms having one or more partners in common, but it does not profess to lay down when and under what circumstances such suits would be entertained and it is not within the scope of the Civil Procedure Code to lay down any such proposition. **M** LAKSHMANAN CHETTY *v.* NAGAPPA CHETTY, 34 M. L. J. 403 **86**

——— **O. XXXII, r. 3 (4)**—*Minor—Guardian ad litem, appointment of—Notice, service of, on natural guardian—Fraud—Negligence of guardian ad litem, effect of—Decree set aside on ground of fraud, effect of.*

Order XXXII, rule 3, clause 4, of the Civil Procedure Code, requires that a notice for the appointment of a guardian *ad litem* should be served upon the natural guardian of the minor.

Where a guardian *ad litem* of a minor defendant is guilty of negligence and no attempt is made by him to protect the interests of the minor in the suit, the decree obtained in the suit will not bind the minor.

Where a decree which cannot be split up is set aside on the ground of fraud at the instance of one of several judgment-debtors, the entire decree must be set aside. **Pat** BHAIRO PRASAD SAHU *v.* RAM CHANDRA PRASAD, 4 P. L. W. 373 **253**

——— **O. XXXIII, rr. 1, 3, 5**—*Companies, right of, to sue in forma pauperis—'Person', meaning of—Explanation to rule, scope of—Liquidator of Company, right of, to appear for Company, though personally not a pauper—Commission, payment of, to liquidator, whether disqualification.*

Order XXXIII of the Civil Procedure Code applies to suits by Companies and Nidhis and the latter can take advantage of its provisions if they are paupers.

The word 'person' in the Order has the same meaning as in the General Clauses Act unless there is something repugnant in the subject or context and includes any Company or Association or body of individuals, whether incorporated or not.

The explanation to rule 1 of the Order simply allows deduction of the value of wearing apparel where the applicant has such apparel. It cannot be construed to mean that only persons who, in law, can possess wearing apparel, can sue as paupers.

Under rule 3 of the Order, the liquidator can fulfil all the obligations of a pauper petitioner required under the Order and can appear for the Company and present the petition in person.

The real question for the purpose of Order XXXIII being who is the *actual* plaintiff and whether he is a pauper within the meaning of the explanation to rule 1 of the Order, a liquidator can act for a pauper Company though he is not personally a pauper.

The payment of commission to the liquidator does not make him a person interested in the subject-matter of the suit within the meaning of Order XXXIII, rule 5, Civil Procedure Code. The provision only applies to agreements between a pauper and a third person with reference to the subject-matter of the suit. **M** PERUMAL KOUNDAN *v.* VENKATASAMI NAYUDU, 31 M. L. J. 421; 41 M. 624 **164**

——— **O. XXXIII, rr. 3, 5** **164**

——— **O. XXXIII, r. 5 (d),** *scope of—Pauperism, enquiry into—Jurisdiction to determine doubtful questions of law—Limitation, decision on question of, legality of.*

Order XXXIII, rule 5 (*d*), Civil Procedure Code, applies only to cases where the allegations of the petitioner do not show a cause of action and it precludes an elaborate enquiry into doubtful and complicated questions of law during the enquiry into pauperism.

A question of limitation cannot be determined at the stage contemplated by Order XXXIII, rule 5, especially if its decision depends on the taking of evidence. **M** GOVINDASAMI PILLAI *v.* MUNICIPAL COUNCIL, KUMBAKONAM, 34 M. L. J. 399; 41 M. 620 **95**

——— **O. XXXIV, r. 1**—*Redemption suit—Suit withdrawn as against one of several mortgagees—Maintainability of suit.*

Where in a redemption suit the plaintiff withdraws his claim as against one of the mortgagees, the suit should be dismissed for non-joinder of necessary parties. **Pat** DHURI PATAK *v.* TIMAL SINGH, 4 P. L. W. 391 **650**

——— **O. XXXIV, r. 5 (2)** **76**

——— **O. XXXIV, r. 5, sub-r. 2** **657**

——— **O. XXXVIII, r. 5, Appendix F, Form 6, Sch. II, para. 16**—*Surety bond for property sought to be attached before judgment—Suit referred to arbitration—Decree in terms of award—Surety, liability of.*

When a suit is referred to arbitration and the Court pronounces judgment for the amount of the award, the amount is "adjudged" by the Court.

A surety gave security under Order XXXVIII, rule 5 of the Civil Procedure Code for the value of the property sought to be attached before judgment. The suit was referred to arbitration and a decree having been made in the terms of the award, it was sought to be executed against the surety:

Held, that the reference to arbitration was an ordinary incident in the suit and the amount awarded was in a judgment against the defendant and was one for which the surety was liable. **S** UMERMAL JANIMAL *v.* FIRM OF BHOJRAJ-HASSOMAL, 11 S. L. R. 122 **429**

——— **O. XL, r. 1**—*Mortgage decree—Execution—Receiver, appointment of—Objection by person not party to suit, rejection of—Appeal, whether lies—Revision—High Court, power of interference of.*

A Receiver was appointed in execution of a mortgage decree. The petitioner who was not a party to the suit objected to the Receiver taking possession of the property on the ground that his father had taken a lease of the property and that he was entitled to retain possession, because although the lease was subsequent to the mortgage, yet he had paid off debts and other charges prior to the decree in the suit under which the sale had been held, and that he was entitled to retain possession of the property as holder of prior charges. The objection was overruled, on the ground that the lease had no existence in the eye of the law having been made during the pendency of the mortgage suit. The objector appealed to the High Court and also filed an application for revision:

Held, that the objector, not having been a party to the suit, had no right of appeal to the High Court.

Held, in revision, however, that the lower Court's order overruling the objection, must be set aside, (*a*) because the objector not being a party to the execution proceedings was not bound by the order appointing the Receiver and the lower Court had, therefore, no jurisdiction to overrule his objection unless it was satisfied that the claim was not made *bona fide* or was made really on behalf of one of the parties to the case, and (*b*) because the lower Court had not dealt at all with the claim that the objector was entitled to a prior charge. **Pat** INDERDEO NARAIN SINGH *v.* GOURI SHANKER, (1918) PAT. 138; 4 P. L. W. 414 **177**

——— **O. XL, r. 1**—*Receiver, appointment of, principles followed in—'Just and convenient', effect of the substitution of the words, in new Code—Discretion of Court in appointing Receiver—Appellate Court, interference by.*

The intention of the Legislature in substituting the words "just and convenient" in place of the phrase "necessary for the realization, preservation, or better custody or management, of any property moveable or immoveable the subject of a suit or attachment," in Order XL, rule 1, of the new Civil Procedure Code, was to bring the law in India into conformity with that in England.

The power of appointing a Receiver should be exercised in India in accordance with principles already settled by the Court of Chancery in England, subject to such modifications as conditions peculiar to India may suggest.

These principles are the preservation of the estate pending litigation on a consideration of the merits of the conflicting titles, the risk to the tenants and other circumstances of the case. The Court, however, is always reluctant to dispossess a party in actual possession under a *prima facie* title.

An order directing a Receiver to manage a partnership business where all the partners are not parties to the suit is *ultra vires*.

A Court of Appeal, though slow to interfere with the discretion of the lower Court in the appointment of a Receiver, would interfere if satisfied that that discretion has not been exercised in accordance with settled principles of law.

It would be mischievous to appoint a Receiver as a matter of course without regard to the principles governing such appointments.

The appointment of a Receiver is unnecessary where there is no allegation of any act of waste or mismanagement but on the contrary there are partners in the estate other than the litigating parties who are interested in seeing that the property is kept safe and regular accounts are kept of the business. **S** MIKANBAI *v.* DASSIMAL GANGARAM, 11 S. L. R. 115 **224**

——— **O. XLI, rr. 5, 6**—*Appeal—Stay of execution, application for, pending disposal of appeal—Stay of sale—Powers of Appellate Court—Jurisdiction.*

An Appellate Court has power, on an original petition presented to it, to direct stay of sale of immoveable property in execution of the decree under appeal before it. The inherent powers of the Appellate Court recognised by Order XLI, rule 5, Civil Procedure Code, are not cut down or limited by the special and exceptional power conferred on the executing Court by Order XLI, rule 6. **M** LAKSHMANAN CHETTY *v.* PALANIAPPA CHETTY, 34 M. L. J. 470; 7 L. W. 612; 24 M. L. T. 18, (1918) M. W. N. 502 **30**

——— **O. XLI, r. 22**—*Cross-objections, failure to file—Respondent, right of, to support decree*

A party who is content to accept the lower Court's decision can resist an appeal from that decision on the ground that the decree errs in favour of the appellant. In such a case the respondent, not having appealed nor filed cross-objections, cannot ask that the decree should be altered in his favour, but he is entitled to urge that if he can show that the decree errs in favour of the appellant it should not be disturbed. **P** MOHAMMAD ALI *v.* PARMANAND, 48 P. W. R. 1918 **232**

——— **O. XLI, r. 23** **290, 552**

——— **O. XLI, rr. 23, 27**—*Appellate Court, power of—Lower Court refusing to record evidence—Remand, order of, validity of—Procedure.*

Where an Appellate Court considers that certain evidence refused to be recorded by the lower Court ought to have been recorded, it has no power to remand the suit for re-hearing *ab initio* under Order XLI, rule 23, Civil Procedure Code, but can direct any additional evidence to be recorded, under Order XLI, rule 27. **O** FIDA ABBAS *v.* RAHIM BAKHSH, 5 O. L. J. 139 **832**

——— **O. XLI, r. 27** **832**

——— **O. XLIII, r. 1 (a)** **471**

——— **O. XLIII, r. 1 (d)** **690**

——— **O. XLIII, r. 1 (j)** **701**

——— **O. XLIV, r. 1**—*Appeal* in forma pauperis—*Application rejected—Applicant, whether entitled to pay Court-fee on appeal.*

An application under Order XLIV, rule 1, of the Civil Procedure Code, asking for leave to appeal *in forma pauperis* was rejected under the proviso to the rule. The applicant then filed a petition praying that he might be permitted to pay Court-fees on his memorandum of appeal. The petition was rejected on the ground that the appeal had already been dismissed:

Held, (1) that what was rejected under the proviso to Order XLIV, rule 1, was the application for permission to appeal *in forma pauperis*, and that the memorandum of appeal was still before the Court;

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(2) that the Court refused to exercise its jurisdiction in not allowing the Court-fees to be paid on the memorandum of appeal. **A** MUHAMMAD FARZAND ALI *v.* RAHAT ALI, 16 A. L. J. 309 **29**

——— O. XLV, r. 4 **551**

——— O. XLVII, r. 2 **13**

——— Appendix F, Form 6 **429**

——— Sch. II, paras. 1, 3 **321**

——— ——— paras. 14, 15—*Arbitration —Award by some out of several arbitrators, validity of.*

The parties to a dispute referred it to six arbitrators agreeing that the verdict should be, if necessary, the verdict of the majority. The arbitrators recorded the evidence of the parties, but no decision was arrived at. Thereupon two of the arbitrators withdrew, and the remaining arbitrators, after notice to the defendants but in their absence, recorded afresh the evidence offered by the plaintiffs and gave an award:

Held, that the award, being based upon fresh proceedings and fresh evidence taken by four out of six arbitrators, was invalid and illegal. **A** KALI CHARAN PANDE *v.* GUPT NATH MISRA, 16 A. L. J. 307 **34**

——— ——— ——— paras. 14, 15, 21—*Arbitration, reference to, out of Court—Revocation of submission by guardian of minor—Award binding minor, validity of—Absence of guardian in proceedings before arbitrators, effect of—Arbitrators, duty of —Misconduct.*

The principles of Order XXXII, rule 11, Civil Procedure Code, apply to references to arbitration made out of Court.

Where the guardian of a minor, on whose behalf a reference was made to arbitration, has been grossly negligent or has acted fraudulently in conducting the proceedings before the arbitrators, it is open to the minor to impeach the award by a suit instituted through a guardian or when he attains majority.

The Court may also refuse to file the award on objection taken on behalf of the minor.

Where a reference on behalf of the minor is revoked by the guardian and the arbitrators nevertheless proceed with the reference, it is the duty of the guardian to watch the proceedings on the minor's behalf, and any award passed binding the minor without his being duly represented is liable to be vacated at his instance. It is the duty of the arbitrators to see that the minor is properly represented.

Per *Abdur Rahim, J.*—An award cannot be said to be *ipso facto* invalid because it is not shown to be advantageous or beneficial to the minor.

An award that is invalid under the law governing minors, as where it is passed on a reference out of Court without the minor being duly represented, comes within the expression 'or otherwise invalid' in paragraph 15 (*c*) of Schedule II, Civil Procedure Code, and the Court can, for that reason, set aside the award.

There is no distinction between void and voidable awards so far as paragraph 15 of Schedule II, Civil Procedure Code, is concerned. The rule itself states the circumstances under which an award becomes void in cases dealt with in paragraph 14, suggesting that awards which can be set aside under rule 15 are not to be treated as void awards.

The words 'or otherwise invalid' in paragraph 15 (*c*) of Schedule II, Civil Procedure Code, are not *ejusdem generis* with the other cases mentioned in the clause, but are meant to include all cases of invalidity on grounds other than those mentioned.

Per *Oldfield, J.*—Under paragraph 21 (1), Schedule II, Civil Procedure Code, the Court must be satisfied that the matter has been referred to arbitration and must, therefore, enquire into the validity of the reference. In such enquiry the question of benefit to the minor can be raised.

An award passed on a reference out of Court binding a minor who was not in fact represented in proceedings before the arbitrators, should be set aside under paragraph 15 (1) of the Schedule as for the arbitrator's misconduct.

An arbitrator fails in his duty and is guilty of misconduct if he does not secure for each party an opportunity to present his case, and he should even go beyond strict legal requirements to do so.

An arbitrator should refrain from passing an award, so long as he is deprived of the power to pass a just one, and should either adjourn the proceedings in case a change in the representation of the minor is probable, or, if one is not probable either generally or within the time, if any, fixed for the award he should refuse to act. **M** LAKSHMINARAYANA TANTRI *v.* RAMACHANDRA TANTRI, 24 M. L. J. 71; 23 M. L. T. 89 **763**

——— Sch. II, para. 14 (c), *scope of—Arbitration, reference to—Award, erroneous view of law in—Court, whether can set aside award—Reference as to right to succession of Hindu alleged to be congenitally blind—Award giving life-interest, legality of.*

An award cannot be set aside under clause (*c*) of paragraph 14 of Schedule II, Civil Procedure Code, on the ground that the arbitrators have given an erroneous decision on a point of law.

Clause (*c*) of paragraph 14, of Schedule II, Civil Procedure Code, should be confined to cases like those where the arbitrator perversely and manifestly misapplies a rule of succession or applies to the parties a rule by which they are not bound. Where the arbitrator has applied his mind honestly and has arrived at a decision to the best of his ability, the fact that the Judge might take a different view is not a ground for holding that the award is illegal on its face.

Where a reference was made to arbitrators as to the right of inheritance of the plaintiff who was alleged by defendants to be congenitally blind, and the arbitrators awarded to plaintiff a life-interest in a fourth share in the properties subject to its becoming an absolute interest in case the plaintiff married:

Held, that the award was not liable to be set aside under paragraph 14 (*c*) of Schedule II, Civil Procedure Code. **M** MADEPALLI VENKATASAMI *v.* MADEPALLI SUBAMMA, 34 M. L. J. 323; 24 M. L. T. 60 **644**

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——— **Sch. II, para. 16** 429

——— ——— **paras. 17, 20, 21,** *scope and applicability of—Application to file award made before delivery of award—Order, whether appealable—Material irregularity in proceedings of arbitrators—Revision.*

Paragraph 20 of Schedule II of the Civil Procedure Code prescribes the procedure to be followed in respect of an application for filing an award which has already been made without the intervention of the Court, and does not apply to a case where up to the date of filing of the application the arbitrators have not made their award.

Where, therefore, the parties to a dispute entered into an agreement to refer it to arbitration and after the commencement of proceedings by the arbitrators but before the delivery of any award, the plaintiff made an application under paragraphs 17, 20 and 21 of the Second Schedule to the Civil Procedure Code, whereupon the Court made an order directing the award to be filed in Court:

Held, that the order was not one under paragraphs 20 and 21 and was not, therefore, appealable.

A revision lies against a decree based upon an arbitration award on the ground of material irregularity, but that material irregularity must have reference to the proceedings of the lower Court and not to those of the arbitrators. **P** ALLAH DIN *v.* BADSHAH BEGAM, 90 P. W. R. 1918 647

——— ——— **paras. 20, 21** 647

——— ——— **para. 20**—*Arbitration—Dispute about partition of joint property—Private reference to arbitration—Award settling shares of parties—Application to file award in Court, whether maintainable.*

An award which does not partition agricultural land but merely settles the shares of the parties therein, may be filed in Court;

Where, therefore, a dispute relating to the partition of joint property including agricultural land, was privately referred to arbitration and one of the parties applied under paragraph 20 of the second Schedule of the Civil Procedure Code for the filing of the award in Court:

Held, that inasmuch as the award did not actually partition the agricultural land, there could be no objection to the filing of the award. **P** JOVIND LAL *v.* MUNI LAL, 81 P. W. R. 1918 166

——— ——— **para. 21** 647, 763

——— **Sch. III, para. 11**—*Sale-deed, executed but not registered—Collector, permission granted by, before registration, validity of.*

Plaintiff sued for possession of property under a sale-deed executed during the pendency of an attachment when the execution proceedings were before the Collector, who accorded his sanction to the sale after the execution but before the registration of the sale-deed:

Held, that permission having been granted while the sale was complete for want of registration, the sale was not void. **N** PARWATRAO *v.* RAMJI 240

Company — *Liquidation — Question decided by liquidating Court, whether can be re-opened by regular suit.*

The Legislature never intended that matters should be decided twice over, once by the liquidating Court and then again by the regular Courts. Therefore, a question which has once been settled by the liquidating Court, cannot be re-opened by a regular suit. **P** KISHEN DAS *v.* OFFICIAL LIQUIDATOR, DOABA BANK, LTD., 40 P. R. 1918; 60 P. W. R. 1918 84

Compromise, *whether binding on person not party to it—Execution—Sale set aside on compromise between auction-purchaser and mortgagee—Surplus sale-proceeds taken away by judgment-debtor, whether liable to be refunded by order of Court on compromise—Appeal—Revision.*

No one can be bound by a compromise to which he is not a party.

After the sale of a *raiyati* holding in execution of a rent-decree, the mortgagee of the holding, who in execution of his mortgage-decree had purchased the holding, applied to have the sale set aside under the provisions of Order XXI, rule 90 of the Civil Procedure Code, A compromise was effected between him and the auction-purchaser of the holding and was given effect to by an order of the Court which was as follows:—

"The application for setting aside the sale is granted in terms of the *solenamah* and the sale is set aside. The judgment-debtors will deposit the surplus sale-proceeds taken by them at once for payment to he petitioner":

Held, that the order relating to the refund of the surplus sale-proceeds was not binding on the judgment-debtors who were no party to the compromise and was not capable of execution as against them, that there was no jurisdiction to make the order in the first instance and there was no jurisdiction to enforce it.

Held, also, that no appeal lay to the High Court on behalf of the judgment-debtors but the matter was one for revision by the High Court. **C** ABDUL KARIM *v.* MEHERUNESSA 33

Construction of document — *Grant, deed of, interpretation of—Under-proprietary rights, whether conferred—Perpetual lease.*

Where a deed of grant, which was executed by the superior proprietors of a village and wound up with a declaration that it had been drawn up as a deed of perpetual lease, put the grantee in possession of a specified share in the village and of all rights attaching thereto; declared expressly that the grant made to him was for generation after generation, provided that the grantee as lessee was to deposit a certain amount of money per year in the Government Treasury for *malguzari* and in addition to pay the lessors another sum per year by way of *malikana*; stipulated that the grantors were to have mutation made in favour of the grantee by setting his name recorded in *khana milkiat*; and gave the lessee the powers of distraint, of suing for arrears of rents and of ejecting tenants:

Held, that the deed conferred upon the grantee rights of a perpetual lessee and not of an under-proprietor.

In construing a deed the terms of which appear to be clear enough and which purports to be nothing more than a deed of lease, it is not permissible to attribute to the lessor an intention to confer rights of transfer unless there are express words to that effect or unless such an intention is necessarily

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implied in the language of the grant. O KALKA SINGH v. SURAJ BALI LAL, 5 O. I. J. 50 208

———*Sale-deed, whether can be treated as deed of gift on failure of consideration.*

Where a deed purporting to be a deed of sale fails for want of consideration, it is not open to the Court, in the absence of any indication in the deed itself, to treat it as a deed of gift.

A deed must be construed by what appears within the four corners of the document itself and the Court cannot go outside the deed for the purpose of showing the intention of the maker. Pat CHUNILAL v. BALA BUKSH SETH, 3 P. L. W. 206; (1917) PAT. 369 330

———*Sale or mortgage - Consideration, non payment of, effect of.*

Where a document is in the form of an outright sale, the executant is precluded from showing that it is in fact a mortgage but he is entitled to show that the consideration has not been paid, and he is entitled to retain possession until the consideration is paid L B HARDUM SINGH v. MG. PO HTU 931

——— "Up to" or "Until" a certain day, meaning of 305

Contempt of Court—*High Court, power of, to punish summarily for contempt—Advertisement for demonstration against Judge, whether contempt—Apology, effect of.*

Per *Peacock, C. J.*—An advertisement published in a newspaper for a demonstration against a Judge for acts done in Court may be a contempt of Court as well as defamation, although it cannot be said that in every case a demonstration got up in order to obtain an expression of public opinion concerning the acts of a Judge would be a contempt.

If anonymous letters are sent to the press containing false statements, the press is responsible for them if the name of the author is not given up.

To say that a sentence is "cruel" may be a contempt of Court, though it would be no contempt if the remark is merely that the sentence is a severe one.

Per *Macpherson, J.*—The High Court has power to proceed by way of contempt even when the contempt is not committed in Court or during the pendency of a suit.

Per *Curiam.*—The fact of his making an apology does not entitle the person charged with contempt of Court to his discharge as a matter of right. C *In the matter of* BANKS AND FENWICK, 26 C. L. J. 401; 19 CR. L. J. 449 113

———, *what constitutes—High Court, power of, to punish contempt summarily when committed out of Court—Printer and publisher of newspaper, liability of, for contempt—Directors of limited company carrying on newspaper, liability of, for contempt—Civil and criminal contempt, distinction between—Construction of writings alleged to be contempt of Court—Secondary evidence of returns in custody of Registrar of Joint Stock Companies, whether admissible.*

Per *Sanderson, C. J, and Mookerjee, J.*— In deciding whether an article published in a newspaper is or is not a contempt of Court, the question is not whether the article in fact obstructed or interfered with the due course of justice but whether it is "calculated" to obstruct and interfere with the due course of justice.

Contempt of Court—contd.

An allegation against a litigant that he is attempting to get a Bench constituted in such a way as would in his opinion give him a favourable decision, is calculated to obstruct or interfere with the course of justice and is, therefore, a contempt.

Per *Curiam.*—The High Courts in India are superior Courts of Record. The offence of contempt of Court and the powers of the High Court to punish it are the same in India as in the superior Courts in England and the High Court has power to punish summarily a contempt of Court committed by the publication of a libel on the Court or on the Judges when the Court is not sitting.

The printer and publisher of a newspaper is liable for contempt even though he was not aware of the subject constituting such contempt.

The jurisdiction which the Court has in respect of a contempt of Court should be exercised with great care and should only be exercised when the case is beyond all reasonable doubt, and this should especially be the case when the proceedings are at the instance of the Court itself.

Per *Woodroffe, J.*—In contempt cases the Court does not seek to vindicate any personal interest of the Judges but the general administration of justice, which is a public concern. Proceedings for contempt by scandalising the Court are not obsolete.

All proceedings, whether in respect of civil or criminal contempts, are of a criminal nature when their object is to punish by fine or imprisonment. But it does not follow that the procedure in such cases is in all respects the same as in an ordinary criminal case. In fact both the offence of contempt as also the jurisdiction and procedure under which it is tried are *sui generis*. There is but one rule of evidence which in India applies both to civil and criminal trials, and that is contained in the definition of "proved" and "disproved" in section 3 of the Evidence Act.

One cannot escape either contempt or libel merely by relying upon a rumour.

It is a contempt of Court to prejudice or attempt to prejudice a litigant before it and to interfere with the course of justice.

The question whether persons in the position of directors of a company carrying on a newspaper are responsible for contemptuous articles published in the paper must depend upon the facts of each case.

Per *Mookerjee, J.*—In ascertaining the true meaning of articles published in a newspaper and alleged to be contemptuous, the obvious course to pursue is to read the offending articles as they stand and to attach to the words used their natural meaning without the assistance of a laborious commentary. The meaning and intent are to be determined by a fair interpretation of the language used and by a consideration of the general tone of the writing. Disclaimer on the part of the publisher as to intentional disrespect to the Court is not a sufficient defence when the purpose and meaning of the writing is obviously of a contrary import. No doubt if the language is fairly capable of an innocent interpretation, the Court will not read into it a sinister import. But if the intent is fairly clear, liability to punishment for contempt of Court cannot

Contempt of Court—contd.

be successfully avoided by the use of a transparent artifice.

Contempt by a speech or writing may be by scandalising the Court itself or by abusing parties to an action or by prejudicing mankind in favour of or against a party before the cause is heard.

A criminal contempt is conduct that is directed against the dignity and authority of the Court. A civil contempt, on the other hand, is failure to do something ordered to be done by a Court in a civil action for the benefit of the opposing party therein. Consequently in the case of a criminal contempt as the primary purpose is the vindication of the public authority by the punishment of an act committed against the majesty of the law the proceeding conforms as nearly as possible to proceedings in criminal cases. In the case of a civil contempt the proceeding in its initial stages at least may be deemed as instituted at the instance of a party and thus to possess a civil character. But here also refusal to obey the order of the Court may render it necessary for the Court to adopt punitive measures against the persons who have defied its authority; at that stage at least the proceedings may assume a criminal character.

A proceeding to punish for contempt has the essential qualities of a criminal proceeding, whether the proceeding is initiated primarily to vindicate the Court's authority or solely as a coercive or remedial measure to enforce the rights of the litigants or for both these purposes combined.

Supplementary evidence cannot be given so as to prejudice the position of an accused.

It cannot be held as a matter of law that the directors of a limited company which owns a newspaper are liable to be committed for contempt of Court on account of a libel published in the paper.

Per *Woodroffe and Mookerjee, JJ.*—Secondary evidence of the returns filed with and in the custody of the Registrar of Joint Stock Companies is admissible, as such returns constitute public records of private documents within the meaning of section 74 (2) of the Evidence Act.

The term "record" includes a collection of documents.

A Division Bench (Mookerjee and Cuming, JJ.) held in an appeal that the Calcutta Improvement Trust had no power under the Calcutta Improvement Act to acquire land compulsorily for the purpose of recoupment. In three other cases Greaves, J, sitting on the Original Side, decided that the Trust had such power. When the appeals from Mr. Justice Greaves were about to be heard by the High Court hearing appeals from the Original Side, the following two articles were published in the "Amrita Bazar Patrika" newspaper in its issues of the 18th and 22nd May 1917, respectively:

"There is a mischievous rumour afloat, which should be contradicted. It is stated that a vigorous attempt is being made to get up a Bench to consider the appeal on the judgment of Mr. Justice Greaves in connection with the acquisition of surplus land by the Calcutta Improvement Trust according to somebody's choice. We do not believe that it is possible for any one, far less the Chairman of the Trust, to secure a Bench after his own heart as a counterpoise to the Mookerjee and Cuming Bench. We are sure

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the interest of every ratepayer is safe in the hands of the Hon'ble Judges, and we do not think that any Official of the Trust can go so far."

"Something like consternation prevails on account of the proposed new constitution of the Appellate Bench of the Calcutta High Court before which appeals against the awards of the Improvement Trust are to be heard. It is known to the reader how this Bench was originally composed of Sir Asutosh Mookerjee and the Hon'ble Justice Cuming, and how latterly it has come to be presided over by the Hon'ble the Chief Justice and Mr. Justice Woodroffe. Rumour has it that for purposes of hearing Improvement Trust appeals the Bench is going to be strengthened by the appointment of Mr. Justice Chitty. Now what neither the public nor ourselves can understand is this special arrangement for such a Special Bench. If it is contended that two Hon'ble Judges of the highest Court in the land are not competent to decide in appeal cases in which the Improvement Trust is concerned, a contention, however, which we do not believe the Chief Justice will care to advance, why should there be a Special Bench of three and not a Full Bench of five, on which at least two Indian Judges could find seats? As a matter of fact, as landowners in Calcutta are mostly Indians, and as Indian Judges are likely to know more of conditions, practices, etc., prevailing here, it is but meet that the Appellate Bench in the present circumstances should be so composed as to associate Indian Judges with their European colleagues. The withdrawal of Sir Asutosh has given rise to rather unsavoury impressions in the public mind, since this proposed arrangement is to follow close upon the heels of his judgment in the case of *Trustees for the Improvement of Calcutta* v. *Chandra Kanta Ghosh*, (36 Ind. Cas. 749; 24 C. L. J. 246; 44 C. 219; 21 C. W. N. 8). Be that as it may, we have perfect faith in the present Chief Justice and believe that as soon as Sir Lancelot Sanderson understands the public feeling in the matter, his Lordship will either form a Full Bench or at least associate an experienced Indian Judge with himself for the hearing of Improvement Trust appeals."

Held, (1) that the articles might legitimately be read together to determine their scope and purpose, even though they were proved not to have been written by the same person;

(2) that the articles were calculated to bring the Court and the Chief Justice who was responsible for its administration into contempt, and not only to destroy confidence in the Court but also to undermine and impair its authority and that as such they constituted a contempt of Court. **C** AMRITA BAZAR PATRIKA, *In the matter of*, 21 C. W. N. 1161; 26 C. L. J. 459; 45 C. 169; 19 CR. L. J. 530 **338**

Contract Act (IX of 1872), s. 2—*'Promisee,' meaning of.*

Prima facie the word 'promisee' in section 2 of the Contract Act means, in reference to bonds, a person in whose favour the document is executed. **M** ANKALAMMA v. BELLAM CHENCHAYYA, 7 L. W. 221; 34 M. L. J. 315; 23 M. L. T. 215; 41 M. 637 **419**

——— s. 15—*Coercion—Refusal to convey equity of redemption except on certain terms.*

A mortgagee, who refuses to reconvey the mortgaged property to the mortgagor except on certain

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terms, cannot be said to be unlawfully detaining or threatening to detain any property within the meaning of section 15 of the Contract Act. **C** BENGAL STONE COMPANY, LTD. *v.* JOSEPH ISAAC JOSEPH HYAM, 27 C. L. J. 78 **738**

——— **s. 16** **101**

——— **ss. 16, 74**—*Undue influence—Penalty—Interest, high rate of, whether allowable.*

Without any evidence of undue influence exercised or unfair means adopted by the lender, a rate of interest agreed to by the borrower cannot be disallowed as being penal unless it is so high as to shock the conscience of the Court. **C** KASI NATH MITRA *v.* BHIKAN CHARAN MAITY **778**

——— **s. 23,** *applicability of, to voidable contract—C. P. Tenancy Act (XI of 1898), s. 70—Tenancy land sold as* khudkasht*—Registration contrary to law—Dispossession of vendee by landlord—Misrepresentation, damages for, suit for, maintainability of.*

Plaintiffs purchased under a registered sale-deed from the defendant 4-pies share in a village and 34·66 acres of land, which was described as his *khudkasht*. The land being the tenancy land of the defendant's predecessor-in-interest could not be transferred without the consent of the landlord, who dispossessed the plaintiff by an order of the Revenue Officer under section 71 of the Central Provinces Tenancy Act. The plaintiffs filed the present suit for compensation for breach of the covenant in the sale-deed which described the land as *khudkasht*. It was contended on behalf of the defendant that, the registration of the sale-deed being contrary to the provisions of section 70 of the Central Provinces Tenancy Act, the agreement was unlawful under section 23 of the Contract Act, as it had the effect of defeating the provisions of the law, and no damages could be claimed in respect of such an agreement:

Held, (1) that a transfer of occupancy and ordinary tenant rights being voidable and not absolutely void, it could not be held to be unlawful within the meaning of section 23 of the Contract Act;

(2) that even if the registration of the instrument was contrary to law, this did not affect the question of damages to which the plaintiffs were entitled for breach of the covenant in the sale-deed.

Where a vendor sells land as belonging to him and it turns out that his title was defective, he is liable to damages for breach of agreement, whether the vendee knows of the defect in the title or not. The vendee is entitled to rely upon the covenant contained in the deed and is not bound to exercise due diligence in discovering the facts. Mere knowledge or suspicion regarding the defect in title does not prevent an express or implied covenant from operating. It is only when there is a contract to the contrary that the implied covenant does not apply. **N** SHALIGRAM SADASHEO PANDE *v.* NARAIN **669**

——— **s. 23**—*Public policy - Agreement to serve creditor till debt paid off, whether slavery bond—Money paid under agreement against public policy, whether can be recovered.*

The plaintiff advanced a sum for marriage expenses to two brothers on their executing a bond, by which they agreed in consideration of the sum advanced that one of them should always work for the plaintiff. It was further stipulated in the bond that interest at the rate of 2½ per cent. per mensem that would accrue on the principal was not to be paid in cash but was to be liquidated by the services of the one or the other of the two brothers whom the plaintiff undertook to feed but not to clothe:

Held, that it was doubtful whether the agreement was opposed to public policy as a slavery bond as under its terms while one brother was working for the plaintiff it would be possible for the other brother to earn money elsewhere and in course of time to pay off the principal debt.

A suit is maintainable for the recovery of a sum of money actually advanced pursuant to an agreement which is opposed to public policy. **C** ANANDIRAM MANDAL *v.* GOZA KACHORI, 27 C. L. J. 459 **965**

——— **ss. 23, 24**—*Public policy—Compounding felony—Unlawful consideration—Specific performance of agreement to sell land.*

The plaintiff sued for specific performance of a contract by which the husband of the defendant agreed to convey to her certain land for a consideration of Rs 150. Annexed to the contract was a term that, in the event of a criminal prosecution for criminal breach of trust instituted by the plaintiff against the said intending vendor not being withdrawn, the contract was not to be enforced.

Held, (1) that if the concluding term of the contract had been complied with or could be complied with, then part of the consideration was void on the ground of being opposed to public policy;

(2) that if the term could not be complied with, then the whole contract became unenforceable for failure of an essential condition and that in either view the suit must be dismissed.

No one can contract on the footing of part of the consideration being the compounding of a felony. **B** BANI RAMCHANDRA SALVI *v.* JAYAWANTI GOVIND PANDIT, 20 BOM. L. R. 331 **566**

——— **s. 25** **727**

——— **s. 38** **638**

——— **s. 43,** applicability of **732**

——— **ss. 62, 63, 73**—*Contract—Novation—Debt, agreement for payment of, at new place—Cause of action—Jurisdiction—Money due on accounts—Interest, claim for, as damages, in absence of agreement, legality of.*

Plaintiff and 2nd defendant were partners. First defendant received Rs. 2,500 as an advance from 2nd defendant, promising to supply cotton at Palladam within the jurisdiction of the Tirupur Munsif's Court. As the 1st defendant failed to supply the cotton or to return the advance plaintiff and 1st defendant looked into the accounts, and 1st defendant's liability was fixed at Rs. 2,000 and it was agreed that this liability should be discharged by the 1st defendant sending cotton to Virudupatti within the jurisdiction of the Satur Munsif's Court, to be sold by the plaintiff's man who should realize the Rs. 2,000 due by 1st defendant from the sale-proceeds. Plaintiff filed a suit in the Satur District Munsif's Court on 1st defendant's default and also claimed interest by way of damages:

Held, that interest could not be claimed as compensation under section 73 of the Contract Act

Per *Sadasiva Aiyar, J.*—The new agreement to pay the amount due at Virudupatti was a novation of the original contract within the meaning of section 62 of the Contract Act and the Satur Munsif's Court had jurisdiction to try the suit.

Per *Phillips, J.*—The agreement was itself a new one and in supersession of the old one and was not a mere agreement to pay a debt at a place other than that mentioned in the original agreement and the cause of action, therefore, arose within the jurisdiction of the Court of the District Munsif of Satur.

Quære—Whether, even where the question is one affecting jurisdiction, failure of justice must be shown to justify the interference of an Appellate Court under section 21, Civil Procedure Code.

Per *Sadasiva Aiyar, J.*—A new contract changing the place of performance falls under section 62 of the Contract Act and no independent consideration is necessary to validate the same.

Per *Phillips, J.*—Where no interest is provided for in the agreement of parties and when it is not a case of damages for breach of contract, interest cannot be claimed as compensation under section 73 of the Contract Act. **M** VASUDEVA MUDALIAR *v.* VELAPPA NADAR, (1917) M. W. N. 779; 6 L. W. 717; 22 M. L. T. 512 **401**

——— **s. 70,** *scope of—Act done primarily for doer's benefit incidentally benefiting another—Irrigation channel, repair of, benefiting both repairer and third party—Contribution, claim for—Refusal of defendant to pay for repairs—Charge, enforceability as—Limitation Act (IX of 1908), Sch. I, Arts. 61, 120—Regulation XXVII of 1802, s. 32—Collection of cost of repairs by Collector, effect of.*

Section 70 of the Contract Act does not apply to cases where a person does an act for his own benefit and that act incidentally benefits his neighbour or any other person. In such cases the latter need not pay for the extent of the benefit derived by him from the act.

A person claiming contribution from another under section 70 of the Contract Act must prove that he did some act for the latter. An act cannot be described as done by one person for another, unless it can be shown that, but for the existence of that other's interest, it would not have been done.

Plaintiffs, the lessees of the Sivaganga Zemindari, executed certain necessary repairs to a tank which irrigated their lands and the defendants' lands and also the lands of other persons. Before commencing the repairs they intimated to defendants their intention to do so and called upon them to bear their rateable share of the expenses. Defendants replied that they did not want the repairs and refused to pay any portion of the expenses. The plaintiffs, however, completed the repairs, and filed the present suit for contribution against the defendants, relying on section 70 of the Contract Act. They prayed also that the amount that may be decreed to them may be made a charge on the defendants' properties:

Held, (1) that as the repairs were executed by the plaintiffs mainly for their own benefit, though the defendants were also incidentally benefited by them, the latter were not liable for a proportionate share of the expenses under section 70 of the Contract Act;

(2) that, even if defendants were liable, plaintiffs were not entitled to a charge on their property;

(3) that Article 120 and not Article 61 of the Limitation Act was applicable to the case.

Per *Oldfield, J.*—Article 61 of the Limitation Act can be applied to cases under section 70 of the Contract Act where the payment made by the plaintiff produced an immediate benefit to the defendant, as in cases of payments of Government revenue or of decree amounts, but the Article will not apply when the benefit will only arise at a subsequent stage and plaintiff's cause of action will not be complete until that subsequent stage is reached. To such cases Article 120 must be applied.

Per *Abdur Rahim, J.*—The fact that the Collector has levied some portion of the expenses for repairs from defendants by coercive process under section 32 of Regulation XXVII of 1802 will not affect their non-liability under section 70 of the Contract Act. **M** VISWANADHA VIJIA KUMARA BANGAROO *v.* R. G. ORR **786**

——— **s. 73** **401**

——— **s. 73, Illus. (a)**—*Contract for delivery of goods—Breach—Market, absence of, at place of delivery—Goods not for sale but for use—Damages, measure of.*

The measure of damages in case of breach of a contract for delivery of goods, where there is no market at the place of delivery and where the goods are not to be re-sold but are intended only for the buyer's use, is that contained in illustration (*a*) to section 73 of the Contract Act, *i. e.*, the sum by which the contract price falls short of the price for which the purchaser might have obtained goods of like quality at the time when the goods ought to have been delivered.

Per *Sadasiva Aiyar, J.*—Section 73 of the Contract Act mentions two alternatives, the latter alternative being an additional right to be availed of at the plaintiff's option.

Illustration (*a*) to the section authoritatively interprets what the Legislature meant by the phrase 'loss or damage which naturally arose in the usual course of things from a breach of the contract' in a 'no-market' case also. The language of the illustration is absolutely general and wide and it makes no exception on account of special circumstances, such as (*a*) where the party complaining of the breach could get some other substitute for the goods ordered, (*b*) where he was made a gift of the articles as substitute on the day fixed for delivery and (*c*) where there was no market at all for the goods at the place of delivery. **M** ISMAIL SAIT & SONS *v.* WILSON & Co., 23 M. L. T. 320; (1918) M. W. N. 399 **942**

——— **s. 74** **778, 901**

——— **s. 74**—*Interest, enhanced, whether penally.*

The mere fact that for certain reasons the parties to a mortgage agreed on very low interest to begin with, is no sufficient reason for holding an agreement to pay enhanced interest at a reasonable and normal rate later on to be penal. **P** MUHAMMAD ALI *v.* PARMA NAND, 48 P. W. R. 1918 **232**

——— **s. 74**—*Lease—Deposit—Forfeiture of deposit in event of breach—Interest, claim for, at 24 per cent. per annum from date of suit—Penalty.*

Under a rental agreement executed by the defend-

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ant to the plaintiff the latter deposited 6 months' rent as advance, stipulating for its forfeiture in case of breach by him of the terms of the lease. In a suit for rent due and for a declaration that the deposit had been forfeited in accordance with the defendant's undertaking under the lease and for interest at 24 per cent. per annum from date of suit;

Held (1) that section 74 of the Contract Act was not applicable to the forfeiture of deposit and that the clause for forfeiture was not a penalty;

(2) that the claim for interest at 24 per cent. per annum from date of suit was penal and should be disallowed.

In determining whether the amount stipulated to be forfeited is in the nature of a penalty, the Court must be guided by the reasonableness or unreasonableness of the amount. **M** VENKATACHARI *v.* RAMLINGA TEVAN, (1918) M. W. N. 197; 7 L. W. 404 **417**

——— **s. 133** **429**

——— **s. 176**—*Pawnee, sale by, of pawned articles—Notice, reasonable, what is.*

Section 176 of the Contract Act does not contemplate that the pawnee should give the pawnor information of the actual date, time and place of sale. The section does not mean that a sale should be arranged beforehand and that due notice of all the details should be given to the pawnor. All that the law intends is that the pawnee should give the pawnor a reasonable time within which to exercise his right of redemption and proceed to sell if the property be not redeemed.

The pawnee's right to sell is analogous to the seller's right of re-selling granted under section 107 of the Contract Act and the two rights must be exercised in more or less the same method.

A pawnee of certain articles of jewellery gave notice to the pawnor that unless the money was paid within a fortnight, the jewellery would be sold without further reference to him. The notice did not mention the actual date, time and place of the intended sale. The articles were sold but the full amount of the debt was not realized. In a suit by the pawnee for the balance, it was contended that the notice given was not a reasonable notice of sale within the meaning of section 176 of the Contract Act:

Held, that the notice given was a reasonable notice of the intended sale within the meaning of the section. **A** KUNJ BEHARI LAL *v.* BHARGAVA COMMERCIAL BANK, 16 A. L. J. 390 **462**

——— **ss. 184, 248**—*Principal and agent—Minor, whether can act as agent—Firm, liability of, for acts done by managing minor member—Minor, liability of, on attaining majority.*

Where on the application of an active minor member of a firm who did most of the business of the firm, shares in a Limited Liability Company were allotted to the firm:

Held, (1) that as a minor can act as an agent under section 184 of the Contract Act, the fact that at the time of the application the member was not *sui juris* did not vitiate the contract between the Company and the firm and that the firm was, therefore, liable on the shares;

(2) that as the minor did not give notice within reasonable time after attaining majority of his

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repudiation, he was also equally liable. **P** GOPI MAL-DURGA DAS *v.* JAIN BANK OF INDIA, LIMITED, 38 P. W. R. 1918; 17 P. L. R. 1918 **17**

——— **s. 247** **667**

——— **s. 248** **17**

——— **ss. 252, 254 (6)**—*Partnership—Dissolution, right to, how far affected by terms of partnership contract—Court, power of, to decree dissolution.*

A partner's claim to a decree for dissolution rests, in its origin, not on contract, but on his inherent right to invoke the Court's protection on equitable grounds, in spite of the terms in which the rights and obligations of the partners may have been regulated and defined by the partnership contract.

It is not, therefore, a contravention of section 252 of the Contract Act for a partner to seek dissolution, or for the Court to decree it, though the partnership agreement contemplates the continuance of the partnership beyond the date at which the suit is instituted. It is to meet the precise predicament of a partnership not terminable at will that the Court's power to decree dissolution is conferred in the events enumerated in section 254 of the Contract Act. **P C** REHMAT-UN-NISSA BEGUM *v.* PRICE, 22 C. W. N 601; 16 A. L. J. 513; 27 C. L. J. 623; 5 P. L. W. 25; 23 M. L. T. 400; 8 L. W. 53; 20 BOM. L. R. 714 **568**

——— **254 (6)** **568**

Contribution suit **236**

Co-owners—*Rent, collection of, by fractional co-owner—Payment of Government revenue—Contribution, suit for, of proportionate share of revenue payable by other co-owners—Set-off of defendant's share of collections, plea of, validity of.*

Plaintiffs owned a ⅞ths share in a *mitth*, and the defendant owned the remaining ⅛th share. Plaintiffs paid the *peishcush* and sued defendant for the share of the *peishcush* paid by them which he was bound to pay. The defendant pleaded that plaintiffs were bound to give him a fourth of the amount of rent collected and he claimed a set-off of such amount as against his share of the *peishcush*. The plaintiffs contended that the total amount collected by them did not exceed their share of the rent and that defendant was bound to meet the common charge, *viz.*, the Government revenue:

Held, that the plaintiffs should be deemed to have made the collections on behalf of all owners, each co-owner being entitled to his fraction in that amount in proportion to his share and that defendant was, therefore, entitled to the set-off claimed.

Per *Sadasiva Aiyar, J.*—Where a co-sharer expressly intends to collect rents for his own share alone and is paid by the tenants expressly for that share he must be deemed to have collected his own share and not for all the co-owners. **M** SIVANARASA REDDI *v.* DORAISAMI REDDI, 8 L. W. 91 **463**

Co-sharers—*Surrender of tenancy lands to one co-sharer—Notice by other co-sharers to vacate their shares—Suit for possession—Delay, unreasonable, effect of.*

The ordinary tenancy lands in suit were at first held by the 1st defendant as sub-tenant. After having acquired a share in the village he got a surrender from the tenants and the fields were held by him as *khudkasht*. The plaintiffs, who were co-sharers in the village, gave a notice to the 1st

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defendant calling on him to vacate their shares in the land but the notice did not contain any offer to contribute the plaintiffs' share of the cost of acquisition. The plaintiffs brought the present suit for joint or exclusive possession of their share of the fields about 2 years after the notice and nearly 4 years after the entry in the *khasra* about the surrender:

Held, (1) that there had been unreasonable delay in bringing the suit;

(2) that as the notice was of a threatening nature describing the possession of the defendant as wrongful and making no offer to contribute towards the cost of acquisition and as the defendant had been in occupation of the field as sub-tenant for many years, it was not a case in which the plaintiffs could get a decree for joint physical possession. The remedy of the plaintiffs was to have a partition effected. **N** BAPU *v.* SITTI **902**

Costs—*Court exercising discretion in arbitrary manner—Appeal, second, whether maintainable.*

Where a lower Appellate Court exercises its discretion as to the award of costs in an arbitrary manner and not according to judicial principles, a second appeal lies from its decree.

Plaintiff, a minor, sued through her brother as next friend for a declaration that she was not the lawfully wedded wife of the defendant and obtained a decree with costs, the Court holding that no valid marriage had taken place between the plaintiff and the defendant as alleged by the latter and that the plaintiff had never lived with the defendant as his wife. On appeal the District Judge, while agreeing with the lower Court on all points, held that the defendant had been badly treated as the customary separation for the abduction of his sister by plaintiff's brother had been denied to him and that therefore the plaintiff's next friend must pay the defendant's costs:

Held, that inasmuch as the defendant's allegations as to the alleged marriage had been found to be false, the District Judge's order as to costs was wholly unjustifiable and must be set aside. **P** FAZAL NUR *v.* MUHAMMAD HASSAN, 97 P. W. R. 1918 **948**

——— *Discretion, exercise of—Solicitor acting on his own behalf, costs of.*

The High Court is averse to interfere with the discretion of a Judge on the question of costs, but the discretion must be exercised judicially. The ordinary rule is that a party who succeeds upon a particular issue gets the costs of that issue, unless there is a good cause for depriving him of the costs of that issue and unless the issues in the case are so closely connected that they cannot be separated one from the other.

A solicitor, who is a party to a suit and acts on his own behalf, is entitled to the same costs as if he had employed a solicitor, except in respect of items which the fact of his acting directly renders unnecessary. **C** BENGAL STONE COMPANY, LTD. *v.* JOSEPH ISAAC JOSEPH HYAM, 27 C. L. J. 78 **738**

Court-fee payable on appeal against decree for possession and remand for ascertainment of mesne profits **100**

——— *payable when co-mortgagor sues to redeem share of mortgaged property.*

Court-fee—concld.

Where a co-mortgagor who is entitled to redeem a share of the mortgaged property sues for redemption, the Court-fee payable is to be calculated on the amount of the mortgage debt which is chargeable on the share which the plaintiff is entitled to redeem. **O** BHAIRON BAKHSH SINGH *v.* RAGHUBANSA KUNWAR, 5 O. L. J. 43 **300**

Court Fees Act (VII of 1870), s. 7 (iv) (c)—*Specific Relief Act (I of 1877), s. 39—Suit to avoid registered deed—Court-fee payable.*

A plaintiff suing for the cancellation of a document under section 39 of the Specific Relief Act is not entitled to reduce the Court-fee payable on his plaint by an assertion that the suit falls under Chapter VI of the Act.

On an adjudication under section 39 of the Specific Relief Act that a deed is void the Court is required by law, if the instrument has been registered, to send a copy of its decree to the officer in whose office the instrument has been registered, and this forwarding of the copy of the decree to the Registrar is a consequential relief upon which an *ad valorem* Court-fee must be paid. **Pat** NOOWOOAGAR OJAIN *v.* SHIDHAR JHA, 3 P. L. J. 194 **238**

——— **s. 7 (v)**—*Madras Civil Courts Act (III of 1873), s. 14.*

The proper valuation of a suit to enforce a right of pre-emption is, in accordance with section 14 of the Madras Civil Courts Act, that fixed in the manner provided by section 7 (v) of the Court Fees Act. **M** NARAYAN NAIR *v.* CHERIA KATHIRI KUTTY, 34 M. L. J. 387 **89**

——— **s. 7 (v) (a)**—*Suit for possession on basis of* mokarrari *deed—Court-fee payable—* Mokarrari *lease, whether land*

A suit for possession of immoveable property on the basis of a *mokarrari* lease is purely one for possession of immoveable property within the meaning of section 7, clause (*v*) of the Court Fees Act.

A *mokarrari* lease of a definite share in a revenue-paying estate is land within the meaning of section 7, clause 5 of the Court Fees Act. **Pat** BIBI KULSUM *v.* SYED MUHAMMAD HAMID **928**

——— **s. 13** **552**

——— **s. 19, cl. (xvii)**—*Petition of appeal by prisoner presented by his Pleader, whether requires to be stamped.*

A petition of appeal presented by a prisoner not personally but through his Pleader is exempted from Court-fees under clause (*xvii*) of section 19 of the Court Fees Act. **N** EMPEROR *v.* MAROTI TELI, 14 N. L. R. 77; 19 CR. L. J. 494 **158**

——— **Sch. I, Art. I, Sch. II, Art. 17**—*Cross-objection—Court-fee payable.*

There is no reason to assume that the words "or cross-objection" have been omitted from Article 17 of Schedule II of the Court Fees Act. Therefore, a cross-objection in a suit for a declaration must bear *ad valorem* Court-fee under Article 1, Schedule I of the Court Fees Act. **Pat** DAROGA RAUT *v.* PAREMA KUER, 3 P. L. J. 197; 4 P. L. W. 368 **568**

——— ——— **Art. I**—*Cross-objections, memorandum of—Court-fee payable.*

A memorandum of cross-objections filed by a respondent must be properly valued and bear Court-fees *ad valorem*.

Court Fees Act—contd.

A respondent who files a memorandum of cross-objections is not excused from the payment of Court-fees thereon, merely because the appellant has paid more than adequate Court-fees on the memorandum of appeal. **C** SECRETARY OF STATE *v.* DIGAMBAR NANDA, 27 C. L. J. 443 **939**

——— **Sch. II, Art. 17** **568**

——— **Sch. III, Annexure B (4)**—*Probate duty—Trusts created by Will, whether liable to duty.*

The deduction allowed under Schedule III, Annexure B, item (4), for property held in trust not beneficially, applies only to property which the testator was possessed of or entitled to not beneficially but as trustee for any other person or persons and not to trusts created by the Will of the testator. **Pat** CHANDRABATI KUAR *v.* COLLECTOR OF DARBHANGA, 2 P. L. J, 611 **578**

Criminal Procedure Code (Act V of 1898), s. 7 (2)—*Notification declaring boundary between two districts, construction of.*

A notification issued under section 7 (2), Criminal Procedure Code, declared that for the purposes of criminal jurisdiction the deep stream of a river running between two conterminous districts was to be considered the boundary between those districts:

Held, that the intention of the notification was not to define the boundary between the two districts as on the date of the notification, but to declare that until a further notification was made the boundary line between the two districts was to be the deep stream of the river as found at any particular time. **O** KAYAMUDDIN *v.* DWARKA, 5 O. L. J. 145; 19 CR. L. J. 671 **1007**

——— **s. 107 (2)**, *proceedings under, whether can be transferred by District Magistrate.*

Proceedings initiated by the District Magistrate under the special powers conferred upon him by section 107 (2), Criminal Procedure Code, need not be continued to the end in his Court but may be transferred by him to the Court of some subordinate Magistrate otherwise competent to deal with the matter. **C** RAKHAL MANDAL *v.* EMPEROR, 27 C. L. J. 314; 19 CR. L. J. 496 **160**

——— **s. 125** **397**

——— **s. 145**—*Dispute regarding right to tap tree—Jurisdiction.*

The right to tap a tree is a question which may be the subject of proceedings under section 145, Criminal Procedure Code.

Where on a Police report that there was an apprehension of a breach of the peace regarding the right to tap a tree, the Magistrate initiated proceedings under section 145 of the Criminal Procedure Code and directed that a passage may be left in a wall which was being built by the second party to enable the first party to tap the tree, the only way to cut the tree lying over the wall:

Held, that the order of the Magistrate was entirley without jurisdiction. **Pat** JIBLAL MAHTO *v.* EMPEROR, 3 P. L. J. 316 **848**

——— **s. 145**—*Rejection of material evidence—Jurisdiction, refusal to exercise—Revision.*

Ordinarily the rejection of evidence might not be accepted as a good ground for revision of an order under section 145 of the Code of Criminal Procedure, but the rejection of material evidence offered by a party would amount to a refusal to exercise jurisdiction vested in the Court by section 145. **Pat** PAITALI SINGH *v.* GANAPATI KUER, 19 CR. L. J. 529 **337**

Criminal Procedure Code—contd.

——— **s. 145, cls. (5), (6)**—*Jurisdiction of Magistrate to deal with lands not subject-matter of dispute—Order under cl. 6 in favour of persons who are not parties but who are directed to come in under cl. 5, validity of.*

In a proceeding under section 145, Criminal Procedure Code, the Magistrate has no jurisdiction to deal with land which is not in dispute between the parties and to declare the same to be in the possession of persons who are not parties to the proceedings.

In such a proceeding the Magistrate exceeds his jurisdiction if he makes an order under section 145, clause (6), in favour of persons who are not parties to the proceeding and who have not filed any written statement or taken any part in the proceedings except to address the Court through their Pleader, and who were directed by the Magistrate to come in for a limited purpose, *viz.*, under section 145 clause 5. **C** RADHAMOHAN RAI *v.* NAIMUDDI MOLLA 19 CR L.J. 653 **845**

——— **ss. 155, 164, 172**—*Police Officer investigating non-cognisable offence—Diary, whether necessary to be kept—Statements recorded under s. 164—Procedure.*

A non-cognisable case can, under section 155 of the Criminal Procedure Code, be investigated by a Police Officer only under the orders of a Magistrate of the first or second class who has power to try such case or commit the same for trial. But when such order is given and the Police Officer proceeds in accordance therewith to make an investigation, such investigation is made under Chapter XIV, which includes both sections 155 and 172.

It is incumbent upon a Police Officer, who investigates a non-cognisable case under the orders of a Magistrate, to keep the diary for which provision is made in section 172 of the Criminal Procedure Code, and the omission to keep such diary deprives the Court of the very valuable assistance which such diaries can give, if legitimately used.

The indiscriminate use of the provisions of section 164 of the Criminal Procedure Code is to be deprecated. No statement should be recorded under that section unless the person making it is a free agent and voluntarily agrees to have his statement taken down. **P** HIRA LAL *v.* EMPEROR, 18 P. W. R. 1918 CR.; 16 P. R. 1918 CR.; 19 CR. L. J. 517 **277**

——— **s. 162** **272**

——— **ss. 164, 172** **277**

——— **s. 164 (3)**—*Confession—Certificate as to voluntary confession, omission of, effect of—Admissibility of confession.*

Where a Magistrate in recording a confession refuses to make the memorandum referred to in section 164 (3), Criminal Procedure Code, on the ground that in his opinion the confession has not been voluntarily made, such confession cannot form part of any judicial record and is, therefore, inadmissible in evidence. **O** RAM SUDH *v.* EMPEROR, 5 O L. J. 70; 19 CR. L. J. 507 **267**

——— **ss. 195, 476**—*Qualifications mentioned in s. 195, whether incorporated in s. 476—Courts in the Presidency towns, power of, to act under s. 476,*

Per *Curiam* (*Fletcher, J., dubitante*).—Section 476, Criminal Procedure Code, does not apply to an offence committed before a Court in presidency towns. Consequently it is not competent to the High Court, acting under section 476, to direct the prosecution of a person for the offence of forgery or abetment of forgery brought to its notice in the course of hearing an appeal in a Probate case.

The qualifications mentioned in section 195, Criminal Procedure Code, are to be treated as incorporated in the provisions of section 476, Criminal Procedure Code. **C** *In the matter of* A VAKIL, 19 CR. L. J. 638 **686**

——— **s. 195**—*Sanction to prosecute for forgery—Document not before Court granting sanction—Delay in applying for sanction, effect of—Revision—High Court, power of interference of.*

Before granting sanction to prosecute an accused person for forgery it is desirable that the Court should examine the alleged forged document.

Inordinate and unexplained delay in making an application for sanction to prosecute is a sufficient ground for refusing the sanction.

The High Court has power to interfere with an order of a Civil Court refusing or granting sanction for prosecution under section 195, clause (6), of the Criminal Procedure Code and not only under section 115 of the Civil ProcedureCode. **Pat** KISHEN DAYAL SINGH *v.* JAGLAL MANDAL, 19 CR. L. J. 642 **834**

——— **s. 195**—*Sanction for prosecution granted by successor of Judge who heard case—Delay, effect of.*

On the application of the defendant in a Small Cause Court suit, the successor-in-office of the Judge who had decreed the suit granted, after an inordinate delay, sanction for the prosecution of the plaintiff for perjury in respect of a false statement in his deposition. This sanction was affirmed on appeal to the District Judge:

Held, that as the Court record of the deposition was not read over to the plaintiff and he was not cross-examined on the statement, and as the sanction was granted after a long delay by a Judge who did not try the case, the sanction should be revoked, especially as this sanction, if not revoked, would be used by the defendant *in terrorem* both as regards execution under the decree passed against him and as regards the suit which he had brought for setting aside that decree and which was pending.

Per *Smither, J.*—When a person wants to prosecute criminally, he must not be dilatory. **C** PREM CHAND *v.* SONATAN SAHA, 19 CR. L. J. 508 **268**

——— **s. 195**—*Sanction for prosecution for perjury—Appellate Court, power of, to accord sanction as for offence committed before it—'In relation to any proceeding in any Court', meaning of—Sub-Magistrate, Court of, whether 'subordinate' to Court of Joint Magistrate.*

A Sub-Magistrate is 'subordinate' to the District Magistrate within the meaning of section 195, Criminal Procedure Code, and is not subordinate to a Joint Magistrate who hears appeals from orders of Sub-Magistrates only in such cases as are made over to him by the District Magistrate.

An Appellate Court cannot accord sanction for prosecution of a person for false statements made in his deposition before the Trial Court on the ground that the offence of perjury was again committed before the Appellate Court with reference to that very deposition. The offence is complete when the evidence is given and it cannot be said to be repeated afterwards because there is an appeal.

The words 'in relation to any proceeding in any Court' have reference to the original trial of the suit or the criminal case. **M** KOMPELLA ANANTARAMAYYA *v.* CHIKKATLA TUKKADU, 34 M. L. J. 404; (1918) M. W. N. 280; 23 M. L. T. 285; 7 L. W. 533; 19 CR. L. J. 483 **147**

——— **s. 195 (7)** **679**

——— **ss. 202, 203, 204**—*Process, issue of, postponed—Reasons, recording of—Accused allowed to appear and cross-examine prosecution witnesses before issue of process, legality of—Procedure, error of, whether vitiates proceeding—Revision—High Court, power of.*

It is imperative for a Magistrate to give reasons under section 202 of the Criminal Procedure Code before postponing the issue of process against the accused.

It is not right for a Court in a judicial enquiry before process has been issued against the accused to allow the latter to attend at the preliminary enquiry and cross-examine the prosecution witnesses.

An error of procedure does not vitiate a proceeding or an order passed therein, unless it occasions a failure of justice. **Pat** MUSHARI RAM MANHARI *v.* RAJ KISHORE LAL, 4 P. L. W. 307; 19 CR. L. J. 527 **287**

——— **s. 221** **847**

——— **ss. 223, 224, 230, 233, 234** **993**

——— **ss. 233, 235, 537**—*Joinder of charges—Police Officer preparing incorrect record consisting of several documents—Separate charge in respect of each document, whether necessary—Irregularity.*

Accused, a Police Inspector, was charged in one trial with having prepared certain documents incorrectly in order to screen one *H.* and to save him from legal punishment. He was convicted of an offence under section 218 of the Penal Code. The documents set forth in the charge were a *ruqqa* addressed to the officer in charge of the Police station, a first information report based upon the *ruqqa*, seven Police diaries relating to the investigation held in the case and the final report to the Magistrate:

Held, (1) that the various documents formed part of one continuous whole, the same purpose, namely, the saving of *H.* from legal punishment, running through them all, and that, therefore, the offences having been committed in the same transaction they could all be tried in the same trial under section 235 of the Criminal Procedure Code;

(2) that the documents in question together comprised the Police record of an investigation into a charge and that the accused being charged with having prepared an incorrect Police record, there was nothing defective in framing a single charge in respect of all the documents;

(3) that even if it were held that the accused should have been charged with separate offences in regard to each document, the trial was not illegal merely because one charge was framed in regard to all the documents, the irregularity being covered by

Criminal Procedure Code—contd.

section 537 of the Criminal Procedure Code. **P** EMPEROR *v.* MUHAMMAD HUSSAIN, 12 P. R. 1918 CR.; 19 CR. L. J. 510; 23 P. W. R. 1918 **270**

——— **s. 235** **270**

——— **ss. 247, 259.**

On the day fixed for the hearing of a complaint under sections 352 and 504, Indian Penal Code, the complainant was absent and the Magistrate passed the following order: 'Complainant absent. Accused discharged':

Held, that as there was only one case before the Court, the Magistrate must be deemed to have acted under section 259, Criminal Procedure Code, and that the order did not operate as an acquittal of the accused even in respect of the offence under section 352, Indian Penal Code. **M** RAGHUVALU NAICKER *v.* SINGARAM, 34 M. L. J. 369; 7 L. W. 520; 19 CR. L. J. 613 **517**

——— **ss. 247, 403**—*Acquittal of accused on default of prosecution—Fresh complaint, whether barred*—Autrefois acquit, *plea of, when available.*

A judgment of acquittal following on complainant's default of prosecution under section 247, Criminal Procedure Code, does not entitle the person acquitted to plead *autrefois acquit* on a fresh prosecution on the same facts and section 403 does not operate as a bar to the Court taking cognizance of a second complaint.

The word 'tried' in the early part of section 403 (1) should not be treated as surplusage, and the section does not apply to a case where even the particulars of the offence were not stated to the accused under section 242. **M** BEZWADA KOTAYYA *v.* KONATHALAPALLI VENKAYYA, 40 M. 977 (*foot-note*); 19 CR. L. J. 497 **257**

——— **ss. 247, 403, 494**—*Withdrawal from prosecution before service of summons, effect of—Acquittal of accused, whether operates as bar to further proceedings*—Autrefois acquit, *plea of.*

The statutory acquittal under section 494 of the Criminal Procedure Code in a summons-case operates as a bar to further proceedings on the same facts.

The provisions of section 403 clearly imply that every order of acquittal, so long as it is in force, is a bar to further proceedings except in the circumstances specified in the section itself, and the words in sub-section (1) do not affect an order of acquittal under section 494 or section 247 of the Criminal Procedure Code.

The Police filed a charge-sheet under section 447 of the Penal Code against a person before a Magistrate with second class powers, whereupon a summons was issued but before it was served the Public Prosecutor, with the consent of the Court, withdrew from the prosecution under section 494 of the Criminal Procedure Code and the accused was acquitted as required by that section. Thereafter the person on whose field the offence of criminal trespass was alleged to have been committed, preferred upon the same facts a complaint charging the accused with offences under sections 143, 447 and 341 of the Penal Code. The accused was convicted and sentenced separately for each of the offences:

Held, (*Napier, J.* dissenting) that the previous order of acquittal operated as a bar to further proceedings and that the conviction was, therefore, bad in law and must be set aside.

Per *Napier, J.*—Section 403 of the Criminal Procedure Code is intended to reproduce what is the law in England, namely, the plea of *autrefois acquit*, but in order to plead *autrefois acquit* successfully in India, the accused must have been put in peril either before the Jury or the Magistrate. **M** DUDEKULA LAL SAHIB, *In re*, 33 M. L. J. 121; 22 M. L. T. 69; 6 L. W. 175; 40 M. 976; 19 CR. L. J. 501 **261**

——— **s. 250**—*Compensation to accused—Charges under different sections—Acquittal on some and conviction on others, effect of.*

Section 250 of the Criminal Procedure Code speaks of "the case" as a whole and contemplates a trial or inquiry ending in the unqualified acquittal or discharge of the accused. A complainant who, having a genuine grievance, wilfully exaggerates or distorts the same in order to aggravate the case against the accused is liable, in the discretion of the trial Court, to be prosecuted for any offence against the Indian Penal Code which he may have committed, but the policy of the Legislature seems to be to limit the summary jurisdiction of the Court under section 250 of the Criminal Procedure Code to simple cases, in which the complainant is found to have been wholly in the wrong.

Complainant charged accused under sections 500 and 506 of the Penal Code. The accused was convicted on the former and acquitted on the latter charge and the complainant was ordered to pay compensation to the accused, on the ground that the charge of criminal intimidation was frivolous or vexatious:

Held, that the provisions of section 250 of the Criminal Procedure Code did not apply to such a state of facts, unless the accused was discharged or acquitted altogether. **A** MUHAMMAD ALI KHAN *v.* RAJA RAM SINGH, 16 A. L. J. 499; 19 CR. L. J. 670 **1006**

——— **s. 259** **517**

——— **s. 260** **113**

——— **ss. 297, 298, 299**—*Misdirection to Jury, whether ground for setting aside verdict—Functions of Judge and Jury Forgery—Penal Code (Act XLV of 1860), ss.* 193, 465, 467.

The accused were tried by the Sessions Judge and a Jury on charges under sections 465, 467 and 193, Indian Penal Code, on the allegations that by personating one Mir Baksha, the husband of a certain woman, before the Muhammadan Marriage Registrar, they had induced the Registrar to make an entry of the divorce of the woman by her husband, to which entry they had affixed their thumb impressions, and thereby made a false document within the meaning of sections 463 and 464, Indian Penal Code

In his charge to the Jury, the Sessions Judge said: "If the person who put his thumb impression in the register as Mir Baksha was not really Mir Baksha, it is clear that he made a false document within the meaning of section 464 and that his intention was that fraud should be committed and also that injury should be caused to Mir Baksha. He, therefore, committed forgery:"

Held, that there was a misdirection on the part of the Judge as he did not leave it to the Jury, as he should have done, to say whether on the evidence

they found that the intention of the accused was dishonest and fraudulent; but that although the misdirection might have been under certain circumstances, a reason for setting aside the verdict of the Jury, yet as the verdict was not erroneous and was perfectly correct on the evidence, it should not be set aside. **C** EMPEROR *v.* ASIMODDI, 22 C. W. N. 572; 19 CR. L. J. 649 **841**

——— **s. 342 (4)**—*Oaths Act (X of 1873), s. 5—Evidence Act (I of 1872), s. 118—Evidence—Accused, whether competent witness—Two persons tried separately, whether can give evidence against each other.*

An accused person actually under trial cannot be sworn as a witness, and if two or more persons, are being jointly tried none of them is a competent witness for or against the others. But this exception to the general rule goes no further and has no application to an accused person who is not at the time under trial. Accordingly when two persons, though they may be accused of complicity in the same offence, are tried separately, each is a competent witness at the trial of the other, and the deposition of each may be used against him in his own trial. **C** AKHOY KUMAR MUKERJEE *v.* EMPEROR, 27 C. L. J. 91; 22 C. W. N. 405; 19 CR. L. J. 663 **999**

——— **s. 346** **993**

——— **ss. 346, 350, 537**—*Transfer of case from file of Magistrate not competent to try it—Trial, de novo—Accused, whether can waive right—Evidence recorded by Magistrate not competent to try case, whether can be considered—Procedure—Illegality.*

Where a case is transferred from the file of a Magistrate who is not competent to try it under section 346 of the Criminal Procedure Code, there must be a trial *de novo* of the whole case, and the whole of the prosecution evidence must be recorded afresh. In such a case the accused have no power to waive their right to a trial *de novo*. The evidence recorded by the Magistrate from whose file a case is transferred under this section, having been recorded by a Magistrate who was not qualified to record it, cannot be taken into consideration by the Magistrate who actually tries the case.

The failure to hold the trial *de novo* in such a case is an illegality which vitiates the trial and not merely an irregularity covered by section 537, Criminal Procedure Code. **Pat** AMBICA SINGH *v.* EMPEROR, 5 P. L. W. 40; 19 CR. L. J. 625 **673**

——— **s. 350** **673**

——— **ss. 350, 223, 224, 230, 233, 234, 346**—*Case transferred from one Magistrate to another—S. 350, applicability of—Trial de novo, whether can be claimed by accused—Estoppel—Intention of Counsel, expression of, in High Court not to claim trial de novo, whether estops accused from demanding trial de novo—Cheating, charge of—Omission to specify manner in which cheating effected, whether vitiates charge—Money delivered by some persons but contributed by several persons—Inducements offered to persons contributing—Separate offences—Misjoinder of charges.*

The general rule is that the decision as to the innocence or guilt of an accused person must be by the Judge who has heard all the evidence.

Section 350, Criminal Procedure Code, introduces an exception to this general rule and the exception should not receive a more extended interpretation than its actual words clearly justify.

The applicant was *challaned* and convicted on three charges under section 420, Indian Penal Code, which were tried together under section 234 of the Criminal Procedure Code, on the allegation that in his capacity as a Revenue Inspector he cheated three persons by dishonestly inducing them to deliver to him sums of money collected by them from several others, they themselves contributing to the sums their own *quota* of subscriptions. The applicant under orders from the Tahsildar caused a list of the tenants of a certain village to be prepared, showing the amount each of the tenants would have to pay towards the War Loan. Sometime after he offered to some of them within the hearing of others to cut down the subscriptions to half if he was paid Rs. 2 a piece, and to omit altogether the names of persons who were to pay Rs. 7-12-0 if they paid him Re. 1 each. The villagers were then told to bring the money and they met in two groups. Seven out of one group paid Rs. 2 each to *K*, who thus collected Rs. 16 including Rs. 2 of his own and paid the amount to the applicant, who made the necessary corrections in the list already prepared. Similarly *C.* collected Rs. 9 from 6 persons including himself out of the other group and paid it to the applicant who, made corrections in the list as promised. The case was originally tried by the District Magistrate but on an application for transfer to the Judicial Commissioner it was sent to the file of a First Class Magistrate in the same District. In the course of his arguments in the proceedings under the transfer application the applicant's Counsel expressed his intention not to apply for a re-hearing of the case. The Magistrate, to whose file the case was transferred, held that this constituted a waiver on the part of the accused and consequently refused to grant the prayer of the applicant for a trial *de novo*. On appeal the Sessions Judge set aside the conviction and sentence on one charge only and upheld those on the other two. The applicant urged amongst others the following grounds:-(1) that there was an illegal contravention of section 350, Criminal Procedure Code, in refusing to grant a trial *de novo*, (2) that there was a non-compliance with sections 223 and 224, Criminal Procedure Code, causing in fact a failure of justice and illegal misuse of section 336 inasmuch as the charges did not give necessary notice of the matter charged, (3) that the charges framed were in contravention of the provisions of sections 233 and 234 of the Criminal Procedure Code, as there were 15 persons cheated and 15 separate offences committed and the offences were wrongly combined in one trial:

Held, (1) that the statement of the applicant's Counsel not to apply for a fresh trial did not operate as an estoppel and the trial Court was wrong in refusing the applicant's demand for a trial *de novo*;

(2) that the omission to specify in the charge the manner in which the applicant cheated, whether by illegal act or omission, could not be regarded as material as it had not misled the accused;

(3) that all or most of the persons who parted with money having been present when the terms

Criminal Procedure Code—contd.

were proposed by the accused, the representations made and inducements offered were made and offered to each of the villagers collected there and when the applicant took the money paid by each villager he committed a distinct offence, and the trial of the case was, therefore, bad for misjoinder of charges as under section 234, the applicant could not be tried for more than three charges.

If circumstances are deposed to against the accused by a prosecution witness, it is necessary that the Magistrate should let the accused know by questions put to him in examination which of them tell against him in his mind; it is more particularly necessary where the witness has deposed to other circumstances favourable to the accused which nullify the value of the circumstances against him. **N** JANGILAL *v.* EMPEROR, 19 CR. L. J. 657 **993**

——— **s. 403** **257, 261**

——— **ss. 408, 413**—*Joint trial of several accused—Sentences, varying, award of—Appeal by persons sentenced to appealable terms—Right of representation of accused sentenced to non-appealable terms.*

In an appeal under section 408 of the Criminal Procedure Code by some of the accused who are awarded appealable sentences in a trial in which the other accused are awarded non-appealable sentences, it is not competent to the latter to have their case examined as if an appeal lay in their case as well. **M** ANNASAMI NADAVAN, *In re*, 7 L. W. 571; 19 CR. L. J. 623 **527**

——— **s. 413** **527**

——— **ss. 423, 438, 439**—*Trial of two accused for kidnapping Appeal by one—Conviction set aside and commitment to Sessions ordered—Commitment of non-appealing accused by Trial Magistrate, legality of—Reference to High Court—Revision.*

Two persons were tried and convicted by a Magistrate for an offence under section 363 of the Penal Code. On an appeal by one of them, the Sessions Judge set aside the conviction and sentence and ordered the appellant to be committed for trial on a properly framed charge under section 366 of the Penal Code. The case of the other accused was referred to the High Court for the exercise of its revisional jurisdiction. While the reference was pending before the High Court, the Trial Magistrate proceeded to pass an order of commitment against both the accused:

Held, that the Magistrate had no jurisdiction to pass the order of commitment while the conviction and sentence against one of the accused on his trial under section 366 of the Penal Code remained standing, and that the order was, therefore, illegal and must be set aside. **A** EMPEROR *v.* BHAGWANI, 16 A. L. J. 311; 19 CR. L. J. 482 **146**

——— **s. 423, cl. (b)**—*Appeal—Evidence omitted by lower Court—Re-trial, whether should be ordered—Procedure.*

Where the only defect in the procedure of the Court of first instance is that certain evidence has not been brought upon the record which ought to have been there, it is quite unnecessary to do anything more than to have that evidence taken and brought upon the record. It is unnecessary to worry all the witnesses a second time and to waste public time in having them re-examined. **A** ISHWAR PRASAD *v.* EMPEROR, 16 A. L. J. 325; 19 CR. L. J. 485 **149**

——— **ss. 435, 438**—*Revision—Concurrent power of High Court with subordinate Courts—Procedure.*

In cases where the High Court has concurrent revisional jurisdiction with a subordinate Court, the aggrieved party should in the first instance seek his remedy before the subordinate Court.

There is no ground for holding that the revisional jurisdiction of a Sessions Judge or of a District Magistrate under sections 435 and 438 of the Criminal Procedure Code is in any way trenched upon by the provisions of section 125 of the Code.

The jurisdiction of a Sessions Judge or a District Magistrate under section 435 of the Criminal Procedure Code is concurrent with that of the High Court, even where the Sessions Judge or the District Magistrate cannot pass a formal order but can only refer the matter to the High Court under section 438 of the Code. **Pat** BIPIN BIHARI MUKHERJI *v.* EMPEROR, 4 P. L. W. 327; 3 P. L. J. 302; 19 CR. L. J. 589 **397**

——— **s. 437**—*Charge framed in warrant case—Plea of not guilty—Discharge of accused, effect of—Further enquiry, order for, legality of.*

In a warrant case after a charge had been framed against the accused he was called upon to plead, and he pleaded not guilty. The Magistrate thereupon wrote a judgment and 'discharged' the accused. This order was set aside by the District Magistrate, who ordered further enquiry under section 437 of the Criminal Procedure Code:

Held, that the only order which the Magistrate could have passed, after a charge had been framed against the accused and he had pleaded to the charge, was either an order of acquittal or an order of conviction and as he was not convicted he must be deemed to have been acquitted and not 'discharged' and that being so the District Magistrate was not competent under section 437 of the Criminal Procedure Code to order further enquiry and the order made by him, therefore, for such enquiry was illegal. **A** CHHOTE LAL *v* EMPEROR, 16 A. L. J. 388; 19 CR. L. J. 596 **500**

——— **s. 438** **146, 397**

——— **s. 438**—*Acquittal—Revision by complainant—Reference by Sessions Judge for re-trial to High Court—Delay, effect of.*

Eleven persons were tried by a Magistrate of the First Class for offences under section 147 read with section 347 of the Penal Code and were acquitted on the 14th of December 1916. No appeal was preferred by the Government, but the complainant filed a revision in the Court of the Sessions Judge who, observing that the Magistrate had not said in what respect he considered the prosecution story to be exaggerated, held that the case was one which should be re-tried and by his order of reference to the High Court, dated 4th January 1918, recommended that the case should be re-tried:

Held, that as the Government did not appeal, it was inadvisable to open up the matter again

Criminal Procedure Code—contd.

ahving regard to the long lapse of time between the order of acquittal and the order of reference. **A** RAM SAMBHARI TEWARI *v.* RAJMAN NAIK, 16 A L J. 378; 19 CR. L. J. 607 **511**

——— **s. 439** **146**

——— **s. 439**—*Revision—High Court, power of, to re-examine evidence—Non-appealable sentence.*

A High Court, as a Court of Revision, has power to re-examine the evidence if there are *prima facie* good grounds for doing so, especially where the accused has been given a non-appealable sentence and has no means of vindicating his character except in revision. **N** TIKEKAR *v.* PIARELAL, 19 CR. L. J. 666 **1002**

——— **s. 476** **686**

——— **s. 494** **261**

——— **s. 514**—*City of Bombay Police Act (IV Bom. of 1902), ss. 106, 107—Bonds for appearance before Police—Forfeiture—Applicability of s. 514 of Code*

Bonds taken under sections 106 and 107 of the City of Bombay Police Act for appearance before the Police are not bonds taken under the Code of Criminal Procedure or for appearance before a Court and such bonds cannot, therefore, be dealt with under section 514 of the Code of Criminal Procedure. **B** HUBERT CRAWFORD, *In re*, 20 BOM. L. R. 379; 19 CR. L. J. 607 **511**

——— **s. 517** **501**

——— **ss. 520, 517**—*Acquittal by First Class Magistrate—Order for disposal of property—Sessions Judge, whether can interfere with order—Court of Appeal.*

A Court of Appeal, within the meaning of section 520 of the Criminal Procedure Code, is the Court to which an appeal lies in the particular case, and not the Court to which appeals would ordinarily lie from the Court deciding that particular case.

A First Class Magistrate, who tried the accused on a charge of theft of certain cattle, acquitted them and directed the cattle to be given to one of the accused. The complainant applied to the Sessions Judge, who directed that the cattle be returned to the complainant:

Held, that the accused having been acquitted the Sessions Judge was neither the Court of Appeal nor the Court of Revision with respect to the case and had, therefore, no power to make an order under section 520 of the Criminal Procedure Code regarding the disposal of the cattle. **B** KHIMA RUKHAD, *In re*, 20 BOM. L. R. 395; 19 CR. L. J. 597 **501**

——— **s. 522**—*Criminal force, use of—Show of criminal force, whether enough.*

The dispossession contemplated by section 522 of the Criminal Procedure Code must be accompanied by criminal force and as a result of the criminal force used, and the mere show of criminal force is not enough for an order under that section.

The foundation of an order under section 522 of the Criminal Procedure Code should be the finding of the Court to the effect that the person in whose favour the order is made has been dispossessed of a specific property by use of criminal force, which forms the material ingredient in the matter of criminal conviction. **Pat** BUNDI SINGH *v.* EMPEROR, 4 P. L. W. 229; 19 CR. L. J. 516 **276**

Criminal Procedure Code—concld.

——— **s. 526**—*Penal Code (Act XLV of 1860), s. 211—False charge of offence made with intent to injure—Competent Tribunal—Honorary Magistrate, whether competent—Unnecessary adjournments—Transfer, ground for.*

A charge of an offence falling under the second clause of section 211 of the Penal Code should not be sent for trial or inquiry to an Honorary Magistrate having no experience of criminal trials, and the mere fact of the Magistrate making unnecessary adjournments in the inquiry or trial of such a case is a sufficient ground for the transfer of the case from his Court. **A** MAGAN LAL *v.* GANESH PARSAD, 16 A. L J. 294; 19 CR. L. J. 611 **515**

——— **s. 526**—*Transfer of case—Magistrate, necessary witness for defence, effect of.*

In applying for the transfer of a case on the ground that the Magistrate before whom it is pending is a witness for the defence, the accused must satisfy the High Court that the Magistrate will be a necessary and essential witness for the defence. **C** SRILAL CHAMARIA *v.* EMPEROR, 19 CR. L. J. 632 **680**

s. 537 **270, 673**

——— **ss. 537, 540**—*Prosecution evidence recorded after defence evidence closed—Procedure, legality of—Revision—High Court, interference by.*

In a criminal trial after the evidence for the defence had closed, the Magistrate examined certain witnesses for the prosecution giving at the same time full liberty to the accused to cross-examine them:

Held, that in revision it was not proper for the High Court, having regard to sections 537 and 540 of the Code of Criminal Procedure, to interfere with the Magistrate's order on this ground. **O** GUR BAKHSH TEWARI *v.* EMPEROR, 21 O. C. 95; 19 CR. L. J. 630 **678**

——— **s. 540** **678**

Criminal Tribes Act (III of 1911), s. 23 **513**

Custom—Abadi deh—*Alienation—Non-proprietors, right of, to sell sites—Mauza Tuto Mazara, District Hoshiarpur.*

In Mauza Tuto Mazara, District Hoshiarpur, non-proprietors have by custom the right to sell their sites. **P** NANDU *v.* PUNJAB SINGH, 35 P. R. 1918; 62 P. W. R. 1918 **96**

——— *Adoption—Gorewaha Rajputs of Mauza Dodhala, Tahsil Nawanshehr, Jullundur District—Adoption of sister's son, validity of.*

Among Gorewaha Rajputs of Mauza Dodhala in the Nawanshehr Tahsil of Jullundur District, adoption of a sister's son is not allowed by custom.

One *M.* adopted his sister's son some 16 years before his death. His entire property was mutated in the adoptee's name in 1886, who managed it, mortgaged a part of it and gifted away a plot. In 1885 a collateral of *M.* and the plaintiffs died and his estate was mutated not only in the names of the plaintiffs but in the name of the adoptee also. *M.* died in 1896 leaving the adoptee and a widow. The widow died in 1913 a few months after which the plaintiffs brought a suit for possession:

Held, that although it was true that the collaterals could have instituted a suit for declaration that the alleged adoption should not affect their reversionary rights, they were not bound to do so, as the succession

Custom - contd.

did not open to them until the death of the widow and that, therefore, their allowing the adoptee to remain in possession of the property and to deal with part of it did not prejudice their right of succession and their acts did not amount to acquiescence in the adoption. **P** ABDULLA *v.* NABIA, 25 P. W. R. 1918 **9**

———*Alienation by widow—Necessity—Husband's debts—Debts incurred by widow for maintenance—Anticipation of immediate wants.*

A widow is justified in alienating property to pay her deceased husband's creditors and to raise money for her maintenance. The alienee is not bound to see to the application of the money. **P** HOTU RAM *v* SUKHA RAM, 4 P. L. R 1918 **530**

———*Landlord and tenant—Occupancy holding, custom of transferability of, subject to payment of* nazar *—Essentials of the custom—*Nazar, *tender of, whether necessary for validity of transfer.*

In order to establish a custom of transferability of an occupancy holding subject to the payment of a customary *nazar*, the evidence must show that the landlord is bound to recognise the transfer when *nazar* of the amount or at the rate determined by custom is tendered to him.

An alleged custom of transferability of an occupancy holding on payment of a *nazar* which leaves the amount or rate of the *nazar* indefinite is void for uncertainty, for no one knows what the tenant has to pay by way of *nazar* and the landlord can demand what he pleases and refuse his consent unless he is satisfied.

Where there is a custom of transferability of an occupancy holding on payment of a customary rate of *nazar*, which the landlord is bound to accept, the transferee has no title under the custom until he has paid or tendered *nazar* at that rate. **C** MISA KUMARI SAHEBA *v.* ICHAMOYEE CHOWDHURANI, 27 C. L. J. 587; 22 C. W. N. 929 **747**

———, *reasonableness of—Custom of remission of entire rent on inundated lands, validity of.*

A custom set up by a tenant that the entire rent in respect of a certain quality of land must be remitted when the lands are inundated, irrespective of the extent of the flood or its destructive effect on the crops, is vague and unreasonable and therefore cannot be valid according to law.

Where the validity of a custom is challenged on the ground that it is against reason, the reason referred to is not to be understood as meaning every unlearned man's reason but artificial and legal reason warranted by authority of law. Consequently when it is said that a custom is void because it is "unreasonable," what is meant is that the unreasonable character of the alleged custom conclusively proves that the usage, even though it may have existed from time immemorial, must have resulted from accident or indulgence and not from any right conferred in ancient times.

A custom which is prejudicial to a class and is beneficial only to a particular individual is repugnant to the law of reason.

The test applied is whether the custom alleged to exist could have a lawful commencement. **C** SIVANARAYAN MUKHOPADHYA *v.* RASIK PATRA, 22 C. W. N. 422; 45 C. 475; 28 C. L. J. 148 **289**

Custom—concld.

———*Succession—Ancestral property—Daughters or collaterals of sixth degree—Manj Rajputs of Talwandi Rai, Tahsil Jagraon, Ludhiana District.*

Plaintiffs, collaterals in the sixth degree of the last male owner, a Manj Rajput of Talwandi Rai, Tahsil Jagraon, Ludhiana District, sued for a declaration that a gift of his ancestral land made by his widow in favour of his two unmarried daughters should not affect their reversionary rights. It appeared that according to the *riwaj-i-am* the daughters had a prior right of succession to the collaterals:

Held, that in view of the entry in the *riwaj-i-am* it was for the plaintiffs to establish their rights of inheritance as against the daughters of the deceased and that they having failed to do so were not entitled to obtain the relief they claimed. **P** SAIDA KHAN *v.* AMIR-UN-NISSA **966**

———*Succession - Self-acquired property—Banias of Palwal Tahsil, District Gurgaon—Sister* versus *collaterals of 4th degree.*

Among Banias of Palwal Tahsil, Gurgaon District, a sister has a preferential right of succession to self-acquired property against collaterals of the 4th degree. **P** NARAIN *v.* GAINDO, 85 P. W. R. 1918 **183**

———*Succession—Sister and sister's son—Gondals of Deoval, Tahsil Bhera, District Shahpur.*

Among Gondals of Mauza Deowal, Tahsil Bhera, District Shahpur, a sister succeeds to the property left by her brother in the absence of his collaterals.

It is too broad and sweeping a proposition that a sister and a sister's son cannot under any circumstances be regarded as heirs to property in cases governed by the general customary law of the province. The onus is on them to prove their right of succession as against near and possibly even remote collaterals, but in the absence of any agnatic heirs, their right to succeed is preferable to the rights of the proprietary body or Government, especially in villages which are not homogeneous and are composed of proprietors belonging to different religions, different castes and different tribes **P** MUHAMMAD YAR *v.* UMAR HAYAT KHAN, 14 P. L. R. 1918; 103 P. W. R. 1918 **924**

Damages, suit for, maintainability of **16**

———, *suit for—Physical injuries caused by falling of door—Damages, measure of.*

In an action for damages for physical injuries caused to the plaintiff by defendant's negligence, the amount of compensation must be fair and reasonable, but an absolute compensation is not the true measure of damages. The Court should not give the value of an annuity of the same amount as the plaintiff's average income for the rest of the plaintiff's life.

An Appellate Court can form its own opinions on the reasons given by the lower Court for the award and measure of damages, but it should be slow to interfere unless, in its opinion, the damages awarded are clearly excessive or inadequate.

In an action for damages, the Court has the power to order amendment of the plaint at any stage of the suit so as to enhance the claim for damages, if the application for amendment was made at the commencement of the trial.

The plaintiff, a lad of 16 who was a student in one of the lower forms of a school, sustained

Damages—concld.

severe injuries by the fall of the door of a temple of which defendant was trustee. It was proved that the boy was dull and not very intelligent and that his father was a pauper, while his brother was earning Rs. 30 a month. The Court awarded him Rs. 12,000 as damages:

Held, that the award was excessive and it was reduced to Rs. 6,000. **M** VINAYAGA MUDALIAR v. PARTHASARATHY AYYANGAR, 7 L. W. 415; 23 M L. T. 312 **556**

Decree, construction of **561**

———, *improper, whether should be passed.*

No decree should be given by the Courts which on the face of it is improper. **N** GOVINDRAO v. GANPATHI, 14 N. L. R. 97 **425**

—— ——, *order refusing to admit appeal filed out of time, whether.*

Quære—Whether an order refusing to admit an appeal filed out of time is a decree within the meaning of the Civil Procedure Code. **C** ISWAR CHANDRA KAPALI v. ARJAN **725**

——— *for rent—Execution, condition imposed upon, validity of.*

A Court decreeing a suit for arrears of rent has no right to impose a condition as to the mode of execution of the decree by making the decree executable only against the defaulting *jama*. **C** CHANDRA KUMAR ROY CHOWDHURY v. ASWINI KUMAR DAS **250**

Defamation—*Defamatory words used in complaint—Privilege, defence of—Damages, suit for, whether maintainable—English Law, rule of, applicability of, to India.*

So far as a civil suit for damages is concerned, defamatory words used by a party in a complaint to a Criminal Court are absolutely privileged and are not actionable.

There is no Statute in India dealing with civil liability for defamation. The rules to be applied, therefore, are the rules of equity, justice and good conscience which has been interpreted by the Privy Council to mean the rules of English Law if found applicable to Indian society and circumstances; and as there is nothing in the circumstances and society of this country that would make it improper or inadvisable to apply the English rule, what is sound public policy in England is equally sound policy in India and the rule of English Law is in accordance with the principles of justice, equity and good conscience.

There is no support for the plea that a criminal enactment can be interpreted as amending the civil law by implication, though it may be anomalous that a party should be criminally punishable and yet be not civilly liable.

The civil and criminal law and procedure do not coincide but are independent of each other.

In a civil action for libel the plea of mere truth is, if established, a complete defence. In a criminal charge it is not so, for the accused has further to prove the fact that it was for the public good that the imputation was made or published. **A** CHUNNI LAL v. NARSINGH DAS, 16 A. L. J. 360 **540**

Dekkhan Agriculturists' Relief Act (Bom. XVII of 1879), s. 48—*Civil Procedure Code (Act V of 1908), s. 48—Execution of decree—Conciliator's certificate, time spent in obtaining, exclusion of.*

The words "period of limitation prescribed" in section 48 of the Dekkhan Agriculturists' Relief Act control and modify the period of time allowed for execution of a decree by section 48 of the Civil Procedure Code, so that a decree-holder is entitled to exclude from the period of limitation allowed by the latter section the interval of time occupied in obtaining a conciliator's certificate.

The intention of the Legislature in enacting section 48 of the Dekkhan Agriculturists' Relief Act was to secure that the judgment-creditor, compelled by the new Act to approach the conciliator for a certificate, was not to be damnified by any lapse of time before the conciliator gave him the certificate. **B** SHIDAYA VIRBHADRAYA v. SATAPPA BHARMAPPA, 20 BOM L. R. 360 **494**

Disclaimer *by real owner—Transfer by ostensible owner*—Taluka—*Succession—Primogeniture sanad, effect of.*

A person who has disclaimed a title cannot be allowed to set it up afterwards to the prejudice of third parties, who have purchased the disclaimed property from the ostensible owner in good faith and for value.

Where a primogeniture *sanad* had been issued to a *talukdar* who died before the Oudh Estates Act came into force, succession to the estate would be governed by the terms of the *sanad* in the case of succession under a testamentary disposition. **O** FAKHR JAHAN BEGAM v. MUHAMMAD ABDUL GHANI KHAN, 5 O. L. J. 49 **307**

Divorce Act (IV of 1869), s. 10—*Divorce—Judicial separation—Adultery and cruelty after separation, effect of.*

A wife who has obtained judicial separation on the ground of her husband's adultery alone, is entitled to a dissolution of marriage on proof that her husband has again committed adultery after the separation and has in addition been guilty of cruelty to her after the separation **L B** MA THIN KYU v MG. BA THAIN **914**

Easements Act (V of 1882), ss. 2 (c), 17 (c)—*Water rights—Right to take river water over another's lands in undefined channel, nature of—Easement.*

From time immemorial the plaintiff and his ancestors as owners of certain non-riparian lands had been taking water from a river at or about a certain spot on the banks and thence over the lands of the defendants successively till the plaintiff's lands were reached. The water was brought not in a defined channel but was allowed to spread over and irrigate defendants' lands first and then the plaintiff's:

Held, that even if the right enjoyed by the plaintiff and his ancestors could not be acquired as an easement, there was nothing intrinsically unreasonable in it; on the contrary it was compatible with the usages and sentiments of the agricultural population in many parts of India and having been enjoyed from time immemorial it was saved by section 2, clause (*c*), of the Easements Act.

Per *Marten, J.*—The plaintiff's claim was to river water and not to mere surface water on the defend-

Easements Act—contd.

ants' lands and consequently section 17 (*c*) of the Easements Act had no application to the case. **B** JANARDAN GANGESH KHADILKAR *v.* RAVJI BHIKAJI KONDKAR, 20 BOM. L. R. 398 **448**

——— **ss. 4, 12, 15, 28**—*'Land,' meaning of —Easement, acquisition of—Evidence of user prior to statutory period, admissibility of—'As of right,' meaning of—Tenants of dominant tenement, user by, effect of—Artificial structure—Easement over roof, whether can be acquired—General right of easement, for sitting, drying clothes, etc., validity of—Right of way, delineation of.*

In disputes relating to acquisition of easements evidence of user prior to the statutory period is admissible.

Artificial structures such as flat masonry roofs of shops are land within the meaning of that expression as used in section 4 of the Easements Act and easements can be acquired over them.

The user of an easement without any one's permission and without interference on behalf of the servient owner amounts to user 'as of right.'

User of the servient tenement by tenants of the dominant owner who are in occupation of the premises is, for the purpose of acquisition of an easement, as good as user by the dominant owner himself.

A general right of easement to use a roof as a place for sitting or as a place for drying clothes or for other purposes of this nature can be acquired under the Easements Act.

Where the area over which an easement of way has been acquired is small and the points of egress and ingress are fixed, it is not necessary for the Court to delineate the particular portion of the ground which persons enjoying the easement are entitled to use. **O** GANESH PRASAD *v.* KHUDA BAKHSH, 21 O. C. 78 **585**

——— **s. 4**—*Windows, right to open and shut into another's land, acquisition of, as easement—Injunction to lower level of roof to enable free movement of window.*

The right to open and shut windows and shutters into adjoining land can be acquired as an easement within the meaning of section 4 of the Easements Act.

Where defendant built his house opposite to the window of the plaintiff's house which had been in existence for 30 years, with the result that the eaves of the defendant's roof rose above the level of the plaintiff's window and the shutters of the latter could not be shut and opened as usual:

Held, (1) that the plaintiff had an easement to swing on the shutters of his window into the defendant's land;

(2) that it was competent for the Court to issue an injunction to the defendant to lower the roof of his house so as to enable the plaintiff to shut and open the window freely. **M** RANGA ROW *v.* RAMATHILAKAMMA, 7 L. W. 832 **435**

——— **ss. 12, 15** **585**

——— **s. 15**—*'Belongs to Government', meaning of —Servient tenement, transfer of, by Government to private individual, after 40 years' enjoyment of easement by dominant owner, effect of—Easement, acquisition of, against transferee.*

The words 'belongs to Government' in the last paragraph of section 15 of the Easements Act refer not to the time of suit but to the time during which the easement is enjoyed.

Where, therefore, after 40 years' enjoyment of an easement as against Government, the latter transfers the property to a private party, the easement does not become absolute, but the person claiming it must make good his title by 20 years' enjoyment against the transferee after the transfer.

Semble.—Where the 60 years' period has nearly expired during Government ownership of the land and the land is then transferred by Government to a private party the acquisition of the easement might be held to be completed if the deficiency was made up by subsequent enjoyment against the transferee. **M** SRINIVASA UPADYA *v.* RANGANNA BHATTA, 34 M. L. J. 396: 41 M. 622 **98**

——— **s. 17 (c)** **448**

——— **s. 23**—*Re-construction involving change in situation of* roshandans, *whether fresh easement—Building up wall so as to block* roshandans *—Injunction, suit for, whether maintainable.*

A re-construction of a house involving a change in the situation of the *roshandans* does not mean a fresh easement requiring a fresh period of 20 years for its acquisition.

Plaintiff sued for the issue of a mandatory injunction to the defendants that they should demolish a wall built by them. It appeared that the plaintiff had re-constructed his house and had changed the position of his *parnalas* and *roshandans*. Defendants had thereafter built up their wall so as to block these *parnalas* and *roshandans*:

Held, that the plaintiff was entitled to the relief claimed. **P** DHARAM DAS *v.* PIYARE LAL, 93 P. W. R. 1918 **985**

——— **s. 24**—*Accessory rights—Right to discharge rain water from eaves—Right to go over servient tenement to repair wall supporting eaves, whether accessory to easement.*

Plaintiff, who was entitled to an easement of discharging water upon the defendant's land from projecting eaves, sued for an injunction restraining the defendant from making any use of his land which would prevent the plaintiff from going upon it for all the purposes of repairing the wall of his house abutting thereon and which supported the eaves:

Held, that inasmuch as it was not absolutely impossible to repair the wall from the inside it would be an altogether illegitimate extension of the doctrine of accessory easements to grant the plaintiff the injunction sued for.

Per *Heaton, J.*—The accessory rights mentioned in section 24 of the Easements Act are not intended to be of such a nature as to deprive the owner of the servient tenement of his rights of property, unless such a result is absolutely essential. **B** HIMATLAL MAGANLAL SHAH *v.* BHIKABAI AMRITLAL SHAH, 20 BOM. L. R. 403 **422**

——— **s. 28** **585**

——— **s. 47**—*Suspension of easement by agreement, whether extinguishes easement—Transfer, sale in execution, whether is—Rule against perpetuities.*

Plaintiff entered into an agreement with one *N.*, by which the latter admitted the former's right to discharge rain water on to the latter's house, and the plaintiff agreed not to exercise the right so long as *N.* or his descendants remained owners of the house;

Easements Act—concld.

if, however, the house was transferred, plaintiff was to resume the enjoyment of the easement. The house was sold in execution of a decree and was purchased by the defendant who had notice of the agreement:

Held, (1) that the sale in execution was a transfer within the meaning of the agreement;

(2) that the plaintiff, having purchased the house with his eyes open, could not be allowed to plead that he was not bound by the contract entered into by his predecessor-in-interest;

(3) that the rule against perpetuities had no application to the case.

An easement is not extinguished by cessation of user, where the cessation is in pursuance of a contract between the dominant and servient owners. **P** FATEH CHAND *v.* PARAS RAM, 56 P. W. R. 1918; 34 P. L. R. 1918 **618**

Ejectment, suit for **317**

——, suit for, against recorded tenant—Burden of proof **470**

——, *suit for—Notice sent through registered post—Proof of service of notice—Evidence necessary.*

A notice to quit was sent through registered post. The posting was duly proved and the registered envelope was produced in Court with an endorsement purporting to have been made by the postal peon stating that the addressee refused to accept it:

Held, that though the evidence adduced as to the service of the notice was not legally sufficient, the plaintiff's suit for ejectment on notice to quit should not have been dismissed on the ground that the service of notice was not proved, but that the plaintiff should have been given an opportunity to prove the actual service of notice on the defendant. **C** KALAMUA KHADIN *v.* AMIR ALI KHALIFA **917**

——*Title, proof of - Burden of proof—Possession, value of.*

In a suit in ejectment the plaintiff must prove good title and there is no onus on the defendant to prove title relatively good or bad at all.

It needs twelve full years' possession to make title, and, therefore, where a plaintiff fails to prove anything more than possession within twelve years of suit, the onus is not shifted on to the defendant to prove good title. **B** BAPUJI NARAYAN CHITNIS *v.* BHAGVANT BALWANT CHITNIS, 20 BOM. L. R. 346 **550**

Electricity Act (IX of 1910), s. 24, Sch., cl. vi—*Fuse or cut-out—Service-line, cost of maintenance of—Liability of licensee—Installation, defective—Consumer, whether liable to pay for new cut-out.*

A fuse or cut-out is a necessary part of the service-line and is kept under the licensee's seal.

The licensee is bound to bear the cost of the maintenance of the service-line whether or not it has been initially paid for by the consumer.

If the consumer's installation is defective, the licensee is entitled to discontinue the supply of energy to him.

In case of a dispute as to any alleged defect, the licensee can take action under clause VI, sub-clause (3), of the Schedule to the Electricity Act and refer the matter to an Electric Inspector who shall decide it.

Electricity Act—concld.

If the licensee continues to supply energy to a consumer when he knows or has reason to believe that the latter's installation is defective, he does so at his own risk and the consumer is not liable to pay for a new fuse or cut-out if the old one melts owing to a defect in his installation. **P** LAHORE ELECTRIC SUPPLY CO *v.* DURGA DAS, 79 P. W. R. 1918 **171**

Estoppel **294, 331, 986**

——*Both parties estopped, effect of—Court, duty of, to decide case on merits.*

In a case of one estoppel against another, the parties are set free and the Court has to see what their original rights are.

S., deriving title by sale from *B.*, sold certain land to *J. B.* subsequently sold the same land to *L.* Before the sale to *S.*, *B.* had mortgaged the land and in 1905 he sued *S.* and his co-mortgagees for redemption. On the same day *L.* sued *S.*, *B.* and one *R.* for redemption of another mortgage executed by *B.* in favour of *R.* Both these suits were compromised: *B.* withdrawing and acknowledging *S.* as full owner, and *L.* agreeing to get possession (in the second suit) on payment of Rs. 550 to *S. J.* now brought the present suit to recover the land from *L.*:

Held, that though *S.* was estopped by the compromise decree from denying *L.'s* right to redeem, *L.* himself was estopped by the decree in *B.'s* suit from denying that *S.* was full owner and that, therefore, the plaintiff was entitled to recover the land in suit. **P** JIWAN LAL *v.* BEHARI LAL **68**

——, *doctrine of, whether applies to Criminal Law.*

The principle of estoppel has no place in the criminal law and the idea of a Christian by estoppel is a contradiction in terms. **A** MAHA RAM *v.* EMPEROR, 16 A. L. J. 414; 19 CR. L. J. 615 **519**

Evidence—*Appeal—Remand, order of, when to be made.*

It is an unusual course to remand for fresh evidence an appeal which has been argued, and which ought *prima facie* to be decided upon the materials which were before the Courts below. **P C** GANGA PERSHAD SINGH *v.* ISHRI PERSHAD SINGH, 4 P. L. W. 349; 16 A. L. J. 409; 34 M. L. J. 545; 27 C. L. J. 548; 22 C. W. N. 697; 20 BOM. L. R. 587; 23 M. L. T. 388; (1918) M. W. N. 382; 8 L. W. 176 **I**

——*First report, value of—Report made by accused, admissibility of.*

A first report is generally very valuable corroborative evidence of the testimony of the person who makes it; but where it is made by an accused, it is not admissible in evidence at all and constitutes no corroboration either of the case against himself or of that against any other co-accused.

Where, therefore, the whole of the evidence was disbelieved by the Sessions Judge but the accused were convicted on the strength of a report made by one of themselves:

Held, that inasmuch as the conviction was based on material which was inadmissible in evidence, it could not stand. **P** HARJI *v* EMPEROR, 4 P. R. 1918 CR.; 19 CR. L. J. 513 **273**

Evidence Act (I of 1872), s. 8—*Res gestæ, admissibility of.*

Under section 8 of the Evidence Act statements accompanying conduct and explaining such conduct are relevant. **N** TULSARAM *v.* ARJUNA **904**

Evidence Act—contd.

——— ss. 21, 24, 25, 26—*Confession—Oral confession made to a Magistrate, whether admissible—Proof.*

In order to make a confession admissible in evidence it is not necessary that it must be recorded.

An oral confession by an accused person not being open to exception under sections 24, 25 or 26 of the Evidence Act, is, as an admission by an accused person, a relevant fact and may be proved at his trial under section 21. Such a confession made to a Magistrate is relevant and may be proved by the evidence of the Magistrate.

Where, therefore, the accused made a verbal confession of his guilt before an Honorary Magistrate:

Held, that the confession was admissible in evidence and could be proved by the evidence of the Magistrate. **P** FEROZ *v.* EMPEROR, 11 P. R. 1918 CR. 19 CR. L. J. 651 **843**

——— s. 24 **843**

——— s. 24.

A confession made by an accused person on his trial for illicit possession of opium to a Superintendent of Excise is admissible in evidence, provided no inducement, threat or promise was held out or made to the accused in order to procure the confession.

An entry in a register of postings showing that certain Customs Preventive Officers were ordered to be at their stations at a particular hour does not refer to matters of State and is not excluded from disclosure under section 123 or 162 of the Evidence Act.

A statement made by a subordinate officer to his superior officer regarding the apprehension of a certain accused person within the hearing of various people cannot be withheld from the Court under section 124 of the Evidence Act. **C** ROKUN ALI *v.* EMPEROR, 22 C. W. N. 451; 19 CR. L. J. 524 **284**

——— ss. 25, 26 **843**

——— s. 35—*Evidence, admissibility of—Certified copies of papers of partition under Regulation XIX of 1814, whether admissible.*

Certified copies of the papers in the Collectorate, which *prima facie* appear to be the record of a partition made in a proceeding under Regulation XIX of 1814 between the predecessors of the parties to a suit, are good and admissible evidence, quite apart from anything contained in section 35 of the Evidence Act. **J** KHETRA NATH MANDAL *v.* MAHOMED ALLA RAKHA **921**

——— s. 58 *Execution of document—Proof—Admission—Inference drawn from matter not on record, validity of.*

In a suit upon a mortgage alleged to have been executed by the father of the defendants, the latter denied all knowledge of the transaction. One of them, however, on being examined as a witness admitted that the signature on the deed was his father's. The suit had been brought on almost the last day allowed by the law of limitation, and from this the Court inferred that the plaintiff must all along have been receiving interest at the stipulated rate and that on that calculation the mortgage debt had been fully satisfied:

Held, (1) that as far as the defendant who identified his father's signature was concerned, his admission, under section 58 of the Evidence Act, relieved the plaintiff of any further responsibility of proving the mortgage-deed;

(2) that the Court had erred in law in drawing the inference as to the payment of interest from matters not in evidence before it, and that, therefore, there had been no proper trial of the suit. **B** LAKHICHAND CHATRABHUJ MARWADI *v.* LALCHAND GANPAT PATIL, 20 BOM. L. R. 354 **555**

——— ss. 65, 74 **338**

——— s. 80 **258, 507**

——— s. 91 **507**

——— s. 91—*Oral evidence to explain document, admissibility of—Construction of document—"Up to" or "until" a certain day, meaning of.*

The words "up to" or 'until" a certain day in a contract may be construed as exclusive or inclusive of the day to which they are applied according to the context and subject-matter of the contract.

No extrinsic evidence as to the sense in which the words were used by the promisor or understood by the promisee is admissible under section 91 of the Indian Evidence Act.

Where in making an offer for the sale of a motor car the vendor said in a letter "please understand that my offer only holds good up to Wednesday next as the time I have is limited:"

Held, that having regard to the ordinary bearing of the words "up to" and to the well-known principle applicable to deeds and other documents that a document should in case of doubt and where all other rules of constructions fail be construed most strongly against the grantor, the offer remained open during the whole of Wednesday and did not expire at midnight of Tuesday. **C** METROPOLITAN ENGINEERING WORKS *v.* WALTER EUGENE DEBRUNNER, 22 C. W. N. 4 6; 45 C. 481 **305**

——— s. 92 **860**

——— s. 92, *applicability of, to document to which one of the parties to suit was not party.*

The provisions of section 92 of the Evidence Act, excluding oral evidence in regard to the question whether a certain plot of land was or was not covered by a sale-deed executed by one of the parties to a suit, do not apply when the other party to the suit was not a party to the document. **C** SUKUMARI DEBY *v.* KALIPADA MUKHERJEE **13**

——— s. 106 **822**

——— s. 108—*Presumption of death—Date of death—Evidence.*

The only rule which section 108 of the Evidence Act prescribes is that a person who has not been heard of for seven years by those who would naturally have heard of him if he had been alive, is presumed to be dead at the time when the question whether he is alive or dead is raised. There is no presumption as to the time of his death, and if any one seeks to establish the precise period at which such person died, he must do so by actual evidence. **P** BASHARAT *v.* NAJIB KHAN, 38 P. R. 1918; 68 P. W. R. 1918 **70**

——— s. 114 **653**

——— s. 114—Estoppel **24**

Evidence Act– contd.

——— **s. 115**—*Estoppel by representation or action causing another to change position—Conveyance by person entitled by estoppel, whether transfers good title against those bound by estoppel.*

The doctrine of estoppel is based upon the change of position brought about by the representations or actings of the persons bound by the estoppel.

Estoppel applies not only in favour of the person induced to change his or her position, but of a transferee from such person, and it binds not only the person whose representations or actings have created it, but all claiming under him by gratuitous title.

The estates of *B.*, a Raja, were taken under Government management under the Encumbered Estates Act. The manager appointed, who had a power of sale under the Act, put up a village to sale. *B.* bought it *benami* in the name of *K*, but the manager never executed any conveyance to *K*. Thereafter the management was removed and *B.* was restored to his estates *K.* having died, *B.* procured *K.'s* heir *L.* to convey the village to *B.'s* illegitimate daughter *R.* After *B's* death *R.* conveyed it to *A.* who sued *B.'s* heir *J.* for possession:

Held, that *J.* was estopped from denying *R.'s* title. **P C** JAGANNATH PRASAD SINGH *v.* ABDULLAH, 16 A. L. J. 576; 5 P. L. W. 83; (1918) M. W. N. 406; 22 C. W. N. 891; 8 L. W. 163; 24 M. L. T. 62; 28 C. L. J. 192 **770**

——— **s. 116**—Estoppel **656**

——— **s. 118** **497, 999**

——— **ss. 123, 124, 162**—Confession made to Superintendent of Excise, admissibility of—State document, posting register, whether is—Official communication—Privilege **284**

——— **ss. 155, 157**—*Statements made to Police, whether can be used as corroboration—Hostile witness, whether can be impeached by reference to Police diary.*

Statements of witnesses made to the Police should not be used to corroborate them except in very special circumstances.

The evidence of a witness who is hostile to the Crown may be impeached by reference to the Police diary.

If in the course of a trial a witness is called upon to say that he saw the offence committed by the accused and when called upon says that the offence was committed by an entirely different person, it is only fair that the Crown should be allowed to use section 155 of the Evidence Act to disabuse the Jury of the effect made by a wilfully false statement. There is nothing in section 162 of the Criminal Procedure Code to prevent this course being adopted. That section provides only for facilities to the accused to obtain copies of Police papers. **Pat** RAM CHARITRA SINGH *v.* EMPEROR, (1918) PAT. 95; 4 P. L. W. 325; 19 CR. L. J. 512 **272**

——— **s. 157** **272**

——— **s. 162** **284**

——— **s. 162**—*Summoning Government servant to produce document—Discretion of Court—Procedure.*

If a Court decides to summon a Government official for the production of certain documents, it should only do so after careful consideration and once the summons has been issued, production should ordinarily be insisted on if the party who obtained the summons so desires. **N** LAXMAN RAO *v.* VITHOBA **898**

Evidence Act—concld.

Execution, *application for, dismissal of—Fresh application, maintainability of—Limitation—Bengal Tenancy Act (VIII B. C. of 1885), Sch III, cl. 6.*

In execution of a rent-decree, the property of the judgment-debtor was sold, but the sale was afterwards set aside on the latter's application. The decree-holder taking no further steps, the executing Court thereupon passed the following order: "Sale set aside; the decree-holder taking no further steps, the case is dismissed for default." On a second application for execution being made by the decree-holder, beyond the three years' period limited by clause (6) of Schedule III of the Bengal Tenancy Act:

Held, that the second application could not be regarded as one in continuation of the previous application for execution, which ended with the order of the Court dismissing that execution case for default of the decree-holder. **C** MIDNAPORE ZEMINDARY COMPANY, LIMITED *v.* DINA NATH SAHU, 22 C. W. N. 766 **712**

——— *—Instalment decree—Default — Acceptance of overdue instalments, whether evidence of waiver—Limitation.*

Where a decree provides for payment by instalments subject to the condition of the entire decretal amount becoming payable at once on failure to pay any fixed number of instalments regularly, the mere acceptance of overdue instalments by the decree-holder is not of itself sufficient proof of waiver on his part to execute the decree for the entire amount.

Whether the payment and acceptance of an overdue instalment is to be treated as a payment regularly made in satisfaction of the instalments due, so as to extend the period of limitation for execution of the decree, is a question of fact. **S** BHAWANDAS FEROOMAL, FIRM OF *v.* MEGHRAJ, 11 S. L. R. 120 **324**

——— *—Sale—Mortgage prior to attachment, whether binding on auction-purchaser.*

A person who purchases property, which has already been mortgaged, in execution of a decree, cannot acquire larger rights than those which his judgment-debtor possessed on the date of the sale.

An auction-purchaser of a property mortgaged to a person under a registered deed, executed prior to the attachment of the property, is bound by the mortgage even if he had no notice of the mortgage and the mortgagee failed to have his lien notified at the time of the sale. **O** BHAIRON PRASAD *v.* SHEO DARSHAN, 5 O. L. J. 114 **877**

——— *—Suit against lunatic—Court refusing to appoint guardian* ad litem*—Decree passed—Representative of lunatic, whether can object to decree in execution.*

Where a suit is brought against a person of unsound mind and the trying Court is asked to appoint a guardian of the lunatic for the purposes of the suit, but refuses to do so and passes a decree against the lunatic, the representative of

Execution—concld.

the lunatic after his death cannot raise an objection in the execution Court that the decree was null and void and could not be executed. **Pat** JANG BAHADUR LAL *v.* PALTU TEWARI, (1917) PAT. 166 **218**

Execution of decree—*Attachment withdrawn—Declaration, suit for, by creditor that property belongs to judgment-debtor, maintainability of—Specific Relief Act (I of 1877), s. 42, proviso, applicability of.*

Independently of the provisions of Order XXI, rule 63 of the Civil Procedure Code, a decree-holder may sue for a declaration that certain property attached in execution of his decree belongs to the judgment-debtor, although at the time of the suit the attachment might have been withdrawn and the property may not be in the possession of the decree-holder. To such a suit the proviso to section 42 of the Specific Relief Act does not apply. **L B** MAUNG BA KYAW *v.* U LAN **972**

——— *Decree on contract entered into while estate under Court of Wards' superintendence—Property purchased from profits of estate after release from superintendence of Court of Wards, attachment of—Court of Wards' superintendence, release from, effect of.*

Property purchased by a person from the profits realised by him from his estate after its release from the superintendence of the Court of Wards, is liable to attachment in execution of a decree obtained against him in respect of a contract entered into while his estate was under the superintendence of the Court of Wards. **O** DEBI BAKHSH SINGH *v.* BED NATH, 5 O. L. J. 90 **219**

Execution of document—Proof **555**

Ex parte application, *duty of party making—Order extending time for filing appeal, whether can be cancelled by same Court.*

When an *ex parte* application is made, it is the duty of the party making the application to call the attention of the Judge not only to the portion of the law or authority in favour of his case but also to the matters that are against him.

On an *ex parte* application made to the District Judge asking him under the provisions of section 5 of the Limitation Act to extend the time for filing an appeal and to give the appellant time for the purpose of paying the Court-fees, the Judge made an order that time would be extended. But subsequently and before the memo. of appeal had in fact been admitted, he re-considered his order and revoked it:

Held, that the Judge had ample authority under the law to revoke or alter his previous order at any time before the appeal was admitted. **C** ISWAR CHANDRA KAPALI *v.* ARJAN **725**

Factories Act (XII of 1911), ss. 34, 41, 42—*"Occupier," meaning of—Separate sentences of fine on occupier and manager, legality of—Exemption of occupier or manager—Procedure.*

An "occupier" of a factory within the meaning of section 41 of the Factories Act is the person entitled to the possession or use of the factory. He is the controller, for the time being, of the factory, the person entitled to use the factory for his own or another's profit.

Factories Act—concld.

He may be the owner, on the other hand he may be only a lessee or a mortgagee with possession, but it is he who decides whether the factory is to work or to close down. The manager merely carries out the occupier's orders to work the factory and if the occupier designates no manager, the occupier himself shall be deemed to be the manager for the purposes of the Act.

Section 41 of the Factories Act authorises a Magistrate to impose on the occupier and manager jointly and severally a fine not exceeding Rs. 200. There can be only one fine and for the whole sum each delinquent is jointly and severally liable. Separate sentences of fine on the occupier and manager, under this section, therefore, are not legal.

Section 42 of the Factories Act provides the remedy for an occupier or manager who is the victim of some other person's neglect, but he must take the prescribed steps to assure the real culprit's conviction and not merely attempt to exculpate himself. **P** NIRANJAN LAL *v.* EMPEROR, 13 P. R. 1918 CR.; 21 P. W. R. 1918 CR.; 19 CR. L. J. 495 **159**

——— **ss. 41, 42** **159**

Financial Commissioner Punjab's Standing Order No. 2, para. 12, object of **980**

First report, value of **273**

Forest Act (VII of 1878), ss. 25 (1), 31 (j), r. 3 (a)—*Reserved forest—Shooting tiger in reserved forest without license to protect property—Offence.*

Under rule 3 (*a*) of the rules made by the Bombay Government under section 25 (*i*) and section 31 (*j*) of the Forest Act, hunting and shooting in a reserved forest are prohibited except under a license to be obtained from the conservator of forests.

Some of accused's cattle were killed by a tiger and with a view to prevent further injury to his property the accused successfully tracked and shot a tiger without a license in a reserved forest, to which the rules made by the Local Government under section 25 (*i*) and section 31 (*j*) of the Forest Act had been duly applied:

Held, that the accused was guilty of an offence under section 25 (*i*) of the Forest Act. **B** AMBIRSAHEB BALAMIYA PATIL *v.* EMPEROR, 20 BOM. L. R. 384; 19 CR. L. J. 610 **514**

——— **s. 31 (j)** **514**

Fraud **222, 250, 253**

———*Decree obtained by perjured evidence, suit to set aside, maintainability of.*

No suit can be instituted to set aside a decree on the ground that it was obtained by perjured evidence. **M** KADIRVELU NAINAR *v.* KUPPUSWAMI NAICKER, 23 M. L. T. 372; 8 L. W. 103; 24 M. L. J. 590; (1918) M. W. N. 514 **774**

General Clauses Act (X of 1897), s. 3 **164**

——— **s. 6 (c), (e)** **109**

Guardian and ward—*Guardian spending more than income of estate upon ward, whether entitled to recover excess—Accounts filed by guardian and accepted by Court—Presumption of correctness.*

A guardian who, without taking the leave of the Court, chooses to spend upon the ward more than

Guardian and ward—concld.

the income of the ward's property is not entitled, after his guardianship has determined, to come forward and sue the ward personally for the excess amount so expended

It is the duty of a Court which appoints a guardian to examine into the accounts submitted to it by the guardian periodically to the best of its ability and to satisfy itself that they are properly prepared A presumption of correctness attaches to such accounts after they have been scrutinized and accepted by the Court. **O** GOPAL *v.* SARJU, 21 O. C. 74 **599**

High Court, power of, to punish contempt summarily when committed out of Court **338**

Hindu Law—*Muhammadan Law—Custom—Halai Memons settled in Kathiawar, whether governed by Hindu Law or Muhammadan Law.*

As regards inheritance and succession Halai Memons settled in Porebunder in Kathiawar did not retain Hindu Law at the time of their conversion to Islam, nor have they by immemorial custom adopted Hindu Law. In these matters, therefore, they are governed by Muhammadan Law and not by Hindu Law. **B** KHATUBAI *v.* MAHOMED HAJI ABU, 20 BOM. L. R. 289 **619**

———**Adoption**—*Orphan boy, whether can be adopted—Will in favour of adopted son, construction of—Widow, power of, to dispose of property inherited from father—Collaterals, rights of.*

According to Hindu Law no other than the father or mother can under any circumstances give a boy in adoption. An orphan boy, therefore, cannot be adopted.

Where a Will is made in favour of an adopted son and the adoption is held to be invalid, the question is whether the mention of the devisee in the Will as an adopted son is merely descriptive of the person to take under the Will, or whether the assumed fact of his adoption is the reason, and motive of the bequest, and a condition of it.

Where a Hindu widow, who had no authority from her husband, adopted a son and subsequently made a Will in his favour, in which after reciting the fact of adoption she stated that she was making the Will "with a view to remove subsequent disputes arising in connection with the management of the property of the family":

Held, that the validity of the adoption was not a condition precedent to the devisee taking under the Will, and that in spite of the adoption being held invalid the devisee was entitled to the property which the widow had power to dispose of by Will.

Property inherited by a Hindu widow from her father is not, strictly speaking, her *stridhan* and a collateral of her husband has, therefore, no *locus standi* to contest her power of disposition in respect of such property. **P** RAMJI DAS *v.* DURGA PARSHAD, 6 P. R. 1918 **90**

——**Alienation** *by widow of her husband's property to pay off his debts—Payment undertaken by relative of deceased—Failure of relative to discharge obligation, whether revives debt.*

A Hindu widow sold her husband's property in her possession in order to discharge debts of the deceased, which a relative of his had agreed to pay off but which he failed to discharge:

Held, that when the relative of the deceased made himself responsible and agreed to pay off the debts, they ceased to be debts either of the deceased or of his widow, and the mere fact that the relative failed to perform his obligation would not revive the debts so as to make them a good consideration for the alienation of the property by the widow. **A** NATHU *v.* TULSHA, 16 A. L. J. 443 **728**

——**Alienation** — Temple property — *Mahant*, alienation by **292**

——**Bengal school**—Yautuka *and* ayautuka *property—Burden of proof—Succession—Ejectment, suit for—Mesne profits, claim for, against trespasser, maintainability of.*

The burden of proving that the property which a Hindu lady purchased long after her marriage was her *yautuka* property, because the purchase was made from a special fund obtained during her nuptial ceremony, is on the person who asserts it.

To the *ayautuka* property left by a Hindu female the sons and the maiden daughters may be entitled in equal shares, but the married daughters are postponed to the sons.

Defendant No 1, under colour of title from defendant No. 4 to whom he attorned, dispossessed the plaintiff's tenants who thereupon surrendered. Defendant No 4 realised rents from the defendant No. 1 for some years. In a suit by the plaintiff for ejectment of defendants Nos. 1 and 4:

Held, that whatever the relation might be between defendant No. 1 and defendant No 4, the possession of the defendant No. 1 as against the plaintiff was that of a trespasser, and the plaintiff was entitled to mesne profits as against him. **C** DELAUNEY *v.* PRANHARI GUHA 22 C. W. N. 990 **879**

——**Guardianship**—*Guardian, mother, whether is.*

Under the Hindu Law the mother is the natural guardian of a minor in the absence of the father, irrespective of the family being joint or separate. **Pat** BHAIRO PRASAD SAHU *v.* RAMCHANDRA PRASAD, 4 P. L. W. 373 **253**

——*Step-mother, right of, to act as guardian of her step-son—Contract by guardian, whether chargeable on minor's estate.*

In the absence of nearer relations, a step-mother is, under the Hindu Law, entitled to act as the guardian of her step-son.

A Hindu guardian cannot enter into a transaction so as to charge the minor on attaining age with personal liability.

Where a decree makes the minor personally liable on a contract by his guardian the Appellate Court has jurisdiction to amend and rectify it even in the absence of a memorandum of objections or cross-appeal on behalf of the minor.

The minor's liability, however, for debts properly incurred on his behalf by his guardian can be charged against his estate. **M** VENKATASAMI NAIKCER *v.* MUTHUSAMI PILLAI, 34 M. L. J. 177; 23 M. L. T. 280 **949**

——**Inheritance**—*Unchaste female, right of.*

According to the Bengal School of Hindu Law, any female heiress who was leading an unchaste life before the date when the succession opened out is excluded from inheritance. **C** RAJABALA DASSI *v.* SHYAMA CHARAN BANERJEE, 22 C. W. N. 566 **714**

——**Joint family**—*Alienation by father—*

Hindu Law—contd.

Suit by son for cancellation of deed—Antecedent debt—Family necessity.

Plaintiff sued for cancellation of two mortgage-deeds and a lease alleged to have been illegally executed by his father in favour of defendant. The 1st Court holding that the alienations were tainted with immorality and were not for any family necessity, cancelled the alienations. On appeal the District Judge held that it was not proved that the executant was leading an immoral life and that the debts were not tainted with immorality and dismissed the suit. On second appeal to the Chief Court:

Held, that it was necessary for the lower Appellate Court to decide, whether the debts in question were raised by the executant for some family necessity or to meet antecedent debts and to see whether the antecedency of the debts was real or merely a cover for what was essentially a breach of trust. **P** LAJJA RAM *v.* NARINJAN LAL, 101 P. W. R 1918 **989**

——Joint family—*Alienations by father—Suit by son—Immoral debts—Burden of proof—Evidence of immorality, whether sufficient.*

In order to exempt a Hindu son's share in the family property from liability for his father's debts the son must show that the debts were incurred for immoral purposes.

There must be some definite connection established between the debt and the expenditure. It is not sufficient to prove that the father was a man of extravagant and vicious habits.

The onus of proof that the debt was incurred by the father for illegal or immoral purposes, is not shifted on to the creditor by proof of immoral habits. **N** PUHKA *v.* HARLAL **206**

——————*Alienation by one member, whether can be impeached by other members not parties to alienation—Stranger, whether can impeach alienation—Grant of property to* mahant *and his heirs, whether grant in favour of temple.*

If one or more members of a Hindu joint family, purporting to act on behalf of the family as a whole, make an alienation of joint family property, it is open to those members of the family who did not join in the alienation, to contend that the alienation was made without authority and not for valid necessity or for the benefit of the joint family and that it is not enforceable. But such alienation is good as against a person who is not a member of the joint family and does not claim through the joint family.

A grant of property made under a deed in favour of a *mahant* of a temple and his heirs for the services rendered by the *mahant* to the temple is not a grant of the property to the idol or to the temple, and the *mahant* and his heirs are competent to deal with the property as their private property. **A** BANARSI DAS *v.* SHEODARSHAN DAS SHASTRI, 16 A. L. J. 394 **451**

————————*Bond executed to manager—Payment to one of several heirs, whether discharges promisor—Payment to one of co-heirs of promisee, effect of.*

Payment to one of the co-heirs of a promisee under a bond would not discharge the promisor from his liability. The same considerations govern payments made to a junior member of a Hindu family during the lifetime of its manager in whose favour the bond was executed.

Hindu Law—contd.

A payment made to one of the sons of a promisee under a bond, while the latter is undergoing a sentence of transportation and there are other sons of the promisee alive at the time, does not discharge the bond.

Where money has been advanced by the manager of a joint family the other members do not become co-promisees with him.

A person who has an interest in bonds or securities standing in the name of another is not a co-promisee with him. **M** ANKALAMMA *v.* BELLAM CHENCHAYYA, 7 L. W. 221; 34 M. L. J. 315; 23 M. L. T. 215; 41 M. 637 **419**

——Joint family *consisting of brothers—Alienation by manager, whether binding on other members—Necessity.*

The manager of a Hindu joint family, which owned a house in a town and lived by cultivation of an occupancy holding, executed a mortgage of the house in favour of the plaintiff The mortgagor died and the plaintiff brought a suit for the sale of the house against the remaining members of the joint family, who contended that as they and their ancestors were cultivators and the house in dispute was used in connection with their cultivation, its hypothecation could not be valid according to law and no decree could be passed in respect thereto:

Held, that the house being situated in a town and there being nothing to show that it passed to the defendants as an appendage or adjunct of the tenure or that there was any connection whatsoever between the two, it could not be held to be appurtenant to their occupancy holding.

In a joint Hindu family consisting of brothers and their families, an antecedent debt incurred by a brother in the position of a manager is not binding upon his other co-parceners, unless it can be shown to have been incurred for family necessity. It is not the pious duty of brothers or nephews to pay debts incurred by their brothers or uncles **A** NIRBHAY LAL *v.* KALLAN **546**

——————*consisting of one adult co-parcener and minors—Testamentary guardian, appointment of, for minors' properties by manager, validity of—Statutory authority, sanction of.*

It is not competent to the only adult co-parcener of a Mitakshara family consisting of himself and his minor co-parceners to appoint a testamentary guardian to the co-parcenary properties of the minor co-parceners.

Per *Ayling, J.*—The attractive doctrine that everything which is not expressly forbidden should be held lawful, if expedient, is one which has its dangers and requires careful consideration before application.

Per *Seshagiri Aiyar, J.*—On principle, a person who is not capable of making a gift of his property or to dispose of it by testament cannot be in a position to control that property after his death

The Indian enactments dealing with guardianship, *viz*, the Court of Wards Regulation, the Guardians and Wards Act and the Widows' Re-marriage Act give no statutory authority for the appointment of a testamentary guardian in respect of co-parcenary property. They only refer to cases in which such power of appointment is permissible under the law,

for example cases of self-acquired property in Madras or Dayabhaga property in Bengal. **M** CHIDAMBARA PALLAI *v.* RANGASAMI NAICKER, 34 M. L. J. 381; 23 M. L. T. 266; (1918) M. W. N. 265; 7 L. W. 454; 41 M. 561 **905**

—— —**Joint family**—*Joint and self-acquired property, blending of, effect of—Gift by managing member of joint family property, validity of.*

A member of a Hindu joint family may convert his self-acquired property into ancestral family estate by throwing it into the common stock.

A Mitakshara family of five brothers separated in estate. *D.* and *K.*, two of the brothers, continued to live together, *D.* acting as guardian of *K*, who was a minor. Later on a son *R* was born to *D.* Later still *D. D.*, a third brother, died, and property came to *D.* and *K.* from his estate. *D.* kept only one account of the profits of this property, even after *K.* came of age, and he kept only one account for all his receipts from this and other property and of all his expenditure. A partition by metes and bounds was later effected between *D* and *K*, and mutual exchanges were made whereby *D.* gave up his share in certain ancestral property for *K's* share in property acquired from *D D.'s* estate and *vice versa.*

In a suit by *D.'s* son and grandsons after *D.'s* death to set aside deeds of gift executed by *D.* in favour of the respondents, on the ground that the property given was ancestral property and the gifts in consequence were invalid:

Held, that even assuming that the property coming from *D.D.'s* estate was *D.'s* self-acquired property, yet by blending the income of that property in the accounts with the income of the new joint family constituted on *R.'s* birth by *D.* and *R.* and by the mutual exchanges with *K. D* had shown his intention to treat what came to him from *D. D.* as joint property and had converted it into ancestral estate and that the properties included in the deeds of gift were, therefore, joint family properties of which *D.* had not the right to dispose, and that the appellants were entitled to recover them **P C** RADHAKANT LAL *v.* NAZMA BEGUM, 22 C. W. N. 649; 27 C. L. J. 632; 16 A. L J. 537; 5 P. L. W. 72; 23 M. L. T. 392; (1918) M. W. N. 386; 35 M. L. J. 99; 20 Bom. L. R. 724 **806**

—— — —— *Mortgage for necessity—Minor members, whether necessary parties to suit on mortgage—Mortgage-decree — Sale — Joint family property, whether passes under sale.*

Where a mortgage is effected for family purposes, it is not necessary to make the minor members of the family parties to the suit on the mortgage.

In order to ascertain what passes upon an execution sale upon a decree made against the *karta* of a Mitakshara joint family it is necessary to look, *first*, at the circumstances in which the debt was contracted, *secondly*, at the form in which the plaintiff's claim was pressed, *thirdly*, at the decree made, *fourthly*, at the attachment, *fifthly*, at the sale proclamation and *lastly*, at the certificate of sale. **Pat** JAGDISH NARAYAN PERSHAD SINGH *v.* MANMATHA NATH, (1918) PAT. 71; 4 P. L. W. 331 **76**

—— —— *Partition—Division in status, when effected—Sale by co-parcener divided in status and excluded from enjoyment of his share—Vendee, position of—Profits, past, right of vendee to.*

A definite and unambiguous indication by one member of a joint family of his intention to separate himself and enjoy his share in severalty will amount to a separation or division of status, and the filing of a plaint for partition is such an indication.

After a division of status between two co-parceners, they are in the position of tenants-in-common with reference to the property left undivided and, therefore, the party who is in exclusive possession of the property and takes the whole of the rents and profits thereof has to account to the other party for his share of such rents and profits.

A vendee from a co-parcener in a Hindu family, who has become divided in status from the other members and has been excluded from the enjoyment of his share in the property, is entitled to an award of profits from the date of such separation.

The rule of law that profits cannot be claimed till after decree applies only to the case of a joint family and not to the case of a divided family with joint property.

The Court will always endeavour as far as possible to allot to the purchaser the share he purchased.

Per *Spencer, J.*—Whatever the seller can get by way of income on his share, the purchaser of his right, title and interest can recover. **M** VANJAPURI GOUNDAN *v.* PACHAMUTHU GOUNDAN, 7 L W. 225 **62**

—— —**Joint family**—*Partition by father without consent of sons, validity of—Devise of father's share to one son—Right of other sons to claim division by metes and bounds.*

Under Hindu Law a father can effect a partition between himself and his sons with or without their consent.

When a Hindu father effects a division with the consent of one of his sons, the other sons dissenting, he must be deemed to have effected the partition in exercise of his power as father.

Where the father in such a case registers the partition deed under section 35 of the Registration Act and afterwards devises the items that fall to his share to one of his sons, the other sons cannot claim a division by metes and bounds but must accept the items allotted to them.

Such a deed of partition is receivable in evidence as evidencing a contract by some only of the intended executants who signed the deed, and it can be looked into to ascertain the intention of the executants.

A testamentary disposition of specific properties cannot be utilized for proving the bequest of the share to be allotted to the deceased, in case it is found that the testator was not entitled to the specific properties but only to a share as a tenant-in-common. **M** NATESA IYER *v.* SUBRAMANIA IYER, 23 M. L. T. 207 **535**

—— —— —Sale by father of equity of redemption of family property as his acquisition—Redemption by vendee and possession thereafter as absolute owner—Redemption, suit for, by son's alienee **867**

—— — —— *Self-acquired property, whether can be converted into joint family property.*

A member of a joint Hindu family who has

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acquired property of his own may convert it into joint family property in the ordinary sense of the term and thereafter all the members of the family will have the same rights in it as though it had been acquired originally by their joint exertions or descended to them from a common ancestor. **B** RANGBHAT RAMCHANDRABHAT *v.* SITABAI BANDBHAT, 20 BOM. L. R. 338 **584**

———**Partition**—*Property included by mistake—Discovery of mistake—Loss, apportionment of—Partition, whether can be re-opened.*

Where parties arrive at a partition either by agreement, or by a decree, which is only a more solemn and binding form of agreement, there is an implied and mutual right of indemnity or contribution in respect of any paramount claim by a third person which throws the burden of a loss not contemplated in the partition proceedings unfairly upon one of the parties. If the original decision has been arrived at by a common mistake, which in the case of a decree has been adopted by the Court making the decree, the mistake can be set right *pro tanto*, *i.e.*, the partition can be opened up in so far as is necessary to apportion the loss which arises out of the discovery of the mistake. **A** GANESHI LAL *v.* BABU LAL, 16 A. L. J. 339 **4**

———**Religious endowments**—Debutter—Asthal, *nature of—Purchases out of* asthal *income, nature of—Alienation by guardian of minor* mahant *with leave of Court, whether binding on* asthal *property.*

The *mahant* of a Hindu *asthal* or *math* holds the property of the *math* in trust for the institution itself. He can only alienate it in case of necessity.

Acquisitions with the income of an *asthal* are subject to the same trust as the original property.

In the absence of such necessity as would render the debts contracted by him binding on the institution, a *mahant* has no power to alienate its properties for the purpose of discharging those debts and if the *asthal* is not liable for such debts, the successor of the *mahant* is entitled to have the alienations set aside.

J, a *mahant*, appointed the first respondent, a minor, his successor and left a Will whereby he appointed *C.* guardian of the first respondent. *J.* had mortgaged the *asthal* property. The mortgagees after his death brought or threatened proceedings on the mortgages. To pay off these liabilities *C.* obtained from the District Judge leave to sell certain of the *asthal* properties

Held, that *C.*'s powers could not be larger than those of the actual *mahant* and that in the absence of proof that the original debts were binding on the *asthal*, the sales must be set aside. **P C** BASUDEO ROY *v.* JUGALKISHWAR DAS, 5 P. L. W. 57; 16 A. L. J. 601; 35 M. L. J. 5; 22 C. W. N 841; (1918) M. W. N. 431; 8 L. W. 120 **818**

———**Succession**—*Dancing girl, succession to property of—Sons* versus *daughters—Daughter's daughter, whether to be preferred to son.*

The property of a dancing girl will pass to her female issue first and then to her male issue.

Its devolution is by custom similar to the devolution of Stridhanam.

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Consequently, a daughter's daughter succeeds to such property in preference to the son. **M** NAGALINGAM PILLAI *v.* VADUGANATHA ASARI, 24 M. L. T. 81 **672**

———**Widow**, *surrender by, of part of estate, validity of.*

A surrender in favour of her husband's reversioners made by a Hindu widow otherwise than for consideration to meet legal necessities, in order to be valid, must be of the whole of her interest in the estate. **C** MOHANANDA DUTTA CHOWDHURY *v.* BAIKANTHA NATH DUTTA **872**

———**Will**—*Ancestral property—Manager of joint family, whether can distribute ancestral property by Will.*

A Hindu proprietor or the manager of a joint Hindu family cannot make by Will any equal or unequal distribution of his ancestral property. **P** NAND LAL *v.* DEWAN CHAND, 78 P. W. R. 1918 **162**

——— ———, *construction of—Woman, estate taken by—Life-estate, whether can be created by Will—Contingent remainder after estate granted to woman, effect of—Adverse possession under Will—Alienation—Necessity—Recitals, value of.*

The Will of a childless Hindu provided that his moveable and immoveable property should remain in the possession of his wife until her death, and that after her death it should pass into the possession of his niece, but that if on the death of his wife and niece there were living a son and a daughter born of the womb of the niece, then two-thirds of the moveable property should belong to the said son and one-third to the daughter. But as regards the immoveable property none shall have the least right of alienation:

Held, (1) that the Will purported to convey an absolute estate ultimately to the son and daughter of the niece and that the fact that the *corpus* was not expressly mentioned was not sufficient to justify the interpretation that the *corpus* did not pass;

(2) that the recital in the Will that there should be no right of alienation made no difference, so far at any rate as the niece's son and daughter were concerned, nor did it make any difference that the bequest in favour of the niece's son and daughter failed on the ground that they were unborn at the date of the testator's death;

(3) that the disposition in favour of the niece's son and daughter was intended as a gift of the remainder, and not merely a statement of what the testator believed to be the rule of succession in case of his niece's intestacy;

(4) that the Will was not intended to and did not vest an absolute estate of inheritance in the niece, and that, therefore, she did not in that capacity have an unfettered right of alienation;

(5 that the estate created in favour of the niece was an estate such as a woman ordinarily acquires by inheritance under the Hindu Law, which she holds in a completely representative character but is unable to alienate except in case of legal necessity;

(6) that the words restricting alienation in respect of the niece's estate were of the nature of surplusage, that is to say, the testator had in his mind the

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ordinary recognized restriction upon alienation which would apply independently of any provision in the Will, and that he had not in his mind the eventuality of an alienation becoming necessary either for the purposes of providing maintenance for the niece or for the preservation of his estate.

An estate of the kind that a Hindu widow inherits in the case of intestacy can be created by Will.

Where a mere contingent remainder is created after a woman's estate and not a vested remainder, this is an indication in favour of the view that the estate created was a woman's estate in the technical sense and not merely a life-estate.

In construing a Will made by a Hindu testator, it is not permissible to take into consideration what the effect of such a Will would be under the English Law. It is not permissible for instance to import the idea that where an estate is devised to enure only for life, the result is that an estate in fee in remainder, whether vested or contingent, must exist in some one.

The English classification under which estates are projected along the plane of time and are measured by time alone, is foreign to the Hindu Law which measures estates not by duration but by use.

A Hindu can by Will create an estate for life in the English sense, but his intention to do so must be made clear by the terms of the Will itself without any importation of English ideas.

Actual proof of necessity which justifies an alienation under Hindu Law is not essential to establish its validity. It is only necessary that a representation should have been made to the purchaser that such necessity existed, and that he should have acted honestly and made proper enquiry to satisfy himself of its truth.

A recital in the deed is clear evidence of the representation, and, if the circumstances are such as to justify a reasonable belief that an enquiry would have confirmed its truth, then when proof of actual enquiry has become impossible, the recital, coupled with such circumstances, would be sufficient evidence to support the deed.

Quære.—Whether where a person enters under a Will of uncertain construction, an absolute title can be acquired by adverse possession in the absence of an express claim to hold an absolute title. **Pat** RAM BAHADUR *v.* JAGERNATH PRASAD, 3 P. L. J. 199; 4 P. L. W. 377; (1918) PAT. 181 **749**

Instalment decree—*Default in payment of instalment—Waiver.*

An instalment decree provided that in case of failure to pay the amount of any two instalments the defendant should pay to the plaintiff the whole of the unpaid balance of the decree. The first instalment was not paid on the date fixed, but before the due date of the second instalment it was paid in full with interest at the agreed rate. There was a further default in paying the second instalment and the decree-holder thereupon claimed that there was a failure to pay the amount of two instalments at the period fixed, and, therefore, that he was entitled to claim the whole amount of his debt at that time remaining unpaid:

Held, that the real intention of the parties was that before the penalty could be enforced two

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instalments must be in arrears together and that condition not having been fulfilled in this case the decree-holder was not entitled to execute the decree for the whole of unpaid balance. **B** SUBRAYA VENKAPPA HEGDE *v.* SOMBAYA HEGDE, 20 BOM. L. R. 335 **561**

Intention, *whether mixed question of law and fact.*

The question with what intention a person did a certain act can hardly be said to be anything but a question of fact.

This question must be examined with reference to the subsequent acts of the person alleged to have a certain intention. **Pat** RAGHUBIR PRASAD *v.* MISRI KAHAR **303**

Interest, *payment of, after date fixed for redemption—Charge, interest, whether is—Excessive rate of interest, whether ground for relief.*

The mere fact that the rate of interest stipulated for in a mortgage deed is excessive is no ground for relief, unless it is shown that the lender was in a position to dominate the will of the borrower. **P** ALLAH DIN *v.* FATEH DIN, 31 P. R. 1918; 54 P. W. R. 1918; 27 P. L. R. 1918 **101**

——, *whether can be allowed as damages for detention of money—Interest Act (XXXII of 1839).*

It is open to a Court to award damages for wrongful detention of money after adjustment of accounts even though interest is not recoverable either under a contract or under the provisions of the Interest Act. **C** KHETRA MOHAN PODDAR *v.* ASWINI KUMAR SAHA, 22 C. W. N. 488 **667**

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Interpretation of Statutes.

It must always be presumed that the Legislature does not intend to make any alteration in the law beyond what it explicitly declares, either in express terms or by implication, or in other words beyond the immediate scope and object of the Statute. In all general matters beyond, the law remains undisturbed. It is in the highest degree improbable that the Legislature would overthrow fundamental principles or depart from the general system of law without expressing its intention with irresistible clearness. **S** SOBHRAJ DWARKADAS *v.* EMPEROR, 11 S. L. R. 128; 19 CR. L. J. 591 **399**

——*Act taking away jurisdiction of ordinary Courts.*

An Act by which the jurisdiction of the ordinary Courts of Judicature is taken away must be construed strictly. **N** KAMA *v.* BHAJANLAL CHAUTANLAL **654**

——Headings of chapters, value of **534**

——, *principles of—Retrospective effect.*

An enactment, which deliberately withdraws certain classes of cases from the jurisdiction of Small Cause Courts, cannot be said to declare the law and does not have a retrospective effect. **M** SUBRAMANIA AIYAR *v.* NAMASIVAYA ASARI, 23 M. L. T. 255; (1918) M. W. N. 238 **11**

——*Vested rights preserved under repealed enactment, rules relating to.*

A repealing enactment cannot impose an impossible condition on pain of forfeiture of a vested

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right or be applied to cases in which its provisions cannot be obeyed. **M** TIRUMALAISAMI NAIDU *v.* SUBRAMANIAM CHETTIAR, 40 M. 1009 **109**

Jagir, *transfers of portions of, nature and effect of—Resumption, right of—Burden of proof.*

A *jagirdar* sold all his rights in certain villages to certain Chowdhris, who in turn sold all their rights in those villages to the ancestor of the plaintiff. The defendants, who were the descendants of the original *jagirdar*, contended that the transfer to the Chowdhris was not a sale, but merely a grant of *baidari* tenure according to which only heirs male of the grantee could succeed, and that as the last holder of the tenure had left no male issue, the plaintiff being his daughter's son, they were entitled to resume the villages. It was found that the ancestors of the plaintiff had been in possession of the villages for generations and that the words used in respect of the transfers of the villages were *bikri* and *farokht*:

Held, that the burden was on the defendants to prove their right to resume both as against the Chowdhris and as against the ancestors of the plaintiff. **Pat** RAMESWAR LAL BHAGAT *v.* GIRWAR PRASAD SINGH, (1918) PAT. 166 **883**

Joint *owner placed in exclusive possession of some lands by mutual arrangement, whether can be disturbed by co-sharers—Partition, suit for—Joint possession, proof of.*

One of the joint owners of an estate, who by mutual arrangement with the other co-sharers has been placed in exclusive occupation of some of the joint lands as representing his share, cannot be equitably disturbed by the latter, unless they seek a partition of all the lands comprised in the estate.

It is essential in a suit for partition that the plaintiffs should establish that they and the defendants are not only joint owners but are also entitled to joint possession, because the object of the suit is to transform the joint possession into possession in severalty. **C** DURGA CHARAN ACHARJEE *v.* KHUNKAR ENAMAL HUQ, 27 C. L. J. 441 **705**

Judge's knowledge *of character of parties or witnesses, whether can be relied upon in deciding case—Procedure—Jurisdiction.*

A Judge is justified in using his knowledge about the character of the parties to a suit to come to a decision upon the credit to be attached to their evidence on the case set up by them.

Where a District Judge declined to believe in the *bona fides* of a suit brought by the plaintiff, unless it was supported by evidence that left no doubt in the mind of the Judge about its credibility, on the ground that many of the suits launched by the plaintiff in his Court had been found to be false:

Held, that the Judge was justified in alluding to his experience of the plaintiff's litigation in his Court. **L B** SAN HLA BAW *v.* MI KHOROW NISSA, 9 L. B. R. 160 **734**

Jurisdiction **30, 71, 236, 494, 734**

——— of Civil Courts **959**

——— *of Civil and Revenue Courts—Partition case before Revenue Court—Title, question of, raised by applicants themselves—Civil suit, maintainability of.*

Where in a partition case filed in a Revenue Court, before any notices were issued to the recorded co-sharers or at any rate before any objections could be filed by them to the application for partition, the applicants themselves asked the Court to postpone the case until they could have the question of their title cleared up in a Civil Court and the Revenue Court granted the required postponement and the applicants then instituted the proposed suit in the Civil Court:

Held, that the Civil Court had jurisdiction to entertain the suit. **O** DEOKI NANDAN *v.* KALI SHANKAR, 5 O. L. J. 116 **873**

——— *Consent of parties, whether confers jurisdiction.*

Where a Court has no inherent jurisdiction to try a case it cannot pronounce any decree and if it does pronounce a decree that decree is null and void. On the other hand, if a Court has jurisdiction and the law requires some preliminary conditions to be observed ancillary to such jurisdiction being exercised, the parties may waive these conditions and in that event the jurisdiction cannot be impeached on the ground of irregularity in the exercise of the Court's jurisdiction. **Pat** RAGHU SINGH *v.* USUF ALI, 4 P. L. W. 445 **920**

——— *Sanction to prosecute granted by Subordinate Judge—Appeal, forum of—District Judge or High Court.*

Where a sanction to prosecute is granted or refused by a Subordinate Judge, an appeal against the order lies to the District Judge, and not to the High Court, even where the value of the suit out of which the proceeding for sanction has arisen is beyond the appellate jurisdiction of the District Judge. **Pat** BHAIRO PRASAD *v.* HARIHAR PRASAD, 19 CR. L. J. 381 **679**

——— of Small Cause Court **323, 414**

Karachi Port Trust Act (Bom. Act VI of 1886), ss. 87, 88—*Board of Trustees for Karachi Port, suits against—Limitation.*

The word 'person' in section 87 of the Karachi Port Trust Act technically includes and was intended to include the Board.

Sections 87 and 88 of the Karachi Port Trust Act do not distinguish suits against private individuals from suits against the Board, but section 87 deals with the limitation of suits against the Board or any servant or officer of the Board, while section 88 defines the responsibility of the Board for acts of their officers and servants. **S** MOOSAJI AHMED & Co. *v.* KARACHI PORT TRUST, 11 S. L. R. 126 **410**

——— **s. 87**—*Limitation—Special period of limitation for suits against Karachi Port Trust, whether subject to general provisions of Limitation Act,*

The general provisions of the Limitation Act regarding the exclusion of holidays and Court vacations in computing the period of limitation, have no application to any special period of limitation prescribed by any special or local law *e. g.*, the Karachi Port Trust Act.

A suit against the Karachi Port Trust filed beyond the period of 6 months allowed by section 87 of the Karachi Port Trust Act, owing to the intervention of Easter holidays and vacation of the Court is barred by limitation. The maxim *lex non cogit ad impossibilia* has no application to such a case as the

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suit could have been filed earlier. **S** Moosaji Ahmed & Co. *v.* Asiatic Steam Navigation Co., Ltd., 11 S. L. R. 06 **168**

Lambardari Rules (Punjab), r. 15—*Appointment of* lambardar *on death without heirs of last incumbent—Matters to be considered—Collector, discretion of, interference with.*

Where a *lambardar* dies without heirs, the question of the appointment of a successor should be dealt with under rule 15 of the Lambardari Rules as though it were a case of the first appointment of a *lambardar*.

An officer making an appointment under rule 15 of the Lambardari Rules is at liberty to consider all matters which may reasonably be regarded as relevant to the suitability of an appointment, and he is expected to decide between rival candidates according to the general balance of their respective claims and of the administrative advantages, or disadvantages, of appointing each respectively. If he exercises his discretion in a reasonable manner, neither ignoring any portion of those matters which he ought to consider, nor perversely running counter to the general sense of the rule, his decision ought to be allowed to stand, and the mere fact that an appellate or revising officer takes a different view of personal claims is not a good reason for upsetting or modifying that decision. **F. C. P** Mashir Ali *v.* Chiragh Khan, 1 P. R. 1918 Rev. **87**

Land Acquisition Act (I of 1894), ss. 12, 18, 20—*Service of single notice and presentation of single application in respect of acquisition of several plots—Splitting up of awards by District Court, whether disentitles petitioner from treating them as single award.*

Where in respect of several plots only one notice was sent to the owner under section 12 (2) of the Land Acquisition Act and he presented only one application under section 18 and one reference was made by the Land Acquisition Officer to the District Court, the fact that the award was split up by the latter should not prejudice the party who is entitled to treat it as one single award. **M** Vengu Naidu *v.* Deputy Collector of Madura Division. 34 M. L. J. 279 **468**

——— **ss. 18, 20** **468**

——— **ss. 29, 30, 45**—*Compensation, apportionment of—Tenant of* abadi *site, whether entitled to share of compensation*—Wajib-ul-arz, *provisions of.*

The plaintiff, a perpetual lessee of a village claimed from the defendant, a tenant, the entire compensation received by the latter under the Land Acquisition Act in respect of a house site in the *abadi* of the village. The village *wajib-ul-arz* declared the right of the defendant to occupy the site as long as he pleased, but also declared the right of the plaintiff to resume the site of the house after the occupant left the village, the latter having only the right to transfer the materials of the house:

Held, that the defendant had no interest in the land but was a mere licensee to occupy it and that he was not, therefore, entitled to any portion of the compensation awarded for the acquisition of the site under the Land Acquisition Act. **N** Shankar Govind *v.* Kisan **554**

——— **s. 45** **554**

Landlord and tenant **289**

———*Accretion to tenancy by formation of* chur *in river—Tenant, rights of.*

Lands which have gradually accreted to a *mukarrari* holding, forming a *chur* in a small shallow river cannot be claimed by the Zemindar as a portion of his *khas patit* but belong to the tenant subject to the payment of additional rent in respect thereof. **C** Gobinda Hota *v.* Kristapada Singha Babu **929**

———*Agreement to grant lease—Lessee admitted as tenant—Subsequent lease to third person, validity of.*

Defendant was tenant of certain land which the landlord agreed to re-let to him on his paying a certain sum of money in cash. Defendant paid the amount and continued in possession of the land agreed to be let to him. The landlord subsequently granted a lease of the same land to the plaintiff:

Held, (1) that the landlord was not entitled to grant a lease to the plaintiff, inasmuch as he had already, by reason of the agreement with the defendant followed by the acceptance of the money, constituted the latter as a tenant on the land;

(2) that plaintiff, when he came to deal with the landlord, must be deemed to have had constructive notice of the rights of the defendant who was actually in possession and cultivating the land. **C** Edon Mollah *v.* Badan **49**

——— *—Agreement to pay enhanced rate of rent after expiration of term of tenancy, validity of.*

An agreement by a tenant that if he holds over upon the expiry of the term he would pay rent at a higher rate than that which he paid during the term, is valid and enforceable. **Pat** Ramadhin Chaudhury *v.* Kumodini Dassi **901**

———*Agricultural lease—Disclaimer of landlord's title, what amounts to—Forfeiture of tenancy—Lease for life or for term, whether determined by disclaimer—Relief against forfeiture—Power of Court—'Renounce', meaning of.*

The principles of section 111 (*g*) of the Transfer of Property Act apply to agricultural leases, though they are not covered by the enactment.

A mere allegation of title by a tenant which does not amount to repudiation of the landlord's title, cannot work forfeiture of the tenancy.

Where the defendant, who was plaintiff's tenant for life, in a document whereunder he assigned certain properties which belonged to him in *jenm*, described certain other properties as his *jenm*, and the landlord sought to recover these latter properties which were comprised in his lease on the ground that his title was repudiated:

Held, that as the assertion was not addressed to the landlord or followed up by a transfer of that particular property to a third party, but was only an incidental reference in a document intended to convey some other property, it was not enough to constitute a disclaimer of title.

Per *Seshagiri Aiyar, J.*—Where there is a disclaimer of the landlord's title by the tenant, it will work a forfeiture of the tenancy even though the lease is for life or for a term.

If there is a denial of title, Courts have no power to relieve against forfeiture. In such a case, the tenant must prove, in order to obtain relief from Court, that the denial was occasioned by the fraud

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mistake or accident of the landlord and that the tenant himself was neither careless nor negligent.

The expression 'renounce' connotes that some act is done to the knowledge of the landlord which is calculated to convey to him the impression that the tenant repudiates his title.

Per *Napier, J.*—Where there is no statutory provision determining particular relations between landlords and tenants in India, resort may be had to the principles of the English Law of Real Property, bearing in mind the difference in the origin of tenures and the conditions peculiar to land tenures in India.

The words 'repudiation' and 'renunciation' require something a great deal stronger than a mere assertion not communicated to the landlord Though a hard and fast rule cannot be laid down, a very good test to apply would be, whether the assertion would operate as a starting point for adverse possession against the landlord. **M** KOMALUKUTTI *v.* PULIKALAKATH MUHAMAD, 34 M. L. J. 170; 23 M. L. T. 178; 7 L. W. 291; (1918) M. W. N. 200; 41 M. 629 **743**

——— *Apportionment of rent—Joint landlords, right of, to recover rent proportionately to their shares.*

Before the rent of a holding is actually apportioned either by an amicable arrangement between all the parties concerned or by a decree, one of the joint landlords cannot, as a matter of right, claim from the tenants what he estimates to be his proportionate share of the rent.

Joint landlords cannot at their choice collect rent in separate shares even after giving due notice to the tenants of their separate demands. **C** SATYESH CHANDRA SARKAR *v* JILLAR RAHMAN, 27 C. L. J. 438 **721**

——— *Cesses, landlord agreeing to bear, effect of.*

Where a landlord let out a tenure at Rs. 90 per annum including the cesses:

Held, that the landlord clearly undertook by contract, as between himself and the tenure-holder, that he would bear the cesses. **C** JOGENDRA NATH MITRA *v.* APARA PROSAD MUKERJEE **616**

——— *Denial of landlord's title—Forfeiture of tenancy—Determination of tenancy.*

A denial by a tenant of his landlord's title in a suit for rent causes a forfeiture of the tenancy enabling the landlord to eject the tenant as a trespasser.

In order to determine a tenancy on the ground of denial of title by the tenant, it is not necessary that any notice should be given or a prescribed act should be done by the landlord. It is sufficient if something is done by the lessor to show his intention to determine the lease. **Pat** MUHAMMAD ABDUL LATIF *v.* HABIBUR RAHMAN **642**

——— Dowl kabuliyat, *construction of—Permanent interest, acquisition of—Landlord entitled to re-enter upon parties failing to settle rate of rent on expiration of temporary term, effect of.*

Where a Dowl Kabuliyat provided *inter alia* that in the event of the landlord and the tenant not being able to arrive at a new rate of rent after the expiration of the temporary term covered by the Dowl Kabuliyat, the landlord would be entitled to take possession of the land leased:

Held, that the provision was absolutely inconsistent with the fact that the tenant had a permanent interest in the land leased. **C** MOHIM CHANDRA PAL *v.* PRADYAT KUMAR TAGORE **651**

——— *Ejectment—Co-sharer landlord, whether can eject tenant—Partial ejectment, whether can be allowed—Tenancy, whether can be created by prescription.*

No co-sharer landlord can put an end to a tenancy unless he represents the entire proprietary body. Any co-sharer can sue to eject a trespasser from the entire area covered by a trespass, but only the full landlord can sue to eject a tenant.

A man who is put on the land as a tenant by a co-sharer and who remains with his status undisputed for many years, is *prima facie* a tenant who has been accepted as such by the proprietary body.

There can be no such thing as a partial ejectment of a tenant to the extent of the share of the co-sharer claiming joint possession, nor can there be joint possession by the landlord with the tenant.

Semble:—There can be created no tenancy by prescription. **N** DHANOOLAL *v.* RAMLAL **496**

——— *Grant of* patta *to tenant by Government, effect of—Adverse possession, claim of.*

Where the relationship of landlord and tenant has once been created, it cannot be terminated by any adverse action taken against the landlord by a third party, whether that party be the Government or some other rival claimant, and the tenant will still be estopped from denying the landlord's title.

The grant of a *patta* by Government to the tenant of a third person or a declaration of its ownership of the property will not dissolve the relationship of landlord and tenant already existing or start adverse possession in favour of the tenant against the landlord. **M** ELEDATH THAVAZHI *v.* ELIANGATTIL SANKARA VALIA, (1918) M. W. N. 376; 7 L. W. 574; 24 M. L. T. 79; 8 L. W. 44 **656**

——— *Lease in consideration of services—Option of landlord to accept money-rent in lieu of services or to eject tenant—Landlord, right of, to eject on tenant's refusal to perform services.*

Where a lease was granted prior to the date of the Bengal Tenancy Act in consideration of the tenant undertaking "to render those services which his predecessor had rendered in the house of the landlord's predecessors and to duly perform those which he would be required to do in the landlord's house at the time of marriages", with an option to the landlord, on the tenant's failure to perform the services, to recover Rs. 2 as rent in lieu thereof or to eject the tenant:

Held, that the lease was a perfectly good one and under its terms the landlord was not bound to accept Rs. 2 in lieu of the services, but was competent to eject the tenant, in the event of the latter's refusal to perform the services. **C** SANCHIRAM DE BAHARI *v* HARA PRIYA THAKURANI **611**

——— *Lease, construction of—Toll, payment of, in respect of goods sold on boat or road.*

The defendant took a lease of a certain property, to which the provisions of the Transfer of Property Act applied, for the purpose of carrying on a shop. The lease provided for the payment of a certain amount of rent and also for the payment of a *toll* over the stipulated rent as part of the rent in respect

of goods that should be sold in the shop or on boat or on road on certain terms:

Held, that on a reasonable construction of the lease the defendant was liable to pay the toll not only in respect of goods sold in the shop but also in respect of goods which, having been taken from the shop to the nearest boat or road, would be sold there, but that his liability did not extend to the case of goods sold on boats and roads far away from the shop. **C** KISHORE LAL GOSWAMI *v.* TARAPADA BHATTACHARJEE **875**

——*Lease to tenant for term with liberty to landlord to settle land on expiration of term, whether confirmatory of pre-existing tenancy.*

A document which gives the tenant a lease for particular term at a fixed rent and which gives to the landlord the right at the expiration of that term to settle the land with whomsoever he pleases, cannot be taken as a mere recognition of a pre-existing tenancy. **C** DHARANI KANTA LAHIRI *v.* ISMAIL SHAIKH **221**

——*Occupancy rights*—Takiadar, *whether can build* pucca *mosque on* takia *land without consent of proprietors*—*Suit by proprietors for injunction*—*Death of some plaintiffs-appellants, pending appeal*—*Appeal, whether abates in toto.*

A *takiadar* is not entitled to build a *pucca* mosque on any part of the *takia* land in his possession as an occupancy tenant without the consent of the proprietors.

A suit was brought by several proprietors of a village against the defendant for a perpetual injunction restraining him from building a mosque on certain *takia* land of which he was in possession as an occupancy tenant. On the hearing of the second appeal in the Chief Court it appeared that some of the plaintiffs-appellants had died and no application had been made to bring on the record their legal representatives within limitation:

Held, (1) that inasmuch as the suit could in the first instance have been brought without the deceased plaintiffs having been joined at all, the appeal did not abate as a whole but only so far as the deceased plaintiffs-appellants were concerned;

(2) that as the building of a mosque was inconsistent with the purpose for which the land was originally given, the defendant was not competent to build a *pucca* mosque on the *takia* land. **P** SAWAN *v.* MEHR DIN **963**

——*Occupancy tenancy in Punjab, nature of*—*Forfeiture*—*Denial of landlord's title, effect of*

The occupancy tenant of the Punjab is more than a mere permanent tenant; he is an individual who in many cases should have been the landlord, and he enjoys a permanent tenancy subject to certain conditions, at a concession rent.

The English rule of forfeiture on denial of the landlord's title is applied in the Punjab in the case of ordinary tenancies and even in the case of permanent tenancies on a rack rent and when the denial of the landlord's title admits of no other remedy, but the rule is inapplicable in the case of an occupancy tenancy. **P** FAKIR *v.* WAZIR KHAN, 32 P. R 1918 **105**

——*Rent received by* gomasta *of landlord, whether sufficient to prove tenancy*

In the absence of evidence to the contrary, the ordinary presumption would be that the *gomasta* of a landlord performed his duty and duly delivered the rent collected by him to his employer the landlord. Therefore independently of the question whether a *gomasta* had authority to grant an *amalnamah* or settle a holding, the receipt of rent by him on behalf of his employer from the person in occupation of a holding is sufficient to prove the tenancy of the latter. **C** JAHURMUL BABU *v.* KERAMUTULLAH MOLLA **196**

——*Rent, suit for maintainability of, against one of several heirs of deceased tenant*—*Contract Act (IX of 1872), s. 43, applicability of.*

A landlord cannot maintain a suit for arrears of rent against one of several heirs of a deceased tenant without joining the others as defendants. Section 43 of the Contract Act has no applicability to such a case. **C** SIBA KRISHNA SINHA SARMA *v.* JAGAT CHANDRA **732**

——*Suit for arrears of rent*—*Decree with limitation that it should not be executed against tenant personally, validity of.*

Where in a suit for rent the Court finds that the defendant-tenant is liable, it should pass a decree in favour of the landlord-plaintiff in the ordinary way without any limitation as to the execution of the decree, *e. g.*, that the decree shall only be executed against the *jama* in default and not against the tenant personally.

Where in a suit for rent the Court, holding that the plaintiff's evidence as to the defendant's possession of the *jama* was meagre and unsatisfactory, but was not so bad as could be wholly discarded, made a decree in favour of the landlord with the limitation that the defendant-tenant would not be personally liable under the decree:

Held, that the decree must be set aside and the case remanded for a re-hearing and a clear finding whether the defendant was or was not liable for rent in respect of the *jama*, and that on that finding there should either be a decree in the ordinary manner without any limitation or the suit should be dismissed altogether. **C** DWARKA NATH DEY *v.* SAILAJA KANTA MULLIK **702**

——*Tenancy, whether divisible*—*Mortgage by one co-tenant in favour of another, whether binding on Malguzar.*

A tenancy, so far as the landlord is concerned, is indivisible and cannot be affected by an act to which the tenants alone are parties. Therefore, a mortgage of his share by one co-tenant in favour of the other is not binding upon the landlord. **N** ANAND RAO *v.* GIRDHARILAL **474**

——Trespass by tenant—Injunction, suit for **592**

——*Under-proprietary right, proof of*—Sir, *land held as, effect of*—Res judicata—*Proprietary title, question of, decision as to*—*Mortgagee, decision against, whether binding on mortgagor.*

While there can be no doubt that under-proprietary rights may be acquired by long adverse possession extending over the necessary period, it is at the same time necessary that a person who claims to have acquired a title in this way, must

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give definite evidence to show that he asserted an under-proprietary title.

Where it was found that certain persons had escaped ejectment on the ground that they had been holding their land as *sir* and that they had been described as *sirdars* in the receipts for rent given to them by the landlord:

Held, that on the above finding they could not be held to be under-proprietors of the *sir* land.

A decision obtained against the mortgagee alone in respect of a question as to proprietary title is not binding on the mortgagor. **O** KHUNNU SINGH v. ABBAS BANDI, 5 O. L. J. 121 **849**

Lease, construction of **875**

— —, *construction of—Covenant for renewal.*

Where a lease granted by Government contained a clause to the following effect: "If you agree to pay the enhanced rent which will be fixed at the time of re-settlement in future, the Government will have the right to settle with you, and if you decline, with some other person:"

Held, that the clause in the lease embodied in essence a covenant for renewal under which the lessee became entitled to a fresh lease on the same terms as before, except as to the amount of rent and the covenant for renewal. **C** SECRETARY OF STATE v. DIGAMBAR NANDA, 27 C. L. J 443 **939**

———, *construction of—Covenant for renewal.*

Where on a settlement made by the Government the grantee executed a Kabuliyat containing the following clause:—"If I agree to the enhanced rent to be fixed at the time of the next settlement in future, the Government shall have the power to settle the lands with me, or if I do not agree then with others":

Held, that the clause in the lease was in essence a covenant for renewal, under which the lessee became entitled to obtain a renewal of the lease on the same terms as were contained in the original lease, except as to the amount of rent and the covenant for renewal, and that according to the true construction of the original lease the term of the renewed lease would continue till the completion of the next periodical settlement by Government. **C** SECRETARY OF STATE v. SIBAPRO AD JANA, 27 C. L. J. 447 **983**

Legal Practitioners Act (XVIII of 1879), s. 13 (b)—*Pleader—Professional misconduct—Acting for both parties in one suit.*

A Pleader, who acts for one party at one stage of a suit or proceeding and then, without the leave of the Court, acts for the opposite party in the same suit or proceeding, although he may not act out of any improper motive, is guilty of gross carelessness and disregard of the rules of the profession, amounting to gross misconduct in the discharge of professional duties within the meaning of section 13 *b)* of the Legal Practitioners Act. **Pat** EMPEROR *v.* BIR KISHORE RAI, 3 P. L. J. 390; 5 P. L. W. 229; 19 CR. L. J. 636 **684**

———, **rules under, r. 41**—*Case involving large pecuniary value—Two sets of fees, award of.*

Under rule 41 of the rules framed under the Legal Practitioners Act, it is competent to a Court to award two sets of fees to a party where more than one

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Vakil has been engaged by him owing to the large pecuniary value of the case, even though it does not involve questions of special difficulty. **M** CHALIKANI VENKATARAYANIM GARU *v.* VATSAVYA NENKATA SUBHADRYAMMA, 34 M. L. J. 488; (19.8) M. W. N. 371; 24 M. L. T 56 **437**

Licensee—*Ejectment, suit for—Notice to quit, whether necessary.*

In order to maintain a suit for the ejectment of a licensee, a notice to quit is not necessary even where the licensee has erected huts upon the land. **C** GABINDA CHANDRA GHOSE v. NANDADULAL SUT, 27 C. L J. 523 **317**

Limitation **324**

Limitation Act (IX of 1908), s. 3 **168**

——— **s. 5**—*Appeal, delay in filing—Sufficient cause—Mistake of legal adviser.*

A legal adviser's mistake, in order to justify an extension of the period prescribed for presenting an appeal, must be a *bona fide* one; and nothing can be deemed to be done in good faith which is not done with due care and attention.

Presentation of an appeal to a Court which has obviously no jurisdiction to entertain it is not a *bona fide* mistake. **P** AHMAD HASSAN v. SHAMS-UL-NISA, 10 P. L. R. 1918; 69 P. W. R. 1918 **542**

——— **s. 5**—*Appeal filed beyond time—Sufficient cause—Mistake of legal adviser—Proof.*

Before an extension of time can be granted under section 5 of the Limitation Act on the ground that the appeal has been filed beyond time owing to a mistake made by the legal adviser of the appellant, there must be proper evidence establishing that a mistake was committed and that it was a *bona fide* one. **C** ISWAR CHANDRA KAPALI v. ARJAN **725**

——— **s. 5**—*Delay in presenting appeal—Presentation to wrong Court, whether sufficient cause.*

Delays in presentation of appeals are within section 5 of the Limitation Act and the Court has power to excuse delays.

Where an appeal is time-barred on the date of its presentation and the delay is due to the fact that it was previously presented in a wrong Court and returned for re-presentation to the proper Court, the delay can be excused under section 5 of the Limitation Act. **M** KARAKKATTITATHIL RAYARAPPA v. KOYOTAN CHARLE VEETIL, 35 M. L. J 51; 24 M. L. T. 28; 8 L W. 154 **489**

——— **s. 10,** applicability of, to suit for accounts by minor against Administrator, whether substantial question of law **182**

——— **s. 10**—*Trust—Assignment of land—Suit for possession—Limitation.*

Where as the result of a mutual arrangement plaintiff assigned some land to the defendant who was to remain in possession of it taking profits and bearing loss until the termination of the assignment:

Held, that a suit to recover possession of the land by the plaintiff was governed by section 10 of the Limitation Act. **P** SEOTI v. BHAGIRATH, 12 P. L. R. 1918; 70 P. W. R. 19 8 **325**

——— **s. 14**—*Exclusion of time spent in* bona fide *proceeding in Court not having jurisdiction—Due diligence—Delay, effect of.*

A decree for rent was obtained against two co-tenants of a holding and was satisfied by one of them

on 9th August 1910. On 20th May 1913 the latter instituted a suit for contribution against the other co-tenant in the Small Cause Court which, holding that it had no jurisdiction to try the suit, directed the return of the plaint for presentation to the proper Court on 27th November 1913. The plaintiff refused to take back the plaint and lodged a revision in the High Court on 19th February 1914, which was dismissed on 16th March 1915. On 15th June 1915 she applied for the return of the plaint which was returned on the 30th June 1915, on which day she presented it in the Court of the Munsif:

Held, that even if it were assumed that the plaintiff was entitled to exclude the period from the 20th May 1913 to the 16th March 1915, she could not in any case be allowed to exclude the period between the 16th March and the 30th June under section 14 of the Limitation Act, inasmuch as she did not prosecute her suit with due diligence in view of the fact that she waited for three months after the dismissal of her application for revision before she asked for the return of the plaint and that, therefore, the suit was barred by time.

Held, further, that the plaintiff was not justified in refusing to take back the plaint from the Court of Small Causes merely because she wished to file a revision in the High Court, inasmuch as if she had taken back the plaint her action could not have prejudiced her application for revision and, on the other hand, she would have been able to present the plaint in the proper Court immediately on the dismissal of the application. **A** HAMIDA BIBI *v.* FATIMA BIBI, 16 A. L. J. 429 **991**

——— **s. 14**—*Execution - Application for transfer of decree, dismissal of—Subsequent application for attachment—Limitation—Exclusion of time occupied in appeal and second appeal against first order.*

A decree-holder applied in the Tinnevelly Munsif's Court on 13th September 1909 for transfer of his decree to the Ambasamudram Munsif's Court. The application was rejected by the Munsif but was allowed in appeal. In second appeal, however, the High Court restored the Munsif's order on 13th February 1914. The decree-holder then applied for attachment of the judgment-debtor's properties on 14th October 1913:

Held, that the application was barred by limitation and that the time occupied in the appeal and second appeal in the matter of the first application could not be excluded under section 14 of the Limitation Act, inasmuch as the application was proceeded with in a Court having jurisdiction and the decree-holder could not be said to have pursued his remedy through a *bona fide* mistake in the wrong Court. **M** VIDHAVA THEERTHA SWAMIGAL *v.* VENKATARAMA IYER, 33 M. L. J. 682 **460**

——— **s. 15 (2),** *applicability of, to suits under s. 104H, Bengal Tenancy Act (VIII B. C. of 1885).*

Section 15 (2) of the Limitation Act cannot be applied to extend the period of six months provided for the institution of suits under section 104H of the Bengal Tenancy Act. **C** SECRETARY OF STATE *v.* GANGADHAR NANDA, 27 C. L. J. 374 **228**

——— **s. 19**—*Acknowledgment—Deposition made by defendant, whether acknowledgment.*

A deposition made by the defendant in a previous case but not signed by him or by an agent duly authorised by him in that behalf does not fulfil the requirements of section 19 of the Limitation Act and does not, therefore, amount to a valid acknowledgment of liability within the meaning of that section. **P** KAPUR CHAND *v.* NARINJAN LAL, 34 P. R. 1918 **99**

——— **s. 19, Sch. I, Art. 78**—*Acknowledgment—Payment by cheque—Cheque dishonoured—Limitation.*

The fact that the defendant, in a suit to recover money alleged to be due on accounts taken between the parties, sent to the plaintiff a *hundi* and a cheque which were dishonoured on presentation, cannot attract the application of Article 78 of the Limitation Act to the suit.

The mere delivery of such a *hundi* and cheque does not constitute an acknowledgment within the meaning of section 19 of the Limitation Act. **C** PADMA LOCHAN PATAR *v.* GIRIS CHANDRA KIL, 27 C. L. J. 392 **241**

——— **ss. 20, 21**—*Limitation, saving of—Interest, payment of—Co-mortgagor, payment by, whether binding on other co-mortgagors*

Where payment of interest as such is made by one of several co-mortgagors, such payment cannot in view of section 21 of the Limitation Act save limitation under section 20 of that Act except as against that co-mortgagor, unless it is shown that the other co-mortgagors authorised the payment. **O** MUBARAK ALI *v.* GOPI NATH, 5 O. L. J. 73 **613**

——— **s. 21**—*Acknowledgment by partner, whether binding on co-partner—Implied authority to acknowledge, proof of, admissibility of.*

In the absence of direct evidence that a co-contractor or partner has authorised his co-contractor or partner to make acknowledgments or payments saving limitation on his behalf, such authority can be inferred from other circumstances, such as the position of the other co-contractors or partners in the business. **M** PANDIRI VEERANNA *v.* GRANDHI VEERABHADRASWAMI, 34 M. L. J. 373; 23 M. L. T. 261; (1918) M. W. N. 285; 7 L. W. 552; 41 M. 427 **18**

——— **s. 120** **432**

——— **Sch. I, Art. 11 (a),** applicability of **103**

——— ——— **Art. 30**—*Carrier, suit against, for injury to goods carried—Limitation.*

A suit for compensation for injury to goods while in the possession of a carrier, *e. g.*, a Railway Company, falls under Article 30 of the First Schedule of the Limitation Act and must be filed within one year from the date when the injury occurs. **S** LOUIS DREYFUS & Co. *v.* SECRETARY OF STATE, 11 S. L. R. 103 **173**

——— ——— **Art. 31,** applicability of **485**

——— ——— **Arts. 36, 62, 102**—*'Wages,' meaning of*—Archaka *of temple, claim by, for salary and perquisites—Limitation.*

The term 'wages' in Article 102 of the Limitation Act is a very general term; although it is usually used in connection with daily wages, it also includes the wages paid as monthly salary.

A claim, therefore, for the salary and perquisites of office by the *archaka* of a temple, whose position is essentially that of a servant under the temple

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trustee, is governed by Article 102 of the Limitation Act.

If the perquisites are received from third persons, they are not wages and if the claim is for their recovery from the trustee as in tort, Article 36 and not Article 102 will apply. **M** BHARADWAJA MUDALIAR v. ARUNACHALLA GURUKKAL, 23 M. L. T. 288; 7 L. W. 524 **414**

——— **Sch. I, Art. 61** **786**

——— ——— **Art. 62** **414**

——— ——— **Art. 78** **241**

——— ——— **Arts. 89, 90**—*Principal and agent—Accounts, suit for, of moneys entrusted to agent—Misapplication of moneys—Limitation, commencement of—Agency, termination of.*

A suit by a principal for accounts of moneys entrusted to his agent is governed by Article 89 of the Limitation Act, even though there are averments in the plaint that the agent either through negligence or misconduct has misapplied the moneys in an unauthorised manner.

The words "other suits" in Article 90 of the Limitation Act show that that article does not include suits which properly come within Article 89.

Such matters as the liability of the agent for wilful default and to account for moneys that should have come to his hands come within the scope of an ordinary money account and are governed by Article 89.

The termination of an agency is a question of fact for the purposes of Article 89 of the Limitation Act and the agency must be considered as having terminated when the authority of the agent is revoked, or the agent renounces the agency or the business of the agency is completed, which is practically another case of revocation or determination of authority. **M** MUTHIAH CHETTY v. ALAGAPPA CHETTY, 41 M. 1 **430**

——— ——— ——— **Art. 102** **414**

——— ——— ——— **Art. 120** **786**

——— ——— ——— **Art. 120**—*Landlord and tenant—Trespass by tenant—Injunction, suit for—Limitation.*

In 1893 defendant, who was the tenant of a house, built his own house on the adjoining land and constructed a staircase which was supported by a pillar driven into land belonging to the house of which he was the tenant. In 1905 the plaintiff took a permanent lease of the latter house and in 1912 he asked the defendant to pull down the staircase. The latter refused and the plaintiff then brought a suit for a mandatory injunction directing the defendant to remove the staircase:

Held, that the suit was barred by limitation under Article 120, Schedule I of the Limitation Act. **B** HARIRAM KISNIRAM v. SHIVBAKAS RAMCHAND, 20 BOM. L. R. 327 **592**

——— ——— **Arts. 126, 144, 148**—*Hindu Law—Joint family—Sale by father of equity of redemption of family property as his acquisition—Redemption by vendee and possession thereafter as absolute owner—Redemption, suit for, by son's alienee—Limitation, commencement of.*

First defendant and his father *G.* mortgaged family property to 2nd defendant. *G.* subsequently sold the equity of redemption as if the property was his self-acquisition to 3rd defendant. Third defendant redeemed 2nd defendant and obtained possession of the property. After *G.*'s death 1st defendant sold his share in the property to the plaintiff. In a suit by the plaintiff for possession of 1st defendant's share on payment of a proportionate portion of the mortgage amount:

Held, that Article 126 of the Limitation Act was applicable to the suit and that time commenced to run from the date of 3rd defendant's entering into possession.

Per *Sadasiva Aiyar, J.*—Article 126, which speaks of a suit "to set aside" the father's alienation of ancestral property, includes a suit in which possession is claimed and does not only contemplate a mere declaratory suit.

An alienation under Article 126 need *not* be for consideration. The Article applies alike to an alience with and to an alienee without notice. **M** MURAJALLI MUNIA GOUNDAN v. RAMASAMI CHETTI, 34 M. L. J. 528; 8 L. W. 28; 24 M. L. T. 22; (1918) M. W. N. 448; 41 M. 650 **867**

——— ——— **Sch. I, Art. 134**—*Alienation of asthan property by mahant—Suit by succeeding mahant—Limitation.*

Article 134, Schedule I, of the Limitation Act governs a suit instituted by a succeeding *mahant* of an *asthan* for possession of property appertaining to the *asthan* by setting aside an alienation for valuable consideration made by the preceding *mahant* in respect of that property. If such a suit is brought beyond 12 years from the date of such an alienation, it is barred by time to the extent of the interest which the alienation purports to convey, inasmuch as each succeeding *mahant* does not get a fresh start of limitation on the ground of his not deriving title from any previous *mahant*. **O** BASDEO BAN v RAM SARN, 5 O. L. J. 38 **292**

——— ——— ——— **Art. 134**—*Mortgage of occupancy holding to zemindar—Transfer of holding by zemindar—Redemption, suit for—Limitation.*

An occupancy tenant gave a usufructuary mortgage of his holding to the *zemindar*, who sold his property rights including the holding to the defendant. The plaintiff brought a suit for redemption and the defendant contended that the plaintiff being an occupancy tenant and having been dispossessed for more than six years from his holding, his suit for possession was barred by time:

Held, that the suit was not one to recover possession of a holding from which the plaintiff had been unlawfully dispossessed, but was a suit by a mortgagor to recover possession of the mortgaged property from his mortgagee and certain persons to whom the mortgagee had transferred the property and as the plaintiff had not been unlawfully dispossessed from the holding, the limitation of 12 years applied from the date of transfer to defendant under Article 134 of Schedule I of the Limitation Act. **A** ABHILAKH DHELPHORA v LILADHAR DHALPHORA **549**

——— ——— ——— **Art. 134**, *scope of—Transfer by mortgagee—Redemption, suit for, against transferee—Adverse possession, plea of—Absolute interest, acquisition of, by purchaser—Tests—Burden of proof—Adverse finding on issue, while final decision favourable to party, effect of*—Res judicata.

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Article 134 of the Limitation Act governs only those cases where the transferee from the mortgagee acquires an absolute title to and interest in the property transferred.

Per *Seshagiri Aiyar, J.*—Article 134 of the Limitation Act is only a branch of the law of prescription, and the question to be determined in cases governed by that Article is, what it is that the purchaser prescribed for. If the transferee bargained for and believed he was bargaining only for the interests of the mortgagee, he cannot acquire title as the absolute owner of the property. The fact that he knew his vendor had only mortgagee rights would not be conclusive on the question. The real test would be, did he ask for and obtain an absolute interest in the property and believe himself that he was acquiring an absolute interest in it.

The fact that a party against whom an issue is decided has no right of appeal does not affect the rule of *res judicata*.

Where the decision on an issue is not necessary for the disposal of the case, it will not operate as *res judicata*.

Where an unnecessary decision on an issue is embodied in the decree itself, the matter becomes *res judicata*.

Where a judgment decides more issues than one and it is doubtful on which of those issues the final conclusion was based, the decision on all the issues will be *res judicata*.

Where the decision on an issue is unnecessary and the party against whom it is given cannot appeal as the final decree is in his favour the decision on the issue would be *res judicata*. The proper procedure for the party adversely affected by the issue is to ask the Court to embody it in the decree.

Per *Bakewell, J.*—A transferee who claims the benefit of Article 134 of the Limitation Act must adduce evidence that he intended to purchase an absolute title, which will be, in the first place, the deed of transfer but may also consist of the contract of sale and the negotiations which preceded it. Evidence as to the documents of title produced by the vendor and the steps taken by the purchaser to ascertain the former's title to the property will be important as showing the interest to be transferred. If the title adduced by the vendor and the deed of transfer to the purchaser are consistent with an intention to transfer an absolute interest, the burden will lie on the plaintiff to show that the circumstances of the transfer negative such an intention. **M** MUTHAYA SHETTI *v.* KANTHAPPA SHETTI, 34 M. L. J. 431; 7 L. W. 482; 23 M. L. T. 291; (1918) M. W. N. 334 **975**

——— **Sch. I, Art. 135** **563**

——— ——— **Art. 142**—*Possession and dispossession—True owner obtaining possession by force—Limitation, commencement of.*

Possession of the true owner, however obtained, counts in his favour for the purposes of Article 142 of the Limitation Act in a suit brought by him for recovery of possession on establishment of title.

The plaintiffs, having been dispossessed by the defendants of certain lands belonging to them, succeeded in ousting the latter therefrom and retained possession until they were evicted under a decree in a suit brought by the defendants under section 9 of the Specific Relief Act:

Held, that time began to run against the plaintiffs from the moment they were evicted in execution of the decree under the Specific Relief Act, and not before. **C** HARI DAS *v.* DEBENDRO RAM BANERJEE **548**

——— **Sch. I, Art. 144** **563, 656, 867**

——— ——— **Art. 148** **867**

——— ——— **Art. 149**, *applicability of, to suit for redemption of charge—Transfer of Property Act (IV of 882), s. 95—Co-mortgagor redeeming mortgage—Charge on shares of other co-mortgagors—Possession of co-mortgagor, whether adverse to others.*

Article 148 of the Limitation Act does not apply to a suit to redeem a charge which one of several mortgagors redeeming the mortgaged property has under section 95 of the Transfer of Property Act on the shares of the other co-mortgagors.

Three brothers *D*, *G.* and *K.* were the joint owners of a *taluq* which they had mortgaged. *A.*, in execution of a decree against two of the brothers, *D.* and *G.*, having purchased the *taluq*, redeemed the mortgage and obtained possession of the lands through Court. Subsequently he procured from the superior landlord a settlement of the whole *taluq* in his favour. The finally published Record of Rights contained an entry showing that the *taluq* was in exclusive possession of *A.* by virtue of the sale-certificate he had obtained at the execution sale:

Held, that *A* having redeemed the mortgage obtained a charge on the share of the third brother *K* by virtue of section 95 of the Transfer of Property Act, but that his possession of the *taluq*, having regard to what happened subsequent to his redemption of the mortgage, was not the possession of a co-sharer of *K.* but was in exclusion of *K.* and adverse to him. **C** PURNA CHANDRA PAL *v.* BARADA PRASUNNA BHATTACHARJEE, 22 C W N. 637 **783**

——— ——— **Art. 181.**

Quære.—Whether Article 181 of the Limitation Act applies to an application to enforce an injunction or whether such an application is exempt from the operation of the Limitation Act. **C** SACHI PRASAD *v.* AMAR NATH RAI, 27 C. L. J. 506 **864**

——— ——— **Arts. 181, 182**—*Execution—Decree satisfied by attachment and execution of another decree in judgment-debtor's favour—Decree set aside on appeal—Refund of amount realised—Application for execution—Limitation*

Appellant obtained a decree for costs against respondent. In execution of that decree appellant attached and executed a decree obtained by the respondent against a third person. The latter decree was, however, set aside on appeal, and appellant had to refund the money realised by him in execution of that decree. The appellant then made a fresh application for execution of his own decree more than three years after his last application:

Held, (1) that the application being in form and in substance one for execution of a decree, Article 181 of Schedule I of the Limitation Act had no application to it;

(2) that the application was governed by Article 182 of Schedule I of the Limitation Act and, having

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been made more than three years after the date of the last application, was barred by limitation. **A** SUNDER LAL v. BANARSI DAS **531**

——— Sch. I, Arts. 181, 182—*Civil Procedure Code (Act V of 1908), O. XXXIV, r. 5 (2)—Mortgage suit—Application for final decree—Limitation applicable.*

Article 181 and not Article 182 of Schedule I of the Limitation Act is applicable to an application for a final decree in a mortgage suit under Order XXXIV, rule 5 (2), Civil Procedure Code, where the preliminary decree was passed after the new Code, Act V of 1908, came into force. **M** PATTABIRAMA NAIDU v. SUBRAMANIA CHETTI, 7 L. W 438 **76**

——— ——— Art. 182 (5)—*Execution of decree—Payment of portion of decretal amount by judgment-debtor—Limitation, fresh starting point of.*

A decree-holder gets a fresh starting point for limitation to execute the decree within the meaning of Article 182, clause (5) of the Limitation Act, from the date on which a portion of the decretal amount is paid by the judgment-debtor. **C** JOTINDRA KUMAR DASS v. GAGAN CHANDRA PAL **903**

——— ——— Art. 182 (6)—*'Date of issue of notice,' meaning of.*

The date of the issue of notice in Article 182 (6) of the Limitation Act means the date on which the notice actually issues from the office of the Court, that is to say, the date for which it is signed by the *shristadar* in the name of the Court. **Pat** KHODA BUKHSH v. BAHADUR ALI, (1918) PAT. 130; 3 P. L. J. 285; 4 P. L. W. 324 **203**

——— ——— Art. 182 (6)—*Date of issue of notice, what is.*

The words, "date of issue of notice" in clause (6) of Article 182 of Schedule I of the Limitation Act mean the date on which the notice was in fact issued, and not the date on which the Court ordered it to be issued. **B** NILKANTH LAXMAN JOSHI v. RAGHO MAHADU PAVALE, 20 BOM. L. R. 851 **559**

——— ——— Art. 182 (7) **436**

Madras Civil Courts Act (III of 1873), s. 14 **89**

Madras Estates Land Act (I of 1908), s. 3 **471**

——— ss. 3 (2) (d), 8 (1) (2) and Exception—*Merger of* kudivaram *interest in fractional* melvaram *holder in* inam *Lease Rent, suit for, whether cognizable by Civil or Revenue Court—Jurisdiction—'The* inamdar,' *meaning of—Exception to s. 8, applicability of.*

A suit for rent by a fractional sharer in an *inam* village who has acquired the Kudivaram interest in the entire village in respect of a lease of a portion of the village after such acquisition, is cognizable by the Revenue and not by the Civil Court, the holding not having ceased to be part of the estate.

The expression 'the *inamdar*' in the exception to section 8 must be read in its strict sense as equivalent only to the owner of the entire interest in the *inam* and the exception is applicable only to sub-section (1). **M** RAJACHARI v. THIRUMUGOOR DEVASTANAM, 34 M. L. J. 419; 7 L. W. 568; (1918) M. W N. 506 **71**

Madras Estates Land Act—contd.

——— s. 8 (1) (2) and Exception 71

——— s. 26—*Madras Rent Recovery Act (VIII of 1865), s. 11—Landlord and tenant—*Faisal *rate, presumption of, as proper rate of rent—Contract to receive lower rate by prior landholder, whether binds successor—Decision in favour of reduced rate in suit by previous landholder, whether* res judicata *in suit for* faisal *rate by successor.*

Though the provisions of section 11 of the repealed Madras Act VIII of 1865 are not re-enacted in the Madras Estates Land Act there is a presumption that the *faisal* rate fixed by Government is the proper rent that can be levied on the land.

A contract between a landholder and a tenant for payment of a favourable rate of rent will not, except in cases specified in section 26 I of the Madras Estates Land Act, bind the successor-in-title of the landholder who can enforce the *faisal* rate or the rate in force prior to such contract.

Per *Phillips, J.*—A decision of Court negativing a landholder's right to levy *faisal* rate and upholding a contract between him and his tenant for payment of reduced rent will not be *res judicata* in a suit by the landholder's successors to enforce the original rate, as under section 26 (3) of the Madras Estates Land Act, a special privilege is conferred on the successor to a landholder, not possessed by the original landholder himself. *i. e*, the right to enhance an unduly low rate of rent agreed to by the latter.

Per *Bakewell, J.*—The prior decision will not operate as *res judicata*, unless it is shown that the plaintiffs in that suit had an absolute interest in the property, in order that they might be held to be the predecessors-in-title of the landholder seeking to enforce the original rate in the subsequent suit. **M** KARUPPA GOUNDAN v. NARAYANA CHETTIAR, (1918) M. W. N. 188; 7 L. W. 376; 24 M. L. T. 35 **406**

——— s. 77 (1) **471**

——— ——— ss. 77 (1), 189, 192, 3—*Civil Procedure Code (Act V of 1908), s 115, O. VII, r. 10, O. XLIII, r. 1 (a)—Suit in Revenue Court—Remand by District Court for presentation to Civil Court—Appeal, second, to High Court, maintainability of—High Court, power of, to treat appeal as revision—Rent, suit for, on cessation of service for which tenure granted—*Forum*—Jurisdiction of Revenue Court, scope of.*

No second appeal lies to the High Court against an order of the District Court in appeal remanding a suit instituted in the Revenue Court for presentation to the Civil Court.

Order XLIII, rule 1 (*a*), Civil Procedure Code, which gives the right of appeal against orders passed under Order VII, rule 10, is inapplicable to suits in Revenue Courts by virtue of section 192 of the Madras Estates Land Act.

The High Court has power to treat an appeal as a petition in revision under section 115, Civil Procedure Code, especially when the question in issue is one of jurisdiction. Section 115, Civil Procedure Code, is not controlled by section 192 of the Madras Estates Land Act.

A suit for rent, based on the allegation of the land being a Ryoti land in which the defendant has occupancy rights, is cognisable by the Revenue Court

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notwithstanding plaintiff's admission that the defendant held at a favourable rent on condition of doing services which were discontinued and which discontinuance disentitled him to claim the reduction. Under the circumstances, the land cannot be said to be held on service tenure *at the date of suit* so as to bring it within the jurisdiction of the Civil Courts.

When the allegations in a plaint bring the case within section 77 of the Estates Land Act, the suit must be filed in the Revenue Court and the jurisdiction of the Court will not depend on any pleas the defendant might raise. The fact that the Court will have to go into complicated questions will not affect the jurisdiction of the Revenue Court. **M** VENKATA RAMAYYA APPA ROW v. CHAKALI VEERASWAMIGADU, 34 M. L. J. 309; 23 M. L. T. 251; 7 L. W. 508; (1918) M. W. N. 327; 41 M. 554 **471**

——— **ss. 189, 192** **471**

Madras Forest Act (V of 1882), s. 26, *scope of—Existing rights, saving of—Conviction without enquiry into rights claimed, legality of.*

Section 26 of the Madras Forest Act does not empower the Government to regulate the use of the land which is dealt with in Chapter III to the detriment of any rights existing in individuals and communities.

Where the residents of a village claim the right of pasturage and the right to cut fuel, a conviction under section 26 without an enquiry into these allegations is illegal. **M** THATHA PILLAI v. EMPEROR, 19 Cr. L. J. 600 **504**

Madras Land Encroachment Act (III of 1905), s. 3—*Pathway on private land, obstruction of, by owner—Penal assessment, levy of, legality of.*

Government have no right under Madras Act III of 1905 to levy penal assessment where an owner of land obstructs a pathway over the land to which the public have acquired a right of user. **M** ALAUDIN SAHEB v. SECRETARY OF STATE, 6 L. W. 436 **30**

Madras Local Boards Act (V of 1884), s. 73 **729**

Madras Rent Recovery Act (VIII of 1865), s. 11 **406**

Madras Revenue Recovery Act (II of 1864), ss. 25, 38—*'Defaulter,' meaning of—Sale for arrears of revenue, suit to set aside, maintainability of—Jurisdiction of Civil Courts—Omission to distrain moveables, whether sufficient to set aside sale—Collusion among bidders, effect of.*

An agreement made between the purchaser and other persons after the sale to go in shares, a collusive agreement between the bidders not to bid against each other, the omission of any attempt to distrain the moveable properties of the defaulter or the crops on the land are not sufficient grounds to set aside the sale by a suit filed in the Civil Court.

The 'defaulter' referred to in section 25 of the Madras Revenue Recovery Act who is entitled to notice or demand before attachment and sale is the ostensible registered proprietor. To plead that section the plaintiff must show that he is the defaulter. A person who owns the land but allows the *patta* to stand in another person's name and thus puts him

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forward as the ostensible owner, cannot claim the benefit of the section or complain that Government erroneously served the written demand on the latter. **M** MANAKARI VENKAPPA CHARI v. HOLAGUNEL POMPONA GOWD, (1918) M. W. N. 191; 7 L. W. 372; 23 M. L. T. 297 **474**

——— **s. 38.**

An irregularity in the conduct of a sale held under section 38 of Madras Act II of 1864 empowers the Collector to set it aside, but there must be other sufficient grounds for a Civil Court to interfere. **M** MANAKARI VENKAPPA CHARI v. HOLAGUNEL POMPANA GOWD, (1918) M. W. N 191; 7 L. W. 372; 23 M. L. T. 297 **474**

——— **ss. 44, 59, 63**—*Regulation X of 1831, s. 2—Sale of minor's property for arrears of revenue—Suit to set aside sale, absence of, effect of—S. 59 of Act II of 1864, applicability of, to cases governed by Regulation X of 1831—Regulation X of 1831, applicability of, to ryotwari estates of minors—Registry in name of minor's mother, effect of.*

A sale of a minor's property under the Madras Revenue Recovery Act is not a proceeding to which section 59 of the Act is applicable so as to compel the aggrieved parties to sue within 6 months of the sale. Section 59 is inapplicable to cases protected by Regulation X of 1831.

Regulation X of 1831 does not only apply to such estates of minors as are ordinarily taken charge of by the Court of Wards; Ryotwari lands owned by minors also come within the protection of the Regulation.

Where the *patta* erroneously stands in the name of the minor's mother, that fact does not preclude the minor from invoking the aid of Regulation X of 1831.

Per *Spencer, J.*—Section 2 of Regulation X of 1831 includes the estates of minor sole proprietors not under the charge of the Court of Wards. This section and the preamble to the Regulation and the foot-note to section 20 of Regulation V of 1804 make it clear that the prohibition extends to minors' estates of every description not subject to the jurisdiction of the Court of Wards. The section does not apply to minor members of a joint Hindu family governed by the Mitakshara Law, who have by birth merely an undivided interest in the estate. **M** SAMINATHA AIYAR v. GOVINDASAMI PADAYACHI, (1918) M. W. N. 409; 8 L. W. 37 **595**

——— **s. 59** **595**

——— **s. 59**—*Sale for dues to Government—Notice, absence of, to defaulter, effect of—Irregularity—Civil Procedure Code (Act V of 1908), s. 115—Suit to set aside sale beyond limitation—Proceedings after sale, knowledge of, effect of—Estoppel.*

Failure to serve notice of sale on a defaulter under Madras Act II of 1864 does not affect the jurisdiction of the Collector to sell the property for arrears due to Government.

An omission to serve notice will amount to an illegality or irregularity in the exercise of jurisdiction by the Collector within the meaning of section 115, Civil Procedure Code, and would vitiate his proceedings; but that is not enough to enable the party aggrieved to obtain a declaration that the sale is not

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binding on him, if he does not sue within the period specified in section 59 of the Act.

The fact that the sale was without notice will not enable the defaulter whose property was sold to ignore subsequent proceedings taken to his knowledge as having been taken without jurisdiction. **M** VADLUR CHINNA NAGI REDDI *v.* DEVINENI VENKATRAMANIAH, 23 M. L. T. 231; (1918) M. W. N. 224; 7 L. W. 468 **653**

——— **s. 63** **595**

Malabar Law—*Compromise of suit by Karnavan on behalf of Tarwad—Karnavan not impleaded as such, effect of—Compromise decree, whether binds Tarwad—Burden of proof—Registration Act (XX of 1866)—Non-registration of compromise decree.*

The validity of a decree passed on compromise was not dependent on registration under the Registration Act of 1866.

The onus of proving that a compromise is illegal or void is on the party asserting it.

Where a decree is in effect against a Tarwad, the fact that the Karnavan was not specially impleaded in his representative capacity will not make it the less a decree against the Tarwad.

It is not the form of the suit that is essential, but the question in each case is whether in substance the person suing or sued conducted the litigation for his own benefit or as representing the family of which he was the head. **M** KARAKKATTITATHIL RAYARAPPA *v.* KOYOTAN CHARLE VEETIL, 35 M. L. J. 51; 24 M. L. T. 28; 8 L. W. 154 **489**

——— —Melcharth, *execution of, by* devaswom *agent—Consideration, application of, for purposes of* devaswom - Melkanomdar, *duty of, to enquire as to application of funds—Recital in deed as to nature of executant's control over* devaswom, *whether renders* melcharth *unenforceable.*

A Melcharth executed by the agent of a Devaswom is not unenforceable merely because the executant describes the nature of his control over the Devaswom.

The grant of a Melcharth by the trustee of a Devaswom is an ordinary incident of its management, the propriety of which the Melkanomdar is under no obligation to scrutinise, and the latter is not bound to enquire into the existence of any particular necessity for funds by the Devaswom or into the application of such funds by the trustee. **M** VYTHINATHIEN *v.* PADMANABHA PATTAR **659**

Malabar Law and Usage—Karnavan, *appointment of senior* anandravan *as, by family* karar *—Removal of* karnavan, *suit for, maintainability of.*

Where the senior Anandravan in a Malabar Tarwad is appointed to the office of Karnavan by a family Karar whereunder the existing Karnavan renounces or is deprived of his office, a suit will lie to remove the Karnavan so appointed for misconduct.

A family Karar to which all the adult members of a Tarwad are parties and by which a person is deprived of his status as Karnavan is not the same thing in the eye of the law as a unilateral act of relinquishment of his office by the Karnavan, though the result on his status as Karnavan may be the same. **M** PAZHAVATHIL MAVILAPUTAI VEETIL CHINDAN NAMBIAR *v.* KUNHI RAMAN NAMBIAR, 34 M. L. J. 40; (1918) M. W. N. 283; 23 M. L. T. 316; 7 L. W. 542; 41 M. 577 **26**

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——— *—Otti mortgagee, right of pre-emption of—Involuntary sale, enforceability of right in—Notice of sale and of sale price, whether necessary—Civil Procedure Code (Act V of 1908), ss. 60, 65, O. XXI, rr. 89, 90, 91, 92*

The right of pre-emption of an *otti* mortgagee in Malabar does not arise in the case of an involuntary sale, and he is not entitled to notice of the sale or of the sale price in such a case. **M** VASUDEVAN *v.* ITTIRARICHAN NAIR, 34 M. L. J. 412; 23 M. L. T. 302; (1918) M. W. N. 318; 7 L. W. 547; 41 M. 582 **46**

Malicious prosecution—*Proof—'Reasonable and probable cause,' meaning of—Innocence, proof of, by plaintiff, whether necessary.*

In an action for malicious prosecution the plaintiff must prove four things, (1) that he was prosecuted, 2) that the prosecution ended favourably to him, (3) that the defendant acted without reasonable and probable cause, and (4) that the defendant was actuated by malice. Under the second and third heads, questions as to plaintiff's innocence generally arise. But they must be regarded only as incidental to the question whether the prosecution ended in the plaintiff's discharge or acquittal and whether the defendant acted without reasonable or probable cause.

The plaintiff is not charged with the onus of affirmatively proving his innocence.

Reasonable and probable cause means an honest belief in the guilt of the accused based on a full conviction, founded upon reasonable grounds of the existence of a state of circumstances, which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed. **M** GOPALA KRISHNA KUDVA *v.* BANGLE NARAYANA KAMTHY, 34 M. L. J. 517; 23 M. L. T. 341; 7 L. W. 604; (1918) M. W. N. 454 **803**

Master and servant—*Liability of master for servant's wrong.*

A master is answerable for every such wrong of his servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved.

The owner of a vessel is not liable *qua* owner for damage caused by the negligence of the crew He is liable only as employer of the wrong-doer. **L B.** BRUCE, D. M. *v.* KYAW ZIN **822**

——— *—Liability of master for wrongful act of servant.*

A master is liable for the wrongful act of his servant where the servant, acting in a matter which in within the scope of his authority, that is, within the course of his employment, commits a wrong by exceeding the authority vested in him. The act itself which constitutes the wrong may be in excess of the servant's authority, but if in thus transgressing his authority the servant is doing in the master's interests one of the class of acts which the master has employed him to do, then the master is liable. **B** GIRJASHANKAR DAYASHANKAR *v.* B. B. & C. I. RAILWAY, 20 BOM. L. R. 126 **715**

Mercantile Law—*Bill of lading—Carrier by sea, right of, to limit liability by bill of lading.*

According to English Law it is open to a carrier by sea to limit his liability by a writing such as the bill of lading. Consequently the following conditions in a bill of lading are perfectly valid:

(*a*) that the Company shall not be liable for any damage caused by sweating, fermenting, heat, boilers, or storage, whether arising or not from the negligence of the persons in the service of the Company;

(*b*) that the liability of the Company shall absolutely cease when the goods are over or beyond the side of the Company's own ship level with the rail;

(*c*) that the Company shall not be liable for any damage capable of being covered by insurance. **S** Moosaji Ahmed & Co. *v.* Asiatic Steam Navigation Co, Ltd., 11 S. L. R. 106 **168**

Mesne profits, claim for, against trespasser, maintainability of **879**

Minor, *decree against—Negligence of guardian* ad litem *in conduct of suit—Bad management of suit—Failure to raise money by encumbering property in order to prevent final decree from being passed, whether gross negligence—Non-service of summons on minor's guardian, whether sufficient ground for setting aside decree by suit—Civil Procedure Code (Act V of 1908), O. IX, r. 13, O. XVII, r. 2.*

Gross negligence on the part of a guardian or next friend in conducting a suit on behalf of a minor is a good ground for the minor to bring a suit for setting aside the decree.

But mere bad management of a suit by the guardian or an omission to raise money on behalf of the minor by further encumbering the estate, in order to prevent a final decree in a mortgage suit from being passed, is not a sufficient ground for setting aside a mortgage decree unless the conduct of the guardian amounts to fraud or gross negligence.

The mere non-service of summons on a party to a suit is not a sufficient ground for setting aside the decree in a fresh suit unless it is part of a scheme of fraud.

If an *ex parte* decree is passed against a minor under Order XVII, rule 2 of the Civil Procedure Code, the remedy of the minor acting through his guardian lies in the provisions of Order IX, rule 13 of the Code, and he cannot obtain relief in a separate suit unless the absence of the guardian has resulted in such an injustice to the minor as would amount to gross negligence on the part of the guardian.

A minor once represented by a guardian does not cease to be so represented merely because an *ex parte* decree is passed against him owing to the absence of his guardian. **N** Vithoba *v.* Skgo **882**

——, *liability of, for debt incurred in carrying on ancestral trade—Minor, liability of, for partnership debt—Contract Act (IX of 1872), s 247.*

The liability of a minor in respect of a debt incurred in carrying on an ancestral family trade, in which he is a sharer, is not greater than that of a minor admitted to a partnership, as laid down by section 247 of the Contract Act. Therefore, a minor, on whose behalf an ancestral trade is carried on, is not personally liable for the debts incurred in such trade. His liability is limited to his share in the trade. **C** Kuktra Mohan Poddar *v.* Aswini Kumar Saha, 22 C. W. N. 488 **667**

Minor and guardian—*Compromise effected by guardian in consideration of settlement of disputed claim, whether binding upon minor - Claim under alleged Will, whether can form consideration for compromise where Will not genuine.*

A *mimanshapatra* (deed of compromise) executed by a father on behalf of his minor son, by which the interest of the minor in an inherited estate is given up in consideration of the other party giving up a portion of their claim under an alleged Will, is not binding upon the minor, unless it is proved by the other party that there was in fact such a Will and that under that Will they had a claim which was made honestly and in good faith, though it is not incumbent upon them to prove the Will in solemn form after a long distance of time.

The position of a minor son is different from the position of the father who executes a *mimanshapatra* on his behalf; for though the father might not be able to avoid a *mimanshapatra* which he had executed for himself, the minor through his guardian can avoid a *mimanshapatra* executed on his behalf if his interest is not properly protected by his father in executing it. **C** Krishna Chandra Dutta Roy *v.* Hemajasankar Nandi Mozumdar, 22 C. W. N. 463 **477**

Mortgage **76, 333**

——*bond made up of principal and prospective interest—Instalments—Default in payment of instalments—Interest, payment of.*

Parties had dealings in money with each other and on making up accounts a certain sum was found due from the defendants to the plaintiff. To the sum found due an addition was made as prospective interest and a mortgage bond was executed in respect of the total sum by the defendants on the 4th October 1916. The bond provided for payment by instalments, and it was stipulated that in default of payment of any instalment it should carry interest at 12 per cent per annum to be compounded every year and that in default of payment of any two instalments the whole sum should become immediately recoverable. Default was made in respect of two instalments on 26th January 1899.

Held, (1) that plaintiff was entitled to recover (*a*) the principal sum secured by the bond; (*b*) proportionate interest out of the total sum fixed as prospective interest up to the 26th January 1899; and (*c*) compound interest at 12 per cent. per annum on the sum due on the date of the first default from that date up to the 26th January 1899;

(2) that the plaintiff was not entitled to any interest after the 26th January 1899. **N** Bhauji *v.* Bhagwant Atmaram Dhongdi **722**

——*Contract giving one of two options to mortgagee—Mortgagee, position of—Waiver as to one option, effect of—Interest, default in payment of, waived, effect of.*

A contract which gives the mortgagee one of two options does not bind him to either of them, if he chooses to stick to the other; in other words, it is open to him to waive the benefit of an acceleration, if the contract leaves him such an option; and that option cannot be taken away by Statute, unless there is anything to show that the grant of such an option is illegal or forbidden by law.

For example, where a mortgage-deed provided for the repayment of the principal with interest in 12

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years and further stipulated that if the mortgagors failed to pay interest regularly every year, the mortgagee would be at liberty to sue for the recovery of the entire money due on the said deed before the expiry of the period fixed for redemption:

Held, that the mortgagee was at liberty to waive the default in the payment of interest and to wait for the expiry of the period fixed for redemption before bringing his action. O MUBARAK ALI v. GOPI NATH, 5 O. L. J. 73 **613**

———*decree against mortgagor after sale of equity of redemption—Purchaser of equity of redemption, position of.*

J. made a simple mortgage of certain groves to *M.* in 1895. In 1907 he transferred the equity of redemption to the plaintiff, who got into possession of the property. Subsequently to the transfer the mortgagee obtained a mortgage-decree against *J.* and in execution purchased the property himself. Formal delivery of possession was made to the mortgagee, who afterwards sold the property to the defendant. The latter dispossessed the plaintiff, who thereupon brought a suit to recover possession of the property:

Held, (1) that the mortgage-decree having been obtained against *J.* after the transfer of the equity of redemption to the plaintiff, the latter was not affected by the decree;

(2) that the delivery of formal possession did not affect the plaintiff who was no party to the decree, and that, therefore, he was entitled to recover possession of the property. O TASADDUQ HUSAIN v. ASGHAR HUSAIN, 21 O. C. 70 **606**

———*Deed allowing part payment of mortgage money—Tender made after demand by mortgagee, validity of—Interest, rebate of.*

Plaintiffs sued to recover a certain amount of money, principal as well as interest, as a charge on property mortgaged to them by the predecessors-in-interest of the defendants. There was no provision in the mortgage deed for piecemeal redemption but it was contemplated that part payment of the principal mortgage money should be allowed. It appeared that a tender of a certain sum was made by some of the defendants on the 14th August 1909, but the plaintiffs refused to take part payment as they had become entitled to the entire mortgage money and did not wish that part of the property should be redeemed. The defendants did nothing till October 1913 when they again tendered the same sum. But on 28th January 1913 the plaintiffs had sent notices to all the mortgagors demanding payment of the full sum due under the mortgage:

Held, that under the circumstances no offer by any of the defendants subsequent to the 28th January 1913 could be a valid tender so as to entitle them to claim rebate of interest on the sums tendered and the plaintiffs were, therefore, entitled to recover the full amount of principal as well as interest. P SALIG RAM v. SARGHAT-ULLAH, 83 P. W. R. 1918 **175**

——— of occupancy holding to *zemindar*—Transfer of holding by *zemindar*—Redemption, suit for **549**

———*Part of consideration kept in deposit and paid afterwards—Remedies of mortgagor.*

Mortgage—contd.

Where at the time of the execution of a mortgage bond for Rs. 3,000, only the sum of Rs. 1,000 was advanced to the mortgagor and the balance was kept in deposit with the mortgagee, which was subsequently paid over to the mortgagor on a registered receipt after the expiry of the due date of repayment stipulated in the mortgage bond:

Held, that in regard to the balance of Rs. 2,000 subsequently advanced the remedy of the mortgagee was not a mere personal action based on a simple contract, but he could recover the whole amount of Rs. 3,000 by a suit on the mortgage security. C KASI NATH MITRA v. BHIKAN CHARAN MAITY **778**

———*Sub-mortgagee, rights of—Discharge of original mortgage by substitution of other mortgages, how far affects rights of sub-mortgagee—Assignment of mortgage, absence of notice of, to mortgagor, effect of—Sale, right of, by sub-mortgagee.*

There is no necessity to give notice of an assignment of a mortgage to the mortgagor, and such want of notice will not render the sub-mortgage invalid, save in so far as the assignee holds subject to the accounts between him and the original mortgagee.

The substitution of one mortgage by another mortgage will not affect the rights of a sub-mortgagee from the original mortgagee to bring the mortgagee's rights under the earlier mortgage to sale.

A sub-mortgagee has the right to sell the mortgagee's rights against the particular properties sub-mortgaged to him for the whole amount due to him and the mortgagor's remedy against him is just what he would have against the original mortgagee if the latter sought to enforce his debt against those particular properties, *viz.*, to redeem by paying the amount due. M PAPALA CHAKRAPANI v LACHIMIACHI, (1918) M. W. N. 249; 23 M. L. T. 300; 35 M. L. J. 109 **769**

———, *suit on—Co-mortgagees, interests of, whether severable—Estoppel—Some co-mortgagees precluded from enforcing their rights—Rights of others.*

In equity co-mortgagees are presumably tenants-in-common of the mortgage debt and their interests are severable or partible among themselves; so that one of them can sue on the mortgage provided those who are unwilling to be joined as plaintiffs are made defendants.

Where some of several co-mortgagees have by their conduct precluded themselves on the ground of estoppel from enforcing their rights under the mortgage against purchasers of a portion of the mortgaged property and a puisne mortgagee of the remainder, it is open to the Court to sever their interests from those of the other co-mortgagees who are under no disability or disqualification and to make a decree in favour of the latter in proportion to their interests in the mortgage-debt. C SAKHIUDDIN SAHA v. SONAULLA SARKAR, 27 C. L. J. 453; 22 C. W. N. 641 **986**

——— *of taluk—Mortgagee undertaking to pay land revenue—Default—Sale, collusive, for arrears, effect of—Redemption.*

Defendant, who was the mortgagee in possession of a share in a *taluk* and had undertaken to pay the Government revenue, made default in payment of the revenue, so that the *taluk* was sold for arrears of revenue and was purchased by *A. A.* sold it to *B.*

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who shortly afterwards sold it to the defendant. Plaintiff, who was a purchaser from the mortgagor, sued to recover possession of the *taluk* from the defendant on redemption. It was found that the sale for arrears of revenue and the subsequent sales to *B* and the defendant were collusive transactions engineered by the defendant for the purpose of obtaining possession of the *taluk* as owner:

Held, that the sales did not affect the rights of the mortgagor or of the plaintiff, who was a transferee from the mortgagor, and that the plaintiff was, therefore, entitled to redeem. **C** JAMILA KHATUN *v.* MAHAMUD KHATUN **735**

———, *usufructuary—Lease given by mortgagor—Sale of equity of redemption—Ex-proprietary rights—Rent, liability to pay.*

The defendant gave a usufructuary morgage of his *zemindari* to the plaintiff, who on the same date gave a lease of the same, to last during the term of the mortgage, to the defendant, who remained in possession as *thekadar* paying rent to the plaintiff under the lease. The rent having fallen into arrears, the plaintiff sued defendant, obtained a decree and caused the equity of redemption to be sold in execution. The plaintiff's mortgage was notified at the time of sale. No application for mutation of names was made and the record stood as it was at the date of the mortgage. The plaintiff again sued the defendant for arrears of rent for a period partly prior and partly subsequent to the date of the sale of the equity of redemption. The defendant denied his liability for the latter period on the ground that as his equity of redemption had been sold, he had become an ex-proprietary tenant and that as no rent had been fixed by the Collector under section 36 of the C. P. Land Revenue Act, he was not liable to pay any rent in respect of that period:

Held, that so long as the mortgage subsisted, the defendant was a *thekadar* under his lease and as such liable to pay the rent stipulated for in the lease, whether or not he also became an ex-proprietary tenant of the *zemindari*. **A** MITHAN LAL *v.* CHHAJJU SINGH, 16 A. L. J. 384 **529**

Muhammadan Endowments Committee at Chittagong, *whether statutory body*—Mutwalli, *appointment of.*

The Muhammadan Endowments Committee at Chittagong is a statutory body and its recognition, where such recognition is necessary, of a person as the true and rightful *mutwalli* of a mosque, to which Regulation XIX of 1810 applied before its repeal by Act XX of 1863, is authoritative. **C** SULTAN AHAMED *v.* ABDUL GANI **581**

Muhammadan Law—*Hindu Law - Custom —Halai Memons settled in Kathiawar, whether governed by Hindu Law or Muhammadan Law.*

As regards inheritance and succession Halai Memons settled in Porebunder in Kathiawar did not retain Hindu Law at the time of their conversion to Islam, nor have they by immemorial custom adopted Hindu Law. In these matters, therefore, they are governed by Muhammadan Law and not by Hindu Law. **B** KHATUBAI *v.* MAHOMED HAJI ABU, 20 BOM. L. R. 289 **619**

———**Dower,** *prompt, right to, accrual of—Dower, whether can be made conditional upon restitution of conjugal rights—Consummation absence of, whether bars recovery of prompt dower.*

The fact that a Court can make a decree for restitution of conjugal rights conditional on payment of prompt dower does not show that a wife's decree for prompt dower can be made conditional upon her living with her husband.

Prompt dower can be demanded by a wife at any time after the right thereto has vested in her whether or before after consummation and she can refuse all conjugal rights on the part of the husband until it is paid.

The right to prompt dower vests at marriage and it can be claimed by the wife at any time thereafter. It is a debt due by the husband to the wife and its payment cannot be made conditional on the wife living with her husband. **P** NAWAB BIBI *v.* MUHAMMAD DIN, 28 P. L. R. 1918; 100 P. W. R. 1918 **893**

———**Gift**—Heba-bil-ewaz—*Condition, invalid, attached to gift.*

The ordinary rules applicable to gifts apply to the Muhammadan Law, like any other system of law, and one of these rules is that a gift is not invalidated by reason of an invalid condition being attached to it.

Where the conditions laid down in a *heba-bil-ewaz* as to the form of enjoyment of the property cannot under the Muhammadan Law control the form of the gift, the gift is absolute and unqualified **C** NEAMAT-UN-NESSA BIBI *v.* GOLAM PANCHATON KAZI, 22 C. W. N. 512; 27 C. L. J. 502 **601**

———*—Possession, delivery of—Gift of corpus, with reservation of usufruct, validity of.*

Where in a deed of gift executed by a Muhammadan lady subject to the Hanafi law the donor excepted some of the property, retaining possession over it free of rent and revenue, and stated that after her death the donee would be its proprietor and that the donor would have no power to transfer it by mortgage, sale, or gift:

Held, that even in respect of the excepted property the deed operated as one of gift, inasmuch as the donor transferred the corpus of the property to the donee, reserving for herself the usufruct for life, which was not prohibited under the Hanafi law.

Held, further, that under the circumstances the stipulation not to transfer her interests in the property during her lifetime satisfied the conditions of the Hanafi law with regard to the delivery of possession.

Per *Stuart, A. J. C.*—There are three essentials of a gift under the Hanafi law—declaration, acceptance, and seizin. With regard to seizin, however, the rule is that where everything reasonable has been done to perfect a contemplated gift, nothing more is required. There is nothing in Hanafi law to prohibit a gift of the corpus combined with the retention of the usufruct, inasmuch as such a transfer does not create a limited estate.

Per *Kanhaiya Lal, A. J. C.*—Where the intention to make an absolute transfer *in praesenti* of all proprietary right is clear, any condition which derogates from the immediate completeness of the gift is regarded as void. Where the condition, however, may be given effect to without in any way interfering

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with or detracting from the immediate completeness of the gift, or rather the immediate transfer of the right in the substance of the gift, the condition as well as the gift are valid.

Any reservation of proprietary rights in the corpus would be inconsistent with an intention to make a gift, but the reservation of a right to the usufruct of a portion of the property given would not be inconsistent, if the intention to give the corpus be otherwise manifest. **O** FAKHR JAHAN BEGUM v. MUHAMMAD ABDUL GHANI KHAN, 5 O. L. J. 49 **307**

——**Gift,** *validity of*—*Burden of proof.*

The onus of proving the *bona fides* and validity of a gift executed by a *purdanashin* lady lies upon those seeking to claim under it. They must point out and prove the circumstances connected with the transaction. **Pat** ZAKIR RAZA v. MADHUSUDAN DASS, 4 P. L. W. 417 **691**

——**Guardianship**—*Mother of minor girl appointed certificated guardian, whether can question marriage of minor effected by her uncle—Specific Relief Act (I of 1877), ss. 42, 43—Suit for declaration that the marriage of a Muhammadan minor girl is invalid, whether maintainable.*

Under the Muhammadan Law the mother, even when appointed certificated guardian of the person and property of her minor daughter, has no legal character within the meaning of section 42, Specific Relief Act, entitling her to a declaration that the marriage of her daughter with a certain person effected by her uncle, is not valid.

It would not be a proper exercise of judicial discretion to make any declaration under section 42 of the Specific Relief Act in a suit by the guardian of a Muhammadan minor girl for a declaration that her marriage with a certain person is invalid when the minor is not a party to the suit inasmuch as under section 43 of the Act, the decree would not be binding upon the minor. **C** SONAULLA SARKAR v. TULA BIBI, 27 C. L. J. 603 **203**

——**Inheritance,** *right of, renunciation or transfer of, before vesting, validity of.*

A transfer or renunciation of the rights of inheritance by a Muhammadan before that right has vested in him is prohibited under the Muhammadan Law. **M** ASHA BEEVI v. KARUPPAN CHETTY, 7 L. W. 215; 34 M. L. J. 460; 41 M. 365 **35**

——**Marzul-maut,** *doctrine of, applicability of*—Waqf · Tauliatnama *appointing successor to* mutwalli, *validity of.*

In the case of a gift or other voluntary disposition of property under the Muhammadan Law the doctrine of *marzul-maut* only applies when the gift is made during such illness.

If a person holding the office of *mutwalli*, to which is attached the right of appointing a successor under the Muhammadan Law or under any general law applicable to the topic, freely executes a *tauliatnama* as a testamentary document for appointing a successor, while he is of sound disposing mind, its validity cannot be questioned. **C** SULTAN AHAMED v. ABDUL GANI **581**

——**Pre-emption**—*Ceremonies, performance of, time of.*

A right to pre-emption is based entirely upon the Muhammadan Law. It has been accepted by Hindus in certain districts in consequence of their close contact with Muhammadans in those districts.

To create a right of pre-emption it is necessary that the Muhammadan ceremonies be performed immediately upon hearing of the sale. The date of performance is not an equitable question, so that ceremonies performed not immediately upon hearing of the sale but within a reasonable time are not good ceremonies and do not create a right of pre-emption.

In a pre-emption suit the plaintiff stated that though the sale took place on the 10th of June, he heard of it only on the 8th of August, and forthwith performed the necessary ceremonies. It was found as a matter of fact that the plaintiff heard of the sale in July of the year, and then performed the ceremonies after being advised by a Pleader to do so:

Held, that the ceremonies were performed too late to create a right of pre-emption. **Pat** JAGAN BHAGAT v. ARJANI MANDAL, (1918) PAT 3; 4 P. L. W. 345 **255**

——**Waqf** **581**

——**Will**—*Bequest of more than one-third, validity of—Consent of heirs, validity of.*

The consent or acquiescence, express or implied, of the heirs of a Muhammadan to a Will by him in excess of two-thirds of his property is treated as a ratification by them of his conduct. Such consent may be express or may be implied from unequivocal conduct **O** FAKHR JAHAN BEGAM v. MUHAMMAD ABDUL GHANI KHAN, 5 O. L. J. 49 **307**

Negligence **556**

Negotiable Instruments Act (XXVI of 1881), s. 19 **22**

——**s. 118 (e)**—*Negotiable instrument, endorsements on—Order of endorsements—Presumption.*

In the absence of direct evidence that the endorsements on a negotiable instrument were made in a particular order, the statutory presumption under section 118 (*e*) of the Negotiable Instruments Act that they were made in the order in which they appear on the instrument, will prevail.

Per *Wallis, C. J.*—*Quære.*—Whether a suit can be filed on an endorsement made by a stranger on the back of a note, who does not satisfy the definition of an endorser **M** KOTHANDARAMASWAMI NAIDU v. MUTHIA CHETTI **186**

Nuisance—*Oil mill, erection of, close to dwelling house—Discharge of foul smell and garbage—Noise—Abatement—Stoppage of work, right of neighbour to.*

It is an actionable nuisance to erect an oil mill close to a dwelling house from which foul-smelling water is always discharged and unbearable noise is produced which can be heard even at some distance.

The owner of the house adjoining the mill is entitled to ask for prohibition of the working of the mill altogether where the nuisance cannot be abated.

The locality, the question whether the nuisance has been long in existence, whether the trade which causes it is commonly carried on in that locality and other questions of a like nature have to be considered in deciding whether a particular business carried on by a neighbour is an actionable nuisance. **M** SADASIVA CHETTY v. RANGAPPA RAJOO, 7 L. W. 506; (1918) M. W. N. 293; 24 M. L. T. 17 **428**

Oaths Act (X of 1873), s. 5 999

—— —— s. 11—*Plaintiffs, one of several, agreeing to be bound by defendant's oath—Other plaintiffs, whether bound by oath—Compromise of suit.*

Section 11 of the Oaths Act shows that an oath is conclusive as against the person who offers to be bound by it; as against other persons it is not conclusive evidence and a Court has no right to treat it as such.

F. and other plaintiffs sued *M.* for possession of certain land. After the plaintiffs' evidence had been recorded *F.* agreed to let the decision of the suit rest on *M.'s* oath. *M.* took the oath and on this the Court dismissed the suit as regards all the plaintiffs:

Held (1) that the suit was correctly dismissed as regards *F.*;

(2) that the oath was not binding as against the other plaintiffs unless the defendant could show that they joined in *F's* challenge to the defendant or agreed to the dismissal of the suit either personally or by agent duly authorised in that behalf;

(3) that the mere presence of the other plaintiffs or of their Pleader at the time of *F.'s* challenge was no proof of assent, inasmuch as a man may disapprove of what is being done, though if he thinks it is to affect some one else only and not himself, he may not trouble to express his dissent. **P** TALAWAND *v.* FATEH DIN, 50 P. W. R. 1918 **230**

—— —— s. 13—*Evidence of child witness—Omission to administer oath, effect of—Evidence, weight of—Witness, competency of—Murder—Punishment—Capital sentence, when not to be passed.*

Per *Shah, J.*—The evidence of a witness of tender years, though taken without any solemn affirmation in the prescribed form, is admissible by virtue of the provisions of section 13 of the Oaths Act. Such evidence, however, must be received with due care and caution.

It is necessary that before proceeding to examine such witnesses the Court should satisfy itself that the witness is competent to testify, that is, is capable of understanding the questions put to him and of giving rational answers to those questions. Thereafter the Court should proceed to administer an oath or affirmation as required by the Oaths Act.

If the witness is found to be incapable of understanding the obligations of such an oath or affirmation, he may be examined without an oath or affirmation, provided he is found to be a competent witness. These facts may be noted, so that the record may show that before taking the statement of a witness of that character, the trial Court had ascertained that the witness was a competent witness under section 118 of the Indian Evidence Act and that the omission to administer an oath or affirmation was due to his want of understanding the obligations of an oath.

The ignorance of a child on such a matter as the nature of a solemn affirmation is not necessarily equivalent to an inability to understand ordinary questions and give rational answers.

There is a certain degree of reluctance on the part of Judges to pass a capital sentence, when the substantial part of the evidence which the prosecuti n rely upon is evidence recorded without an oath or affirmation as required by the Oaths Act. **B** HARI RAMJI PAVAR *v.* EMPEROR, 20 BOM. L. R. 365; 19 CR. L. J. 593 **497**

Opium Act (I of 1878), s. 9 284

Oudh Land Revenue Act (XVII of 1876), s. 174, *scope of.*

The language used in section 174 of the Oudh Land Revenue Act points to the property which was actually under the superintendence of the Court of Wards and not to any profits that may be derived therefrom after its release or to any acquisition made from the same. **O** DEBI BAKHSH SINGH *v.* BED NATH, 5 O. L. J. 90 **219**

Oudh Rent Act (XXII of 1886), s. 27—*Improvement by tenant—Compensation for improvement, amount of.*

Where it is found that a tenant is entitled to compensation for an improvement made by him on his holding, the Court is not justified in reducing the amount of compensation on the ground that a cheaper improvement could have served the tenant's purpose unless such a plea is raised by the landlord, inasmuch as such a consideration does not form part of the considerations enumerated by section 27 of the Oudh Rent Act. **U P B R** DWARKA *v.* BHAGWATI PRASAD SINGH, 5 O. L J. 69 **227**

—— —— ss. 52, 141—*Grant for maintenance, interpretation of—Tenant under special agreement—Interest on arrears of rent.*

Defendant held a village for his maintenance under a grant from the Taluqdar on condition (1) that he paid the revenue assessed on the same and 15 per cent. *malikana* and 7 per cent *sawai* to the Taluqdar, (2) that the grant was resumable if the grantee failed to maintain the members of his family, and (3) that while the grant was hereditary the grantee was debarred from selling or mortgaging the village:

Held, that the grantee was a tenant holding under special agreement within the meaning of section 52 of the Oudh Rent Act and was, therefore, liable to pay interest on the arrears of rent due from him under section 141 of that Act. **O** SHEORAJ SINGH *v.* SRIPRAKASH SINGH, 5 O. L. J. 141 **855**

—— —— s. 141 **855**

Paper Currency Act (II of 1910), s. 26, *scope of—Negotiable Instruments Act (XXVI of 1881), s. 19—Note or bill payable to bearer on endorsement of payee, whether payable 'on demand'—Evidence, admissibility in.*

A bill or note which is payable to the bearer who brings it to the place of payment on the order of the payee, does not offend against section 26 of the Paper Currency Act and is an on demand note. The note is receivable in evidence and is one made in accordance with law.

A note which does not fix any date for payment is an 'on demand' note. Also a note will be construed as an 'on demand' note if it is so expressed.

Per *Seshagiri Aiyar, J.*—The principle underlying section 26 of the Paper Currency Act is that private persons should not be permitted to usurp the privileges of the Government, for the latter alone have the right to get a note negotiated by bare presentation. The language of an ordinary currency note is what the Legislature intended should not be copied by private parties.

Per *Napier, J.*—A bill of exchange is nonetheless payable on demand for the fact that the demand

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cannot be made on the day when the bill is drawn. M TITTU GOPALACHARIAR v. MAIYAPPA CHETTY, (1916) M. W. N. 177 22

Parjote, payment of—Suit to recover *parjote*, maintainability of 329

Partition proceedings—*Consent of joint owners—Mortgagee, consent of, necessity of.*

A partition effected with the consent of the joint owners of the land is not invalidated by reason of the lack of consent of the mortgagee of an undivided share, and such a mortgagee has no claim to be made a party to the partition proceedings.

A mortgagee with possession of an undivided share in joint property has no right as such to intervene in partition proceedings, or to be a party to them, except when the property to be partitioned is a tenancy of which he is technically the landlord, that is to say, the person under whom the tenants hold land and to whom the tenants are, or would be but for a special contract, liable to pay rent.

A mortgagee of an undivided share in joint property, alleging injury to his interest by the collusive conduct of his mortgagor in partition proceedings, can claim his remedy by regular suit in the Civil Courts. A dispute of this character does not come within the functions of a Revenue Officer dealing with a partition under the Land Revenue Act. F C P THAKAR DAS v. SULTAN BAKHSH, 2 P. R. 1918 REV. 5 P. W. R. 1918 REV. 405

—— —— suit 7

—— ——, suit for 705

—— ——, *whether requires to be in writing.*

The law does not require writing to complete a partition which has already been effected by Panchas. N FAKIRA v. TULSIRAM 854

Partition Act (IV of 1893), s. 4, *order under, whether decree—"Court", whether includes Appellate Court—Application under s. 4, when to be made—"Dwelling house," meaning of.*

An order made under section 4 of the Partition Act in the course of a suit for partition is a decree within the meaning of section 2, Civil Procedure Code, and is, therefore, appealable.

The word "Court" in section 4 of the Partition Act includes the Appellate Court, which like the trial Court is bound to make an appropriate order under the section upon any member of the family, who is a share-holder, undertaking to buy the share of the transferee.

An application by a member of a family, who is a share-holder in the family dwelling house belonging to the family, under section 4 of the Partition Act need not necessarily be made upon the institution of the suit for partition by a transferee of a share in the house, but may be postponed till after the preliminary decree. The operation of section 4 extends to the appellate stage of the suit.

The word "dwelling house" in connection with its conveyance on partition generally means not only the house itself, but also the land and appurtenances which are ordinarily and reasonably necessary for its enjoyment. C PRAN KRISHNA BHADURI v. KESHAB CHANDRA ROY, 22 C. W. N. 915 634

Partnership 31, 85

—— ——, suit for dissolution of 727

Patna High Court, *whether bound by view of Calcutta High Court.*

In cases falling under clause 6 of Article 182 of the Limitation Act the Patna High Court is bound to accept the view of the Calcutta High Court, inasmuch as it is on this view that Pleaders have been calculating limitation in making applications for execution. It would not be fair to turn round suddenly and say that the view of the Calcutta High Court is wrong. Pat KHODA BUKHSH v. BAHADUR ALI, (1916) PAT. 130; 3 P. L. J. 285; 4 P. L. W. 344 203

Penal Code (Act XLV of 1860), ss. 21 (9), 161 *'Public servant', meaning of—Quarter Master's clerk, whether public servant—Taking illegal gratification in respect of official act—Offence.*

The mere fact that a person is in the pay or service of Government is not enough to constitute him a public servant within the meaning of section 21, ninthly, of the Penal Code. He must also be an "officer" *i. e.*, holder of some office. The office may be of dignity and importance or it may be humble, but whatever its nature, it is essential that the person holding the office should have in some degree delegated to him certain functions of Government.

A Quarter Master's clerk merely as such is not necessarily a public servant within the meaning of section 21 of the Penal Code, but a person who is otherwise an officer in the pay or service of Government, does not lose his status as a public servant if, while still such an officer, he is employed as a Quarter Master's clerk.

For the purposes of section 161 of the Penal Code, it is not necessary that at the time of the bribe-taking the accused person should be actually discharging the functions which constitute him a public servant; it is sufficient that he is a public servant and his act falls under one of the three clauses specified in the section. P AHAD SHAH v. EMPEROR, 19 CR. L. J. 486; 18 P. R. 1918 CR; 26 P. W. R. 1918 CR 150

—— —— **s. 71** 270

—— —— **ss. 75, 379**—*Boat theft—Sentence—Previous convict—Enhanced punishment, principles governing.*

There is no hard and fast rule that a sentence of two years' rigorous imprisonment must be passed in all cattle and boat theft cases, without regard to the value and utility of the stolen property, the youth of the accused, his previous character, or any other circumstances that may justly be taken into consideration in passing sentence. Each case should be considered on its merits, and, if extenuating circumstances appear to exist, the sentence should be modified accordingly. A sentence should never be heavier than is necessary to deter the criminal from committing the offence again.

In the case of men with previous convictions, regard should be had to their career and to the time that has elapsed between the convictions passed upon them. Sections 75, Indian Penal Code, and 222, Criminal Procedure Code, were not intended for the purpose of automatically enhancing by a kind of geometrical progression the sentence to be passed after a previous conviction. The reason for passing a more severe sentence in the case of a criminal with a previous conviction is primarily to

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protect society from the predations and offences committed by an habitual rogue, who has shown no signs of repentance. A Magistrate or Judge should make some enquiry into the repute and antecedent behaviour of a man whom he proposes to sentence severely. **L B** Po Nyein *v.* Emperor, 9 L. B R. 167; 19 Cr L. J 655 **847**

——— **ss. 90, 360, 363**—*Kidnapping from British India—Consent of person kidnapped—Offence.*

A person who kidnaps a girl over twelve years of age from British India with her consent is not guilty of an offence under section 360 of the Penal Code. **B** Haribhai Dada *v.* Emperor, 20 Bom. L. R. 372; 19 Cr. L. J 602 **506**

——— **ss. 96, 99**—*Private defence, right of—Complainant provoking fight and receiving injuries—Offence.*

An attaching party went to the house of the judgment-debtor and began looking for the property when *S* assaulted them. The consequence was a fight in which *S.* received slight injuries:

Held, that as the fight was provoked by *S* and no very grievous injuries were inflicted upon him, the attaching party could not be said to have exceeded their right of private defence and were, therefore, not guilty of any offence. **P** Devi Das *v.* Emperor, 20 P. W. R. 1918 Cr.; 36 P. L. R. 1918 Cr.; 19 Cr L. J. 635 **683**

——— **s. 99** **683**

——— **s. 161** **150**

——— **s. 186**—*Obstructing public servant in discharge of public function—Written order, whether must be shown to accused.*

In order to constitute an offence under section 186 of the Penal Code, it is not necessary to prove that the written order under which the public servant was acting was actually shown to the accused. It is enough if it is found that the public servant had the order with him and could show it to anybody who wanted to see the same or question his authority. **O** Tribhawan *v.* Emperor, 5 O. L. J 1'2; 19 Cr. L. J. 611 **833**

——— **s. 193** **147, 507**

——— **s. 211** **515**

——— **s. 218** **270**

——— **s. 302** **497**

——— **s. 302**—*Murder—Sentence—Youth of offender, consideration of.*

Ordinarily youth is in itself an extenuating circumstance in murder cases as in other criminal cases. Cases of extreme depravity do occur in which the youth of the accused may not be a sufficient reason for imposing the lesser sentence. But the youth of the criminal is a circumstance which should always be taken into account by Sessions Courts in exercising the discretion vested in them by section 302 of the Indian Penal Code. **L B** Chit Tha *v.* Emperor, 9 L. B. R. 165; 19 Cr. L. J 648 **840**

——— **s. 336**—*Rash or negligent act endangering human life—Driving motor car without spectacles—Offence.*

It is a rash or negligent act for a person to drive a motor car without wearing spectacles if his eyesight is really defective. But an omission to wear spectacles at the time of driving the car in every case where a driver may properly use spectacles would not necessarily render the driver liable under section 336 of the Penal Code. It must depend upon the nature of the defect in the eye-sight and the necessity for using spectacles in each case.

A licensed driver, who was required by his license to wear spectacles when driving a car, was found driving without spectacles. It was found that the defect in his eyesight was not very great, and that it would not appreciably interfere with his efficiency as a driver even though he drove without spectacles:

Held, that he was not guilty of an offence under section 336 of the Penal Code. **B** Abas Mirza *v.* Emperor, 20 Bom L. R. 376; 19 Cr. L. J. 665 **509**

——— **s. 341** **261**

——— **s. 352** **517**

——— **ss. 360, 363** **506**

——— **ss. 366, 494, 498**—*Abduction of married woman—"Marry", meaning of.*

Section 366 of the Penal Code applies to the case of the abduction of a married woman. The word "marry" in this section has the same meaning as it has in section 494 of the Code, *i. e.*, the going through a form of marriage, whether the marriage should prove in fact legal and valid or illegal and invalid. **C** Taher Khan *v.* Emperor, 27 C. L. J. 436; 22 C. W. N. 695; 19 Cr. L. J. 640; 45 C. 641 **688**

——— **s. 366**—*Kidnapping from lawful guardianship—Offence, essentials of*

A girl, under 16 years of age, was sent by her father to take food to the bullocks, when on her way she was persuaded by the accused to accompany him. The latter cut off her hair and dressed her up in boy's clothes and lived with her for some time:

Held, that the accused was guilty of the offence of abduction under section 366 of the Penal Code with the intent that the girl might be compelled to marry against her will or forced or seduced to illicit intercourse. **A** Har Kesh *v.* Emperor, 16 A L. J. 445; 19 Cr. L. J. 645 **837**

——— **s. 379** **847**

——— **s. 380** **513**

——— **s. 420** **993**

——— **s. 447** **261**

——— **s. 447**—*Trespass—Possession necessary to be determined.*

For a conviction under section 447 of the Penal Code the finding on the point as to who was in possession of the land in dispute is necessary.

Where a person enters upon land, not with the object of intimidating, annoying or insulting the complainant, but in the *bona fide* assertion of his own right to remain on the land till he is ejected therefrom in accordance with law, he is not guilty of an offence under section 447 of the Penal Code. **Pat** Jagan Dubey *v* Emperor, 19 P. L. J. 629 **677**

——— **ss. 457, 380**—*Criminal Tribes Act (III of 1911), s. 23—Lurking house-trespass—Theft—Walking into open house and stealing articles therefrom—Offence—Sentence.*

Accused, who was a member of a criminal tribe and had been twice previously convicted of dacoity finding the door of a house open, walked in and proceeded to steal certain articles therefrom. He removed some of the articles preparatory to taking them away, but before he actually got away the alarm was given and he was caught:

Penal Code—concld.

Held, that the accused was not guilty of lurking house-trespass under section 457 of the Penal Code so as to be liable to enhanced punishment under section 23 of the Criminal Tribes Act. **A** BHAGWANA *v.* EMPEROR, 16 A. L. J. 383; 19 CR. L. J. 609 **513**

—— — **ss. 465, 467** **241**

—— — **ss. 494, 498** **688**

—— — **s. 499, Excep. 9**—*Defamation—Statement, relevant, by party to suit—Privilege—Malice.*

A statement made by a party to a suit in good faith and for the protection of his interests, and which is relevant to the matter in issue, falls under exception 9 of section 499 of the Penal Code and is privileged. In order to take such a statement out of the exception, express malice must be proved. **N** BAIJA *v.* BABU, 19 CR. L. J. 641 **833**

—— — **s. 500**—*Defamation—Using obscene and insulting language in respect of complainant—Offence.*

After an altercation between the parties was over, the accused addressing third persons used language of an obscene and insulting nature in respect of the complainant, a respectable Mukhtar:

Held, that the words were calculated to harm the reputation of the complainant and that the accused was, therefore, guilty of an offence under section 500 of the Penal Code.

Obiter dictum.—There is some authority for the proposition that words *prima facie* defamatory used in a street quarrel should be regarded as mere vulgar abuse and that their utterance under such circumstances does not necessarily suggest an intention to harm the reputation of the person to whom they are applied **A** RAJA RAM SINGH *v.* EMPEROR, 16 A. L. J. 498; 19 CR. L. J. 669 **1005**

—— — **s. 504** **517**

—— — **s. 504**—*Insult with intention to provoke breach of peace—Barrister—Privilege.*

An intentional insult with intent to provoke a breach of the peace is an offence more cognate to the offence of assault than to the offence of defamation. A Barrister cannot claim privilege in the case of an assault, nor can he claim any privilege if his conduct is calculated to provoke an assault. **N** TIKEKAR *v.* PIAREYLAL, 19 CR. L. J. 666 **1002**

Pensions Act (XXIII of 1871), s. 4—*Suit for declaration of ownership in respect of share in vatan, maintainability of—Certificate of Collector, necessity of.*

A suit for a declaration that the plaintiff is the owner of a certain share in a *kulkarni vatan* falls within the purview of section 4 of the Pensions Act and is not maintainable without the Collector's certificate. **B** BALKRISHNA SUMBHAJI GHATE *v.* DATTATRAYA MAHADEV GHATE, 20 BOM. L. R. 325; 42 B. 257 **580**

Pleadings, *standard of, in India.*

In this country a very high standard of pleadings cannot be expected. **C** NAJA MIA *v.* ABDUL KADAR **878**

Possession, *suit for—Boundary dispute—Burden of proof—Appeal—Appellate Court dissatisfied with local enquiry—Procedure.*

Where the defendant in a suit for recovery of possession of land, even where the question is a question of boundaries clearly shown, is found to have been in actual possession of the disputed area, the burden will be on the plaintiff to establish his title.

An Appellate Court is not bound in law to direct a fresh local investigation even where it is dissatisfied with the map and report of the Commissioner, appointed by the trial Court for a local enquiry. In such a case though it is open to the Appellate Court to send back the case for further enquiry, it does not commit any error of law if it decides the case on the evidence before it. Whether the decision thus arrived at is right or wrong (on questions of fact) is a question into which the High Court cannot enter in second appeal. **C** MANINDRA CHANDRA NANDI *v.* SARASINDU RAY, 27 C. L. J. 599 **408**

Possession—concld.

——, *value of—Adverse possession of co-owner.*

The possession of one co-owner even over the whole co-parcenary, is not *prima facie* adverse to the other co-owners.

Though a certain lease may be inadmissible in proof of its terms, it may still be used to prove the relationship of landlord and tenant. **N** RAGHOBA *v.* PALHOBA **217**

Pre-emption—*Land on outskirt of town included in Municipal limits for certain purposes, whether becomes part of town—"Owner", who is.*

The mere fact that for certain reasons the Local Government has seen fit to include a part of the Premgarh estate within the Municipal limits of Hoshiarpur city, does not necessarily mean that the locality in question has become a part of the town for purposes of pre-emption. Although the site in dispute is situate between the Hoshiarpur city and the railway station, and shops have sprung up in the vicinity, it cannot be said that the town has extended so far.

Where a person buys agricultural land assessed to revenue and becomes one of the *khewatdars*, he must be regarded as an owner of the estate for purposes of pre-emption, no matter whether the area he buys is small and whether he pays only a few annas as revenue: and he does not cease to be such owner merely because he walls off the land and stores iron thereon. **P** SALAMAT RAI *v.* KANSHI RAM, 30 P. L. R. 1918; 106 P. W. R. 1918 **887**

—— —, *right of, how can be defeated—Fraudulent form of transaction, effect of—Mortgage to one brother—Sale of equity of redemption to another brother, effect of.*

Persons are entitled to defeat the operation of the law of pre-emption if they can do so by legitimate means, but it is not permissible to throw a transaction of transfer into a fraudulent form for the purpose of avoiding a claim for pre-emption.

Where a property was mortgaged with possession for a long term to one of two brothers forming a joint family and the mortgage was followed by a sale of the equity of redemption in favour of the other brother:

Held, that there was really only one transaction, thrown into a fraudulent and deceptive form, to effect a complete sale, so that pre-emption of the property could be allowed regardless of the mortgage created on the same. **O** RAM DUT SINGH *v.* BALKARAN SINGH, 5 O. L. J. 87 **231**

Presidency Towns Insolvency Act (III of 1909), s. 17—*Secured creditor, suit by, to realise security—Leave of Court, whether necessary.*

A secured creditor of an insolvent can bring a suit to realise his securities without the leave of the Court under section 17 of the Presidency Towns Insolvency Act. **L B** BADRI DAS *v.* CHETTY FIRM OF O. A. M. K. **918**

Press and Registration of Books Act (XXV of 1867), s. 6—*Refusal of District Magistrate to authenticate declaration—Proceedings, whether judicial—Revision—High Court, power of interference of.*

A District Magistrate, in acting or purporting to act under section 6 of Act XXV of 1867, cannot be said to exercise jurisdiction as a Court, Criminal or Civil, nor can his proceedings be said to be in any sense judicial.

Where, therefore, a District Magistrate refused to authenticate a declaration under section 6 of the Act:

Held, that the proceedings of the Magistrate were purely ministerial and the Chief Court had no power to interfere with his proceedings. **P** AHAD SHAH *v.* EMPEROR, 19 CR. L. J. 621; 27 P. W. R. 1918 CR.; 21 P. R. 1919 CR. **525**

Presumption **186, 217**

— Evidence in rebuttal of presumption, consideration of **916**

—— —— *of lost grant.*

The presumption of a lost grant is one which may be made in India as well as in England. The presumption arises out of the strong desire of the Courts to find a legal origin for an ancient and uninterrupted user. The presumption may be rebutted like other presumptions. It also requires certain conditions and one is that the right could have been the subject of a grant. **B** JANARDAN GANGESH KHAPILKAR *v.* RAVJI BHIKAJI KONDKAR, 20 BOM. L. R 398 **448**

Principal and Agent—Accounts, suit for, of moneys entrusted to agent **430**

——— *Agent, authority of, limit of—Burden of proof.*

In a case where the question is whether a particular act was or was not within the scope of an agent's employment, the burden of proving the limit of the agent's authority is on the principal, inasmuch as the character of the authority is a matter specially within the knowledge of the latter. **L B** BRUCE, D. M. *v.* KYAW ZIN **822**

——— *Fraud of agent, liability of principal for—Station Master issuing receipt for non-existent goods, whether acting within scope of his authority—Railway Company, liability of.*

A principal is liable for the fraud of his agent acting within the scope of his authority, whether the fraud is committed for the benefit of the principal or for the benefit of the agent.

A railway employee, however, cannot be said to act within the scope of his authority or in the course of his employment when he treats as brought for despatch that which is non-existent.

A Station Master fraudulently issued a Railway receipt which purported to show that a certain consignment of rice had been delivered at a certain station for despatch to another station, whereas no such consignment had been delivered for despatch at all:

Held, that the Railway Company was not liable for the fraud of the Station Master, inasmuch as the latter could not be said to have been acting within the scope of his authority or in the course of his employment. **N** HUKUMCHAND *v.* BENGAL NAGPUR RAILWAY CO. **856**

Principal and Agent—concld.

Probate, *delay in taking, consequences of.*

Although a Will propounded a long time after the death of the testator must give rise to a case in which the Court is bound to scrutinize the evidence very carefully, there is no rule of the law of evidence that a Will propounded so late, is incapable of being proved.

Where an application for Probate of a Will was made 17 years after the death of the testatrix who was an illiterate Hindu lady:

Held, that the prior history of the case was not unworthy of consideration and that the case demanded a careful investigation by the Court. **C** BENODINI DEBYA *v.* HRIDOY NATH GHOSAL, 22 C. W. N. 424 **187**

——— —, *revocation of—Legatee under earlier Will, locus standi of.*

A legatee, whose interest under a Will has been considerably cut down by an alleged Will said to have been subsequently executed by the testator revoking the earlier one, has *locus standi* to apply for the revocation of the Probate of the later Will on the ground of non-service of citation, even before he has obtained Probate of the earlier Will. **C** DRAUPADI DASYA *v.* RAJKUMARI DASYA, 22 C. W. N. 564 **760**

Probate and Administration Act (V of 1881), ss. 8, 9, 98—*Probate granted to some executors without citation upon others—Remedy of other executors—Executors not liable to render accounts under Will, whether exempt from exhibiting accounts to Court.*

Where Probate has been granted to some of the executors appointed by a Will without citation upon the others calling upon them to accept or renounce their executorships, section 9 of the Probate and Administration Act becomes applicable to the case and the other executors can, on application for Probate, obtain it unless they are debarred under section 8 of the Act.

A provision in a Will that the executors shall not be liable to render accounts does not exempt them from the obligation of exhibiting to the Court of Probate the account of the estate required by section 98 of the Probate and Administration Act. But the Probate Court in such a case has no concern with the accounts of management by the executors. **C** PEARI LAL DAS *v.* BEPIN BEHARI DAS **336**

——— **s. 23**—*Letters of Administration, grant of—Rival applicants—Procedure.*

Where rival applicants apply for Letters of Administration one of whom is admittedly entitled to a share in the estate under section 23 of the Probate and Administration Act and the status of the others is disputed, the Court should grant Letters of Administration to the heir whose status is admitted. **L B** SHWE YIN *v.* MA ON, 9 L. B. R. 174 **935**

Probate and Administration Act—concld.

——— **s. 23** - *Letters of administration, grant of—Sister and adopted daughter, contest between—Procedure.*

Where the full sister and an alleged adopted daughter of the deceased whose adoption was disputed applied for Letters of Administration to the estate of the deceased:

Held, that inasmuch as in the event of the adoption being established the sister would not under the Buddhist Law be entitled to any share in the estate, the Court would be justified in going into the question of adoption. **L B** AUNG MA KHAING *v.* MA AH BON, 9 L. B. R. 163; 11 BUR. L. T. 65 **737**

— — **ss. 62, 85**—*Application for Letters of Administration with Will annexed, nature of—Duty of Court - Court, whether can refuse Letters.*

An application for Letters of Administration with the Will annexed stands on the same footing as an application for Probate, and the Court is bound to grant the Letters unless it finds that the Will was not executed by the testator or that he was not of a disposing mind at the time of making it or that the Will was not his own voluntary act.

In an application for Letters of Administration to the estate of one *D.* with a copy of the Will annexed it appeared that *N.*, the husband of *D*, made a Will dedicating certain property to a temple and directing that his widow be maintained out of his other property. After the death of *N*, *D.* applied for Letters of Administration to his estate. The executors under the Will appeared in Court and consented to the widow being granted the Letters, which were granted accordingly. Later on *D.* made a Will in which she appointed the applicants as executors, who after her death applied for Letters of Administration with a copy of her Will annexed. The executors under the Will of *N.* lodged caveats urging that *D.* had no power to make a Will:

Held, that as it was proved that *D.* executed the Will and as it was not contested that she was not of a disposing mind at the time she made it, the applicants were entitled to Letters of Administration with copy of her Will annexed **P** BABU MISAR *v.* UMBE PARSHAD, 110 P. W. R. 1918 **974**

——— **s. 85** **974**

——— **s. 98** **336**

——— **s. 120** **664**

Promissory note, liability of minor on **761**

Provincial Insolvency Act (III of 1907), s. 16—*Order of adjudication, effect of—Suit by undischarged insolvent after vesting order, maintainability of—Appeal, right of.*

After the passing of an order of adjudication and the vesting of the insolvent's property in the Official Receiver under section 16 of Act III of 1907, the insolvent is *ipso facto* divested of the same and can have no vested interest in the property until after it is restored to him after administration. The insolvent cannot maintain a suit in respect of such property, nor has he a right of appeal against any decree passed in a suit instituted by him, the Official Assignee alone being competent to sue for enforcing the rights possessed by the insolvent at the date of adjudication. **M** SUBBARAYA CHETTIAR *v.* PAPATHI AMMAL, (1918) M. W. N. 288; 7 L. W. 516 **239**

——— **ss. 24, 26, 36, 52**—*Official Receiver, framing of schedule by - Enquiry, nature of - Court, function of, nature of, under s. 26.*

The power delegated to the Official Receiver under section 52 of Act III of 1907 is to frame the schedule after an *ex parte* examination of the evidence tendered by the alleged creditors of the insolvent and he does not decide judicially or finally upon contested claims His entering a creditor's name in the schedule does not prevent the Court from entertaining applications under sections 26 and 36.

The provisions of section 26 contemplate a judicial enquiry. **M** MOHIDEEN KADIRSHAW MARAIKAR *v.* OFFICIAL RECEIVER, TINNEVELLY, 41 M. 30 **67**

— — **ss. 26, 36** **67**

——— **s. 36**—*Jurisdiction of Insolvency Court to decide claims based on transfers made more than two years before adjudication.*

Under the Provincial Insolvency Act the Insolvency Court has no jurisdiction finally to decide claims to the insolvent's properties based on transfers made by the insolvent more than two years before his adjudication. **C** AMINA KHATUN *v.* NAFAR CHANDRA PAL CHOWDHURY **180**

——— **s. 43 (2) (b)**—*Fraudulent concealment of property Proceedings under s. 4', nature of -Charge, framing of, whether necessary.*

In a proceeding under section 43 (2) of the Provincial Insolvency Act it is not essential that there should be a definite charge, finding and a conviction as a foundation for a sentence under the said provisions. All that the law requires is that the principles underlying a criminal trial should be observed in essentials.

Where an insolvent who was being proceeded against under section 43 (2) (*b*) of the Provincial Insolvency Act was informed of the nature of the proceedings, the offence with which he was charged and of its consequences:

Held, that the essentials of a criminal trial were complied with. **N** GANPATY *v.* CHIMNAJI, 19 CR. L. J. 627 **675**

— — **s. 52** **67**

Provincial Small Causes Courts Act (IX of 1887), s. 23—*Transfer of suit of Small Cause Court nature to ordinary jurisdiction of Munsif—Appeal.*

A suit for the recovery of damages for the appropriation of a jack tree was instituted by a landlord against his tenant on the Small Cause Court side of a Munsif's Court invested with Small Cause Court jurisdiction. The Munsif transferred the suit to his ordinary jurisdiction, on the ground that it involved questions of custom and title to immoveable property, and after taking evidence under the ordinary procedure made a decree in favour of the plaintiff. On appeal an objection was taken that as the suit was triable by a Court of Small Causes the appeal was incompetent. This objection was overruled:

Held, that though the procedure which the Munsif followed in transferring the suit to his ordinary

Provincial Small Causes Courts Act—contd.

jurisdiction was not strictly in conformity with the language of section 23 of the Provincial Small Causes Courts Act, yet his order of transfer might be regarded as an order made under section 24 of the Act, so that his decision was a decision by a Court having jurisdiction to determine questions of title and was, therefore, open to appeal. **C** ANHAYESWARI DEBI *v* HATU SHIEKH **645**

——— **Sch. II, Art. 8**—*Suit against partner for share of rent, whether suit for rent—Jurisdiction of Small Cause Court.*

Defendant, in consideration of being admitted as a partner in the plaintiff's tenancy, agreed to pay to the latter a certain sum as his estimated share of the rent of the holding:

Held, that the payment was not rent within the meaning of Article 8, Schedule II, of the Provincial Small Causes Courts Act, so that a suit for its recovery was cognizable by a Court of Small Causes. **A** RAM NATH *v.* SEKHDAR SINGH, 15 A. L. J. 862; 40 A. 51 **323**

——— **Art. 13.**

A suit to recover an amount alleged to be due to a hereditary *archaka* of a temple as the dues of his office falls under Article 13 of the Schedule to the Provincial Small Causes Courts Act.

If any portion of a claim is not cognizable by a Small Cause Court, the whole claim should be brought in the regular Court. **M** BHARADWAJA MUDALIAR *v.* ARUNACHALLA GURUKKAL, 28 M. L. T. 288; 7 L. W. 544 **414**

——— **Art. 35,** effect of amendment of Act V of 1914 upon **11**

——— **as amended by Act VI of 1914, Sch. II, Art. 35, Cl. (11)**—*Suit for value of paddy wrongfully and forcibly taken away, whether cognisable by Small Cause Court.*

A suit to recover the value of paddy alleged to have been forcibly, wrongfully and maliciously cut and taken away by the defendant from the possession of the plaintiff is not cognisable by a Court of Small Causes. **C** LALU SARDAR *v.* OHEDALI MRIDHA **15**

——— **Art. 41**—*Decree for maintenance against three brothers making one of them expressly liable for whole amount Payment by defendant made liable Suit to enforce contribution, whether cognisable by Small Cause Court—Jurisdiction.*

A Hindu widow sued the brothers of her deceased husband for maintenance and obtained a decree. For certain reasons the decree made one of the defendants expressly liable for the whole amount of the decree. The latter made payments under the decree and then sued the other defendants for contribution:

Held, that under the peculiar circumstances of the case the fact of his having made payments under the decree gave rise to an equity in favour of the plaintiff as against the defendants, but that nevertheless the suit as brought could not be treated as a suit for contribution within the meaning of Article 41 of Schedule II of the Provincial Small Causes Courts Act, and was not, therefore, excluded from the cognisance of a Court of Small Causes.

Provincial Small Causes Courts Act—concld.

Per *Walsh, J.*—It is only suits for contribution of a peculiar and special character which are included in the exemption contained in Article 41 of Schedule II of the Provincial Small Causes Courts Act, and a litigant who wants to bring himself within the exemption must clearly establish that his suit in every respect complies with the very precise definition contained in the Article. **A** ANT RAM *v.* MITHAN LAL, 16 A. L. J. 44; 40 A. 135 **560**

Public path—*Encroachment, suit for removal of, by private person—Special damage, proof of.*

Special damage for obstruction of a highway has to be established in a case for the removal of an encroachment on the highway. **N** CHAINU *v.* MANBODH **894**

Punjab Alienation of Land Act (XIII of 1900), s. 10—*Mortgage—Condition operating by way of conditional sale, legality of—Mortgagor not member of agricultural tribe, effect of.*

The language of section 10 of the Punjab Alienation of Land Act is wide enough to include every mortgage which contains a stipulation as to conditional sale, and it is absolutely immaterial whether the mortgagor is or is not a member of an agricultural tribe.

A mortgage-deed provided that the principal money together with interest at a certain rate shall be paid within one year, and that on default the transaction shall be deemed to be a sale. It was further stipulated that the interest shall be payable from year to year, and that in the event of non-payment every year the debtor shall be liable to pay compound interest. The mortgagor was also prohibited from transferring the property until redemption:

Held, (1) that the covenant as to the payment of interest from year to year and as to the liability of the debtor to pay compound interest showed that the parties contemplated that interest should be payable after the expiry of the period fixed for redemption;

(2) that the mortgagor's liability to pay interest having been established, there was no equitable reason why he should get the property without discharging his obligation, *i. e.*, the mortgagor must pay the interest before redemption. **P** ALLAH DIN *v.* FATEH DIN, 31 P. R. 1918; 54 P. W. R. 1918; 27 P. L. R. 1918 **101**

Punjab Land Revenue Act (XVII of 1887), s. 111 **405**

Punjab Municipal Act (III of 1911), ss. 152, 153—*Brothel and house of public prostitute, distinction between—Notice, necessity of, to constitute offence—Summary trial.*

No offence can be said to be committed under section 153 of the Punjab Municipal Act until the owner or tenant of the house summoned by the Magistrate fails to comply within five days with the Magistrate's order to discontinue the use of the house as a brothel, and as no offence can be said to be committed by the owner of a brothel at the time when the complaint is made to the Magistrate, the Magistrate has no jurisdiction to hold a summary trial under section 260 of the Criminal Procedure Code.

Punjab Municipal Act—1911—concld.

In view of the distinction drawn by the Legislature itself in section 152 of the Punjab Municipal Act between a brothel and the house of a public prostitute, the latter does not become a brothel within the meaning of section 153 of the Municipal Act merely because the owner plies the trade of a prostitute therein. **P** KANKU *v.* MATHRA DAS, 12 P. W. R. 1918 Cr.; 19 Cr. L. J. 449; 55 P. L. R. 1918 **113**

Punjab Pre-emption Act (I of 1913), ss. 19, 20—*Notice to pre-emptor not specifying property to be sold or its price, whether valid—Omission of pre-emptor to reply to notice—Suit, whether maintainable.*

In a suit for possession by pre-emption, it appeared that the vendor on the 12th June 1913 applied to the Court stating that he proposed to sell certain property and praying that action be taken under section 19 of the Punjab Pre-emption Act and notices issued to the persons entitled to pre-empt. The Court issued the notices, but in those notices there was no mention of the actual property to be sold or of the price at which it was to be sold. The notices were served on the 16th June 1913 and the 1st of July was fixed for the appearance in Court of the persons to whom they were issued. On that date plaintiff appeared and protested that the notice had not given him all the requisite information. Thereupon the Court handed over to him for perusal the original application of the vendor and on the same day he filed certain pleas with regard to the price, etc. The hearing was adjourned to the 21st of July and on that date to the 11th of August, when a further postponement to the 12th of November was ordered. On that date the Court recorded an order to the effect that none of the parties was present, that the three months' limitation had expired and that the proceedings should, therefore, be filed. On the 9th June 1914 the vendor sold the land and the plaintiff instituted his suit on the 8th June 1915:

Held, (1) that under the circumstances there was sufficient notice of the sale given to the plaintiff within the meaning and for the purposes of section 19 of the Pre-emption Act but that on the other hand the plaintiff had failed to prove that he had complied with the provisions of section 20;

(2) that the right of pre-emption had been extinguished before the suit was instituted and the plaintiff was, therefore, not entitled to any relief. **P** JESA RAM *v.* MEHR CHAND, 104 P. W. R. 1918 **935**

Punjab Tenancy Act (XVI of 1887), s. 19—*Appraisement proceedings—Consent of landlord or tenant, whether necessary—Refusal of tenant to accept appraisement, effect of—Omission of Revenue Officer to vary or confirm appraisement—Financial Commissioner's Standing Order No. 2, para. 12, object of.*

The consent of neither landlord nor tenant is necessary for the validity of appraisement proceedings under Chapter II of the Punjab Tenancy Act.

The refusal by a tenant to accept the result of an appraisement is not an adequate reason for declining to confirm it under section 19 (2) of the Punjab Tenancy Act.

Punjab Tenancy Act—concld.

The failure by a Revenue Officer to give effect to the direction contained in section 19 (2) of the Punjab Tenancy Act, which requires him to make an order either confirming or varying an appraisement, does not affect the admissibility or the value of the evidence contained in the appraisement record.

In suits for the value of produce rents there is no conclusive presumption that produce calculated according to the Financial Commissioner's instructions in paragraph 12 in Standing Order No 2 is the actual produce of the particular land in the particular harvest in suit.

The object of the executive instructions there given is to provide the Revenue Courts with a means of calculating the *probable* produce and its *probable* selling value, from the records of crop inspection, the Settlement Officer's estimate of average outturns and other available sources, in those cases in which reliable evidence of the *actual* produce and *actual* selling price is not available. **F. C. P** MULK SHAH *v.* NATHU, 4 P. R. 1918 Rev; 1 P. W. R. 1918 Rev. **980**

——— **s. 59** **800**

——— **s. 59**—*Occupancy rights, succession to—Burden of proof—Settlement record, entry in—Presumption of correctness.*

M. son of *K.* claimed possession of certain occupancy land on the ground that he was the heir of one *S.* It appeared that in the Summary Settlement of 1853 one *K.* was entered as an *asami* of certain land in the same village, but *K.*'s name did not appear in the Regular Settlement of 1860 and *S.*, the uncle of the plaintiff, was found to be in possession of certain land which he stated he had reclaimed from *banjar* within the previous 15 years and was granted occupancy rights therein. On the death of *S.* the land was mutated in the name of his widow, the landlord allowing her to remain in possession for her lifetime:

Held, (1) that inasmuch as it was not proved that the land entered in the name of *S.* was the same as that entered in the name of *K.*, it could not be presumed to be the same;

(2) that a presumption of correctness attached to the entry in the Regular Settlement of 1860 and that *S.* having at that time been declared as having personally acquired occupancy rights in the land in suit, *K.* having had no part or share in bringing the land under cultivation, the plaintiff's suit was not maintainable;

(3) that presumption could not take the place of positive proof. **P** HAYAT MUHAMMAD *v.* MAHMUD, 107 P. W. R. 1918 **938**

——— **s. 59**—*Occupancy tenancy—Joint tenants—Survivorship, right of—Tenants recorded as having defined shares, effect of.*

The right of a landlord to claim the extinction of an occupancy right when there are joint tenants does not arise on the death of one of them, as they collectively constitute a single tenant and the right continues to exist in the survivor or survivors.

The fact that the occupancy tenants are recorded as having defined shares in the tenancy does not make any difference and does not affect the right of survivorship. **P** UDMI *v.* MUNSHI, 95 P. W. R. 1918 **574**

Railways Act (IX of 1890), ss. 108, 121, 128, 131.

Plaintiff was travelling in one of the defendant Company's trains. The compartment occupied by the plaintiff was greatly overcrowded to the inconvenience and discomfort of the occupants. After ineffectual efforts to obtain assistance from the guard or the station master at a station, the plaintiff stopped the train by pulling the communication chain. Thereupon the driver and the guard got down from the train, the driver pulled the plaintiff out of the compartment and cuffed and slapped him, the guard assisting in this assault. The plaintiff sued the defendant Company for damages for the assault committed on the plaintiff by the Company's servants:

Held, that the offence of pulling the communication chain without reasonable and sufficient cause was one in respect of which the Company itself had no power of arrest and that, therefore, the assault committed by its servants was outside the scope of their authority and the course of their employment and the Company was not liable therefor. **B** GIRJASHANKAR DAYASHANKAR *v.* B. B. & C. I. RAILWAY, Co., 20 BOM. L. R. 126 **715**

——— **ss. 121, 128, 131** **715**

Record of Rights, *entry in—Declaratory suit for correction of entry—Entries in two consecutive records—Suit for correction of entry in second record, maintainability of—Limitation Act (IX of 1908), s. 120 - Limitation—Fresh cause of action.*

Where there are two consecutive finally published Records of Rights, it is competent to a party aggrieved by the second to ask for a declaration in respect of the second record without first displacing any prejudicial entries in the first record.

Where there was an entry in the Record of Rights prepared in 1888-89 against the plaintiff and then again there was a similar entry in the record prepared in 1905:

Held, that the entry in 1906 was a fresh invasion of the plaintiff's right, so that the plaintiff was entitled to sue for the correction of the record within six years of the second entry. **Pat** LATAFAT HUSAIN *v.* KALIKER NAND SINGH, 4 P. L. W. 303; 3 P. L. J. 361; (1918) PAT. 225 **432**

———, *entry in—Presumption of correctness—Rebuttal of presumption, whether question of fact—Appeal, second—Appellate Court, whether can interfere with finding.*

An entry in a Record of Rights is not conclusive, but it is an entry to which by Statute the presumption attaches that it is correct unless and until the contrary is proved by legal evidence.

The question whether the presumption of correctness attaching to an entry in a Record of Rights has been rebutted or not is a matter within the competence of a final Court of fact, and is incapable of being reviewed by a Court having the limited jurisdiction that the High Court has in hearing a second appeal. **C** RAM KUMAR CHACKERBUTTY *v.* BIRENDRA KISHORE MANIKYA BAHADUR, 22 C. W. N 449 **65**

——— ———, *entry in, value of—Presumption—Evidence in rebuttal of presumption, consideration of—Court, duty of.*

An entry in the Record of Rights merely raises a presumption as to its correctness, and where this presumption is sought to be rebutted the Court must show by its judgment that it has considered the evidence on the record and then come to a distinct finding whether the evidence has or has not rebutted that presumption. **Pat** DURGA PRASAD *v.* HARIHAR PRASAD, 4 P. L. W. 448 **916**

Record of Rights—concld.

Registration **926**

Registration Act (XX of 1866) **489**

Registration Act (XVI of 1908), s. 17 **986**

——— **s. 17** *Mortgage, equitable—Memorandum of securities handed over to mortgagee—Registration, whether necessary.*

A document merely reciting what securities are handed over to an equitable mortgagee is a memorandum and not a mortgage and does not require registration. **L B** BADRI DAS *v.* CHETTY FIRM OF O. A. M. K. **918**

——— **s. 17 (1) (c)**—*Receipt for possession of land allotted in partition already effected, whether requires registration.*

A document, which is in terms merely a receipt for possession of some land allotted to one of the parties in a partition which has already been effected by Panchas, is not compulsorily registrable under section 17 (*c*) of the Registration Act. **N** FAKIRA *v.* TULSIRAM **854**

——— **s. 17 (2) (vi)**—*Compromise embodied in proceedings of Court, whether compulsorily registrable—Party to compromise, whether can bring fresh suit—Estoppel.*

Where a compromise entered into by parties to a suit is embodied in the proceedings of the Court, it does not require registration.

In a suit to recover possession of certain land the defendant pleaded that the plaintiff had served him with a notice of ejectment and he had brought a suit to contest the notice, whereupon the parties reached a compromise whereby the plaintiff ceded the land in dispute to the defendant and the defendant withdrew his suit in the Revenue Court:

Held, (1) that the compromise did not require registration and secondary evidence of its contents was admissible;

(2) that by his admission of compromise before the Revenue Court the plaintiff having induced the defendant to withdraw his suit in that Court, he was now estopped from bringing the present suit. **P** GULAB *v.* BADHAWA **331**

——— **ss. 32, 33, 71, 73, 75, 87**—*Mortgage deed—Registration Presentation by duly authorised agent—Refusal to register—Registrar's order to register—Presentation on behalf of Collector as Manager of Court of Wards, validity of.*

A mortgage-deed was executed in favour of one *S.* but before it could be registered *S.* fell ill. Subsequently *S.* executed a special power-of-attorney as required by section 33 of the Registration Act authorising one *N.* to present the deed for registration on his behalf. Accordingly, within the period prescribed by law *N* presented the deed for registration and the Sub-Registrar made an endorsement on the deed certifying its presentation by *N.* under a special power-of-attorney authenticated in his office. The mortgagor, however, failed to appear and the Sub-Registrar, therefore, refused to register the deed. In the meantime *S* had died and his widow on behalf of his minor sons applied to the Registrar, who made an order under section

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75 (1) of the Registration Act that the document should be registered. Within thirty days of this order the Collector in his official capacity as Manager of the Court of Wards, by whom the estate of the sons of *S.* had been taken over for management, sent the deed to the Sub-Registrar with an official letter, enclosing also a certified copy of the order of the District Registrar. The Sub-Registrar on receipt of this communication took cognisance of the same as a presentation of the document, within the meaning of section 75, clause (2) of the Registration Act, and proceeded to register the document accordingly:

Held, (1) (per *Piggott, J.*), that the endorsement on the deed by the Sub-Registrar that it was presented by *N.* under a special power-of-attorney registered and duly authenticated in his office entitled the Court to assume that the Sub-Registrar acted in the proper and lawful exercise of his powers under the proviso to section 33 of the Registration Act, and that, therefore, the original presentation of the deed for registration by *N.* was a proper and valid presentation under section 32 of the Registration Act;

(2) (*per Curiam*) that the procedure adopted by the Collector after the order of Registrar directing registration of the deed was a sufficient compliance with the requirements of section 75 (2) of the Registration Act;

(3) that even if the procedure was irregular, the irregularity was covered by section 87 of the Registration Act

Per *Walsh, J.*—What happens after the Registrar's order under section 75 (1) of the Registration Act directing registration of a document is pure machinery. Any form of presentation, if it is supported by an application, which takes place on behalf of the presenter and is noted on the order in his favour, is sufficient for the purposes of clause 2) of section 75. **A** COLLECTOR OF MORADABAD *v.* MAQBUL UL-RAHAMAN **37**

—— **s. 35**—Registration of partition deed, effect of **535**

—— **ss. 71, 73, 75, 87** **37**

—— —— **s. 90**—*Bombay Land Revenue Code (Bom. Act V of 1879), ss.* 74, 76—Razinamas *and* kabuliyats, *whether evidence of transfer—Registration.*

Per *Beaman, J.*—Although *razinamas* and *kabuliyats* are not in themselves documents of transfer, they are fairly conclusive evidence that a transfer has in fact been made.

Razinamas and *kabuliyats* executed between a mortgagor and his mortgagee extinguish the equity of redemption.

Quære.—Whether in proper cases governed by the Bombay Land Revenue Code, *razinamas* and *kabuliyats* stand in need of registrsition at all?

Per *Heaton, J.*—It is quite possible that *kabuliyats* are exempted from registrationion consequence of the provisions of clause (*b*), section 90, of the Registration Act, as they appear to evidence assignments by Government of an interest in land. **B** NARSO RAMAJI KULKARNI *v.* NAGAVA ISHVARAPPA, 20 BOM. L. R. 358 **492**

Regulation XXVII of 1802, s. 32 **786**

Regulation XVII of 1806, ss. 7, 8—

Mortgage by way of conditional sale—Foreclosure—Notice, defective, effect of.

The mere fact that parts of the seal of the District Judge are not legible, is not a fatal defect in a notice of foreclosure served under sections 7 and 8 of Regulation XVII of 1806.

Nor is an ambiguity in the specification of the date of the mortgage-deed fatal, where it is such that it could not have led to any misconception on the part of the mortgagor.

Nor is an omission of words describing the property mortgaged, fatal where it could not have caused any misunderstanding **P** RAGHU NATH *v.* RUKNA, 82 P. W. R 1918 **179**

Regulation XIX of 1814 **921**

Regulation X of 1831, s. 2 **595**

Remand *by Appellate Court, order of, for taking evidence for elucidation of obsolete or provincial expression, validity of.*

A suit can be remanded by an Appellate Court for the purpose of taking evidence in order to elucidate the meaning of an obsolete or provincial expression. **C** ANHAYESHWARI DEBI *v.* HATU SHEIKH **645**

—, order of, when to be made **1**

, order of, whether appealable to His Majesty in Council **192**

Res Judicata **849**

— in execution proceedings—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 5, sub-r 2 Application for final decree, whether can be considered as in continuation of previous application.

On the death of one of several decree-holders after the preliminary decree in a mortgage suit, the surviving decree-holders were, at the instance of the judgment-debtor, treated as the legal representatives of the deceased decree-holder. They then applied on their own behalf as well as the legal representatives of the deceased decree holder for a final decree for sale of the mortgaged properties, and after issue of notice upon the judgment-debtor a final decree was made Afterwards on the judgment-debtor's objection to execution on the ground that the widow and not the surviving decree-holders was the legal representative of the deceased decree-holder, the widow made an application to be made a party as the legal representative of her deceased husband, which was granted and was treated as an application for a final decree. The judgment-debtor then raised objections to execution on the ground that the widow's application not having been made within six months from the date of her husband's death, the suit had abated and also that the application was barred by the three years' rule of limitation contained in Article 181 of Schedule I of the Limitation Act:

Held, (1) that unless and until the judgment debtor succeeded in having the final decree made on the application of the surviving decree-holders set aside, he could not be permitted to advance the objections, as the final decree, having been made after notice to the judgment-debtor, could not be attacked at a subsequent stage of the execution proceedings;

(2) that even if the widow's application was regarded as one for a final decree, it should be referred back to the judgment-debtor's original application for substitution of the surviving decree-holders as the legal representatives of the deceased decree.

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holder, or be dealt with under Order XXII, rule 9, and should next be considered as in continuation of the application of the surviving decree-holders for a final decree. **C** Makunda Lal Kundu v. Priya Nath Moitra **657**

———*—Landlord and tenant*—Ex parte *decree as to rate of rent, whether* res judicata *on question of rate of rent annually payable.*

An *ex parte* decree in a rent suit, allowing the plaintiff's claim at the rate of rent alleged in the plaint, does not operate so as to render the question of the rate of rent annually payable *res judicata* unless there was a prayer in the plaint for a declaration as to the rate of rent as part of the substantive relief claimed. **C** Brajendra Kumar Roy v. Sarajendra Nath **416**

———*—Profits, suit for*—Sir *and* khudkasht, *profits of, rate of.*

A decision in a previous suit for profits between the co-sharers of a village that the *sir* and *khudkasht* of a particular co-sharer yielded profits at a certain rate in the years in suit, does not operate as *res judicata* in a subsequent suit between the same co-sharers for profits in respect of other years. **O** Baldeo Bakhsh v. Pahlad Singh, 5 O. L. J. 67 **218**

———*—Rent suit—Decision as to rate of rent in particular year, whether* res judicata.

A decree in a rent suit does not operate as *res judicata* as to the rate of rent payable for years other than the years covered by the decree.

Per *Mullick, J*—The question whether a decision as to the rate of rent operates as *res judicata* depends on the frame of the issue. **Pat** Kishun Deyal Rai v. Kulpati Kuer, 3 P. L. J. 372; (1918) Pat. 234 **316**

Restitution of conjugal rights, *suit for—Discretion of Court—Court, whether can refer entire suit to arbitration.*

It is entirely within the discretion of the Court to grant or refuse a decree for restitution of conjugal rights but the Court cannot delegate the decision of the entire suit to arbitrators, although it is open to it to refer any particular matter to arbitration.

Where, therefore, in a suit for restitution of conjugal rights, the Munsif delegated the entire suit to persons appointed by the parties as their arbitrators:

Held, that the Court could not delegate its function to arbitrators and the case should be tried on its merits. **P** Kalabutu v. Prabh Dial, 80 P. W. R. 1918 **163**

Revenue record in Berar, *correctness of—Presumption.*

Where nothing else is known, the person in possession of property is presumed to be the owner.

Though the revenue record in Berar is not supported by a statutory presumption like a Record of Right in the Central Provinces, an entry in the Record of Rights does raise a presumption, and the presumption arising from possession is weakened considerably if the person in possession fails to explain an adverse entry and is unable to state the origin of the possession by virtue of which he claims an adverse title to the recorded holder. **N** Raghoba v. Palhoba **217**

Review *of order by lower Court after dismissal of appeal, legality of.*

When an appeal from an order has been dismissed by a higher Court, the lower Court cannot review its order. **P** Kishen Das v. Official Liquidator, Doaba Bank, Ltd., 40 P. R. 1918; 60 P. W. R. 1918 **84**

Revision **33, 337, 647**

——— High Court, power of **2F**

——— High Court, power of interference of **17, 325, 39**

———*—High Court, power of interference of.*

The High Court is not entitled to create what are really appeals put forward in the shape of revisions. **A** Fazal Rab v. Manzur Ahmad, 16 A. L. J. 433 **773**

Right to office, *suit for declaration of, maintainability of*—Teerthakars *in Hindu temple, right of, to recite* prabandam—*Duty not legally enforceable.*

A suit to establish a right to an office to which emoluments are alleged to be attached is maintainable, when the existence of the office as also the connection between the office and the honour and dignities and perquisites is proved by clear evidence.

To constitute an office, the one, if not the essential thing is the existence of a duty or duties attached to the office which the office-holder is under a legal obligation to perform and the non-performance of which is visited by penalties. The rendering of a voluntary service cannot constitute an office. **M** Vathiar Venkatachariar v. Ponappa Ayyengar, 7 L. W. 64 **959**

Right to sue, *want of, plea as to—Plaintiff suing on behalf of others as well as for himself—Defendant, knowledge of.*

Where a defendant in a suit brought by the Manager of the Court of Wards knows that the Manager is suing on behalf of the ward as well as on behalf of other persons interested in the property in dispute, he cannot resist the suit on the ground that the ward is not the sole owner of the property. **O** Hashmat Ali v. Mahewa Estate, 5 O. L. J. 31 **248**

Riwaj-i-am, *evidentiary value of entries in—Burden of proof.*

An entry in a *riwaj-i-am* even though unsupported by instances constitutes a strong piece of evidence in support of an alleged custom and it lies upon the party impugning it to rebut the value of this evidence. **P** Saide Khan v. Amir-un-Nissa, 109 P. W. R. 1918 **966**

Sale or mortgage—*Consideration—Non-payment of purchase-money—Remedy of vendor—Oral evidence, admissibility of, to explain document—Sale of immoveable property—Delivery of possession, whether necessary.*

In a sale of immoveable property the non-payment of the purchase-money does not prevent the passing of the ownership of the purchased property from the vendor to the purchaser and the purchaser can notwithstanding such non-payment maintain a suit for possession of the property, and the only remedy of the vendor is a suit for the recovery of the purchase-money.

Oral evidence is not admissible to show that a transaction which is *ex facie* a sale is really a mortgage, except to prove fraud on the part of the party taking benefit under the deed. **L B** Venkatachallum v. Mg. Tun E **860**

Settlement Record, entry in—Presumption of correctness **938**

Small Cause Court, *suit cognizable by—Jurisdiction—Contribution suit.*

A suit for contribution is not exempted from the cognizance of a Court of Small Causes. **O** BHAGWATI PRASAD SINGH v. MUHAMMAD ABUL HASAN KHAN, 5 O. L. J. 109 **236**

Special custom—*Burden of proof—Acquiescence, what amounts to.*

If a party pleads a custom opposed to the generally established custom prevailing in the community to which he belongs, the onus lies on him to prove that special custom and a solitary instance is insufficient to discharge that onus. **P** ABDULLA v. NARIA, 25 P. W. R. 1918 **9**

Specific Relief Act (I of 1877), ss. 12, 17—*Unpaid consideration for mortgage, suit for, whether one for specific performance—Maintainability of suit.*

A suit to recover the unpaid consideration for a mortgage is a suit for specific performance of an agreement to lend money on a mortgage, and is not maintainable. **M** RAJAGOPALA AIYAR v. DAVOOD ROWTHER, 34 M. L. J. 342 **161**

—— **s. 15.**

A right to specific performance is in the discretion of the Court and can only be claimed subject to the condition laid down in section 15 of the Specific Relief Act. But after the parties have performed the contract by executing a sale-deed and delivering possession, the rights of the parties are no longer governed by the Specific Relief Act but by the Transfer of Property Act. **N** SHALIGRAM SADASHEO PANDA v. NARAIN **669**

—— **s. 17** **161**

—— **s. 39** **238**

—— **ss. 42, 43** **203**

—— —— **ss. 42, 54** **80**

—— **s. 42**—*Declaration, introductory to relief for possession, nature of—Parties—Defendant not interested in property in dispute, declaration against, whether can be granted.*

A. instituted a suit for declaration of title to and recovery of possession of the estate of one *K.* as his next reversionary heir after the death of *K's* grandmother, who had succeeded to his estate. *M.*, a cognatic relation of *K.*, was made a defendant to the suit, because in a probate proceeding relating to the Will of another separated member of the family, *M* had claimed to be the nearest cognatic relation and had not admitted *A.'s* claim as an agnatic relation of the family. *M.* claimed no interest in the property in suit but it was alleged that he was interested in denying *A.'s* title to the estate of *B.*, another member of the family, succession to which had not yet opened;

Held, (1) that the declaration claimed, being merely introductory to a claim for possession, was not one for which legislative sanction was required and that the suit was not one under section 42 of the Specific Relief Act;

(2) that *M.* not having claimed any interest in the properties in suit, it would be an abuse of the process of the Court to allow him to be harassed by being made a party to litigation, the only relief claimed in which was one in which he had no interest and in which he was not directly concerned, to enable the plaintiff to support a possible claim in a future litigation which might arise. **Pat** ASHARFI SINGH v. MADHABESHWAR INDRA NARAIN SAHI, 4 P. L. W. 412 **665**

Specific Relief Act—concld.

—— **s. 42**—*Trespasser, whether can sue for declaration that he is trespasser.*

Section 42 of the Specific Relief Act does not contemplate an action by a person having no title

A trespasser cannot, therefore, sue for a declaration that he is a trespasser. **Pat** RAGHUBIR PRASAD v. MISRI KAHAR **303**

—— **s. 42, proviso,** applicability of **972**

—— **s. 42, proviso**—*Declaration, suit for, maintainability of—Defendant in possession as mortgagee from Hindu father—Suit by sons for declaration that their share is not liable to attachment and sale in execution of money-decree against father, maintainability of.*

The proviso appended to section 42 of the Specific Relief Act refers to the legal character or right to property which is set up in the plaint. In other words, the further relief, referred to in that proviso, is a relief appropriate to, and consequent on, the right asserted.

Where the sons of a Hindu father sued merely for a declaration that their share in the family property was not liable to attachment and sale in execution of a money-decree obtained against their father, and it was found that the decree-holder defendant was in possession of the property under a mortgage effected by the plaintiff's father:

Held, that the suit was not barred by the proviso to section 42 of the Specific Relief Act, inasmuch as it arose quite independently of the mortgage. **O** NARINDRA BAHADUR SINGH v. RAM SINGH, 5 O. L. J. 133 **859**

—— —— **s. 54** **80**

Stamp Act (II of 1899), s. 64—*Failure to stamp document—Fraudulent intent.*

Mere non-payment of a proper stamp duty does not make a person liable to prosecution under section 64 of the Stamp Act, unless it is proved that he had an intention to defraud the Government of its stamp revenue. **C** BROJENDRA NATH BAKSHI v. EMPEROR, 19 CR. L. J. 515 **275**

Succession Act (X of 1865), s. 190—*One of several heirs of deceased sued as his legal representative—Letters of Administration, whether necessary.*

Where one of several heirs of a deceased who died intestate was impleaded as a defendant to a suit as the legal representative of the deceased :

Held, that section 190 of the Succession Act applied to the case and that no right to any part of the property of the deceased could be established in any Court unless Letters of Administration were granted by a Court of competent jurisdiction. **B** TIMAJI KRISHNA POTDAR v. RAMA PIRAJI BHATKHANDE, 20 BOM. L. R. 175 **862**

Succession Certificate Act (VII of 1889), s. 4, *applicability of, to substituted plaintiff on death of original plaintiff.*

Without the production of one of the certificates mentioned in section 4 of the Succession Certificate Act, no decree can be passed in favour of a person who has been substituted as plaintiff in a suit for recovery of money due on a bond upon the death of the original plaintiff.

Succession Certificate Act—concld.

Quære.—Whether the same principle applies to execution proceedings. C NEPUSI BEWA *v.* NASIRUDDIN, 27 C. L. J. 400 **730**

Suits Valuation Act (VII of 1837), s. 3 (l) **89**

Summons case *and warrant case tried together —Dismissal of case for default of prosecution, effect of —Procedure.*

Where there are two offences complained of, one of which is triable as a summons case and the other as a warrant case, both arising out of the same transaction, the Court cannot separate the two, applying two kinds of procedure, but should adopt the procedure relating to the graver charge, *i. e.*, the warrant case.

Per *Napier, J.*—Unless the Court chooses to separate the two offences and take them up, one as a warrant case and the other as a summons case, the fact that one of the offences complained of and tried by him is punishable by six months' imprisonment or less does not make that part of the trial a summons case. M RAGHUVALU NAICKER *v.* SINGA RAM, 34 M. L. J. 369; 7 L. W. 520; 19 CR. L. J. 613 **517**

Testamentary suit—*Caveat, remote reversioners, whether can file.*

In a testamentary suit caveats against the Will were entered by *B.*, the immediate reversioner of the deceased, and some other persons, alleging that the Will propounded was a forgery. Subsequently *B.* entered into an agreement with the propounders of the Will for an amicable settlement on their paying him a large sum of money raised by the sale or mortgage of a portion of the estate. Before this agreement was assented to by the other caveators, *S.* and *R.*, who would be immediate reversioners of the testator after the death of *B.* during the lifetime of the testators' widow, filed caveats against the Will:

Held, that *S.* and *R.* had *locus standi* to enter the caveats, as *B.* by entering into the agreement had done his best to render it impossible for him successfully to challenge the Will or had at least shown that at all events he could not be relied upon seriously and successfully to contest the Will.

Quære.—Whether any interest, however slight, or even the bare possibility of an interest in the estate left by an alleged testator, is enough to entitle a party to oppose the Will. C SATINDRA MOHAN TAGORE *v.* SARALA SUNDARI DEBI, 27 C. L. J. 320 **59**

Transfer of case—*District Magistrate, power of, to transfer case outside district.*

There is no authority which enables one District Magistrate to transfer a case for trial to another District Magistrate. O KAYAMUDDIN *v.* DWARKA, 5 O. L. J. 145; 19 CR. L. J. 671 **1007**

Transfer of Property Act (IV of 1882), *whether exhaustive*

The Transfer of Property Act is not exhaustive of all modes of transfer and does not deal with transfer by an award. If there is a transfer of property which does not come within the special modes dealt with in the Act, the conditions as to writing and registration prescribed therein have no application. M AMIR BIBI *v.* AROKIAM, 34 M. L. J. 184 **813**

——— s. 41 **307**

Transfer of Property Act—contd.

——— s. 51 *-Compensation for improvements—Purchaser for value from limited owner, position of—Equitable principles.*

Where a purchaser knows or is presumed to know that the vendor can sell only under certain circumstances and he either knows that such circumstances do not exist or wilfully abstains from making any inquiry on the subject, the mere fact that he purchased for consideration will not suffice to show good faith and he will not be able to claim compensation under section 51 of the Transfer of Property Act for improvements effected by him.

Apart from the provisions of section 51 of the Transfer of Property Act, however, an equitable right may arise in favour of the owner of a limited interest who makes improvements on the property in his possession.

But this right can only come into existence if it can be shown that the true owner stood aside and abstained from asserting his rights. There must be in such cases some equity arising out of the conduct of the true owner and further, apart from the conduct of the owner in this connection, the right cannot come into existence unless it is found that the person in possession was under a mistaken belief that he had a permanent interest in the property. C ETIZAD HUSAIN *v.* BENI BAHADUR, 5 O. L. J. 1 **242**

——— s. 53—*Fraudulent transfer—Transferee's right under it*—Bona fides—*Payment of full value, effect of.*

The purchaser of a property, with full knowledge of the intention of the seller to defraud or defeat his creditor, is not a *bona fide* transferee and his purchase is invalid as against the creditors, even though full consideration was paid for the purchase and a portion of the purchase-money was paid in discharge of a debt which the seller owed to third persons. C AFFABUDDIN *v.* BASANTA KUMAR MUKOPADHYAYA, 22 C. W. N. 427 **441**

——— s. 53—*Transfer to defeat or defraud creditors, whether liable to impeachment by creditors as defence to suit—Right of individual creditors to set aside sale.*

A transfer effected with intent to defeat or defraud the creditors of the transferor confers a good title on the transferee, until it is set aside by a suit by the creditors for that express purpose. The creditors cannot plead the colourable nature of the transaction by way of defence to an action by the transferee to establish his title under the sale, if they have not already sued for its cancellation.

Per *Coutts Trotter, J.*—The mere obtaining of a judgment in India creates no title or only an inchoate title in the judgment-creditor, and therefore a creditor who impeaches a transfer must follow up his judgment by attaching the properties in order to enable him to utilise section 53 in answer to a claim founded on the impeached deed of transfer.

It is inconvenient to allow each and every creditor in turn to attack such deed independently.

Per *Seshagiri Aiyar, J.*—There is nothing in Hindu Law which is inconsistent with section 53 of the Transfer of Property Act. At any rate, the section may be taken as indicating the principles of

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equity, justice and good conscience which ought to guide Courts in the absence of specific legislative provisions.

On the language of section 53 of the Transfer f Property Act it is open to any creditor to mpeach a conveyance made by his debtor, provided he alleges in the plaint that the sale was intended to defraud him and others similarly placed. **M** PALANIANDI CHETTY *v.* APPAVU CHETTIAR, 22 M. L. T. 474 **52**

—— **s. 53 (2),** *presumption under.*

Under the provisions of section 53 (2) of the Transfer of Property Act, the vendor is deemed to contract with the buyer that the interest, which he professes to transfer, subsists and that he has power to transfer the same. **N** SHALIGRAM SADASHEO PANDE *v.* NARAIN **669**

—— **s. 54**—*Registration Act (XVI of 1908), s. 17 Transfer of mortgage-debt—Registration, whether necessary.*

A mortgage-debt is immoveable property both for the purposes of section 54 of the Transfer of Property Act and for the purposes of section 17 of the Registration Act.

Where a mortgage-debt is transferred by an instrument in writing and the value of the right, title and interest transferred is Rs 100 or more, the writing requires registration under the Registration Act. **C** SAKHIUDDIN SAHA *v.* SONAULLA SARKAR, 27 C. L. J. 453; 22 C. W. N. 641 **986**

—— **s. 59**—*Mortgage—'Attestation,' meaning of.*

The requirement as to attestation contained in section 59 of the Transfer of Property Act, is not complied with unless the attesting witnesses are able to swear both to the act of execution and the identity of the person performing the act.

Where, therefore, the only evidence was that the attesting witnesses were on one side of a *parda* and the executant of the deed, a *pardanashhin* lady, on the other, that her son took the deed behind the *parda*, returned with it bearing a signature purporting to be hers, and said it had been signed by her, and that the witnesses thereupon attested:

Held, that the terms of the Statute had not been complied with and that the mortgage was void. **P C** GANGA PERSHAD SINGH *v.* ISHRI PERSHAD SINGH, 4 P. L. W. 349; 16 A. L. J. 409; 34 M. L. J. 545; 27 C. L. J. 548; 22 C. W. N. 697; 20 BOM. L. R. 587; 23 M. L. T. 388; (1918) M. W. N. 382; 8 L. W. 176 **1**

—— **s. 59**—*Mortgage executed by* pardanashin *lady—Attestation—Witnesses on one side of* pardah—*Mortgage suit—Title paramount, question of, whether can be gone into.*

In the case of a document executed by a *pardanashin* lady, it is not necessary that the attesting witnesses should be actually inside the *pardah*: they are deemed to be present at the execution of the document in such a case, although they may be screened off from the executant by a *pardah*.

In an ordinary mortgage suit, title paramount to and independent of the mortgagor is not a necessary issue and should, as far as possible, be excluded from the trial of the suit, but that is not an absolute principle which should apply to the circumstances

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of each case. Where the leaving of such an issue undetermined would lead to inconvenience or hardship, it is proper that it should be tried in a mortgage suit. **Pat** ZAKIR RAZA *v.* MADHUSUDAN DASS, 4 P. L. W. 417 **691**

—— **s. 67** **769**

—— **s. 72**—*Mortgage, usufructuary—Expenses of criminal litigation conducted by mortgagee to support title, whether chargeable on property—Suit for re-imbursement, maintainability of.*

It is open to doubt whether an expensive criminal litigation, conducted by a usufructuary mortgagee for the purpose of securing the conviction of persons who have reaped and carried away the crops on the mortgaged land, can be regarded as a proceeding necessary to support the mortgagor's title.

Where, however, the mortgagee acts as a prudent owner and at the request of the mortgagor and the proceedings are rendered necessary, he is entitled to be indemnified in respect of such expenses.

In such an event the mortgagee has the right to add the amount so expended to the principal money and insist on its payment before redemption or sue separately for its recovery.

Section 72 of the Transfer of Property Act does not restrict the mortgagee's remedy to what is stated there. There is an independent cause of action for expenses incurred under any of the clauses of the section. **M** VENKITASAMI NAIKER *v.* MUTHUSAMI PILLAI, 34 M. L. J. 177; 23 M. L. T. 280 **949**

—— **s. 82**—*Joint mortgage of several properties —Mortgagee, right of, to enforce debt against one property.*

Section 82 of the Transfer of Property Act defines the relation of joint mortgagors *inter se*, and there is nothing in the language of the section which compels the conclusion that the mortgagee must distribute his debt in a certain manner or is unable to enforce it against each and every part of the property made security for the mortgage. Each of several mortgaged properties is, so far as the mortgagee is concerned, liable for the entirety of the mortgage-debt. **B** TIMAJI KRISHNA POTDAR *v.* RAMA PIRAJI BHATKHANDE, 20 BOM. L. R. 175 **862**

—— **s. 83**—*Tender of mortgage money—Deposit of more than amount due, validity of—Non-acceptance, wrongful, by mortgagee—Redemption, suit for—Cessation of interest—Interest to plaintiff from date of suit—Civil Procedure Code (Act V of 1908), O. XXIV, r. 2—Petition for deposit asking for costs, legality of—Contract Act (IX of 1872), s. 38—Tender, nature of.*

The deposit of a larger sum than is due to the mortgagee, from which the latter is asked to take whatever is due to him, is valid under section 83 of the Transfer of Property Act and from the date of such deposit interest on such amount ceases to run.

Where a mortgagee wrongfully refuses to receive the amount deposited and the mortgagor is forced to bring a redemption suit, he is entitled to interest after the date of the service of the plaint and summons on the defendant.

Properties in schedule A were mortgaged to defendant in 1902. A portion of these properties covered by schedule B was subsequently mortgaged to one *R*. *R*. sued on his mortgage and brought the sche-

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dule B properties to sale, which were purchased by the plaintiff subject to defendant's mortgage. Plaintiff paid the money due on schedule A mortgage into Court and presented a petition, requiring that defendant should accept it and give possession of all the properties or that he should take from the amount deposited whatever was due on the schedule B mortgage and deliver to him the schedule B properties, and that the Court should provide for the costs. Defendant refused to receive an unspecified proportionate amount, but was willing to deliver to plaintiff the title-deeds of the Schedule B lands only on receiving the entire amount due on schedule A properties. Plaintiff in consequence, sued for redemption of schedule B properties, the whole amount deposited remaining in Court:

Held, (1) that as a larger amount was deposited in Court than was due under the schedule B mortgage, the tender was valid and interest ceased to run from its date;

(2) that under Order XXIV, rule 2, Civil Procedure Code, plaintiff was entitled to interest after the date of the service of the plaint and summons on the defendant.

Per *Seshagiri Aiyar, J*.—The rule as to tender is part of the law as to performance of a contract as laid down in section 38 of the Contract Act.

If parties make a *bona fide* attempt at performing their contracts, the rights of the parties should not be defeated by technicalities. There is no rule that where a person tenders a large amount and asks for a change, he should not have the benefit of the tender.

Per *Napier, J*.—Section 83 of the Transfer of Property Act does not contemplate the exercise of any discretion by the Court in the matter of making either party liable for costs or granting any relief. If a tender under the section is accompained by a prayer for costs and the Court refuses to take action thereon, the tender is bad. The tender is equally bad if, in making the deposit, the mortgagor requires the Court to ascertain the amount due on the mortgage. **M** SUBRAMANIA AIYAR *v.* NARAYANASWAMI VANDYAR, 34 M. L. J. 439; 7 L. W. 537 **638**

——— **s. 84**—*Tender, what amounts to.*

A mere readiness and willingness to pay not communicated to the creditor and without the accompanying circumstance of the debtor being in a position to pay immediately if the offer is accepted does not amount to a valid tender. **N** SHEORATAN *v.* BIHARILAL SEWARAM MARWADI **106**

——— **s. 84**—*Tender, what is—Usufructuary mortgage—Requisition by mortgagor for statement of accounts and expression of readiness to pay, whether constitutes tender—Assertion by mortgagee of title in himself, whether causes cessation of interest.*

The mere expression of willingness on the part of a mortgagor to pay the amount due on the mortgage cannot amount to a tender within the meaning of section 84 of the Transfer of Property Act.

The assertion of a title by the mortgagee in himself, coupled with a statement of the amount due by the mortgagor on the mortgage in reply to a requisition by the latter for accounts, will not amount to a dispensation of tender, nor cause a cessation of interest as from that date.

Per *Abdur Rahim, J*.—The Transfer of Property Act lays down the conditions relating to a valid tender and a valid deposit. It nowhere says that, even if a valid tender has not been made, interest will cease to run if the mortgagee happens to set up a right to the property in himself.

Per *Oldfield, J*.—The foundation of section 84 of the Transfer of Property Act is that the liability for interest on the amount due on the mortgage shall cease from the date of the tender, inasmuch as the person who has made the tender not merely has to produce money in order to make it but must also keep it ready for payment in Court or otherwise. There is a distinction between the proposal to make a tender and an actual tender, and there is no reason why a person who makes the former should be treated any better than a person who makes the latter. **M** CHALIKANI VENKATARAYANIM GARU *v.* VATSAVYA VENKATA SUBBADRYAMMA, 34 M. L. J. 488; (1918) M. W. N. 371; 24 M. L. T. 56 **437**

——— **ss. 85, 88, 89**—*Mortgage, suit on—Puisne mortgagee not made party, effect of—Order, absolute, for sale, effect of.*

Under section 85 of the Transfer of Property Act, a first mortgagee is bound to make a second mortgagee a party to his suit for sale, and if he does not do so, the second mortgagee is not bound by any order for sale obtained in such a suit.

On the making of an order absolute for sale under section 89 of the Transfer of Property Act the mortgagee's security as well as the mortgagor's right to redeem are both extinguished, and for the right of the mortgagee under his security there is substituted the right to a sale conferred by the decree. **P C** HET RAM *v.* SHADI RAM, 5 P. L. W. 88; 16 A. L. J. 607; 35 M. L. J. 1; 24 M. L. T. 92; 26 C. L. J. 188; (1918) M. W. N. 518; 20 BOM. L. R. 793 **798**

——— **ss. 88, 89** **798**

——— **s. 90** **76**

——— **s. 95** **783**

——— **s. 95**—*Payment by co-mortgagor—Charge, whether created—Payment made by natural guardian of co-mortgagor not appointed by Court, whether sufficient to create charge.*

All that section 95 of the Transfer of Property Act requires is that one of several co-mortgagors should redeem the mortgaged property in order to obtain a charge on the share of the other co-mortgagors. It is not essential that the redemption should take place in Court. If the money is paid out of Court and the decree-holder accepts it and certifies the payment, the requirements of the section are fulfilled.

Plaintiff alleged that he had paid the whole amount of a mortgage decree passed jointly against him and the defendant, and claimed a charge against the mortgaged property in respect of the amount paid for the defendant. The defence was that the payment was made by the plaintiff's mother who was not authorised to act on behalf of her minor son, the plaintiff. Her name was proposed as the guardian *ad litem* of the plaintiff in the mortgage suit but she was removed from the guardianship and the defendant was appointed in her place:

Held, that though the payment by the plaintiff's mother was irregular, the acceptance of the decree-holder amounted to a certificate that the payment was duly made and had the effect of curing the irregu-

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larity and that the plaintiff, therefore, acquired a valid charge over the defendant's share in the mortgaged property. **N** TUKARAM *v.* ARJUNA **904**

—— **s. 111 (g)** **642, 743**

—— **s. 123**—*Gift—Registration—Buddhist Law, Burmese—Religious gift, whether requires registration.*

Burmese Buddhist religious gifts are not exempted from the operation of section 123 of the Transfer of Property Act. Therefore, a gift or dedication of a Kyaung is not valid unless registered. **L B** U ZAYANTA *v.* U NAGA **926**

Trust—*Dedication, proof of—Trustee, power of, to transfer trust property—Hindu Law—Temple property*—Mahant, *alienation by.*

Where there was no clear proof of dedication in regard to a village, but it was found that for more than 200 years the village had been incorporated with a particular *asthan*, had been held by its *mahant* from time to time and had been treated as a part of the *asthan* property:

Held, that under these circumstances a dedication either by the *mahant* to whom the village had originally been granted or by one of the persons who succeeded him might be presumed.

Where a tenure is in the nature of a trust for a charitable purpose, the trustee has no right to transfer the same except for legal necessity. **O** BASDEO BAN *v.* RAM SARAN, 5 O. L. J. 38 **292**

——, public, for religious purposes **213**

Trusts created by Will, whether liable to duty **578**

U. P. Land Revenue Act (III of 1901), s. 36 **529**

—— **s. 111** **873**

—— **ss. 111, 112, 132, 133**—*Partition, suit for—Objection by persons not recorded co-sharers, whether maintainable—Appeal, forum of—Jurisdiction.*

In a partition suit of certain land, trees and wells, the defendants objected to the partition on the ground that when their ancesters sold the village, they reserved to themselves and their heirs the said land, etc. The Assistant Collector decided in favour of the objectors, overruling the plaintiff's plea that defendants not being recorded co-sharers had no *locus standi* to object to the partition. The plaintiff preferred an appeal to the District Judge, who allowed it on the ground that the objectors not being recorded co-sharers could not object under section 111 of the Land Revenue Act:

Held, that the defendants not being recorded co-sharers, sections 111 and 112 of the U. P. Land Revenue Act had no application to the case and that no appeal, therefore, lay to the District Judge. **A** LABHU *v.* RADHA CHARAN **544**

—— **ss. 132, 133** **544**

Valuation of suit—*Suit for declaration that property attached is not liable to sale, value of—Jurisdiction.*

The value for purposes of jurisdiction of a suit for a declaration that a certain property attached in execution of a decree is not liable to sale, is the value of the decree sought to be executed, and not the value of the property attached. **A** ANANDI KUNWAR *v.* RAM NIRANJAN DAS, 16 A. L. J. 374 **494**

Venue of case, *how to be determined.*

The venue of a case must be determined by the nature of the claim as laid, and not by the nature of the defence set up. **N** KAMA *v.* BHAJANLAL CHATANLAL **654**

Vizagapatam Agency Rules, Rule X, cl. (5)—*Suit by purchaser of* mokhasa *in Court auction to recover rent illegally collected by judgment-debtor and to restrain further collections, whether suit 'for immoveable property'—Jurisdiction of Agency Court—Leave of Agent, whether necessary—Madras Local Boards Act (V of 1884), s. 73.*

The expression 'suit for land or other immoveable property' in clause 5 of Rule X of the Vizagapatam Agency Rules bears the same construction as in section 12 of the Letters Patent of the Madras High Court.

The plaintiff purchased a *mokhasa* held by some of the defendants in a Court sale in execution of a decree against the 1st defendant the Zemindar, part of whose estate it was. The 1st defendant having collected cess by virtue of his being the registered Zemindar, the plaintiff sued for recovery of the amounts collected by the 1st defendant and for an injunction restraining him from making future collections:

Held, that this was a suit to recognize the plaintiff as a land-holder for the purpose of section 73 of the Madras Local Boards Act and could be filed in the Agency Court, Vizagapatam, without the Agent's permission. **M** MAHARAJAH OF JEYPORE *v.* LAKSHMI NARASIMHA, 7 L. W. 564; 35 M. L. J. 284 **729**

Wajib-ul-arz, *entry in, value of*—Parjote, *payment of—Suit to recover* parjote, *maintainability of.*

The *wajib-ul-arz* of a village recorded that every shopkeeper in the village was liable to pay *parjote* at a certain rate:

Held, that the entry pointed to the fact that the payment was based on agreement and not on custom and that being rent payable in kind under the terms of the *wajib-ul-arz* it could be recovered by suit. **A** MUHAMMAD FAIYAZ ALI KHAN *v.* BEHARI, 15 A. L. J. 873; 40 A. 56 **329**

Water rights—*Government channel, right to use of, for irrigation—Easement—Possessory rights, claim of, legality of—Injunction, suit for, to restrain threatened interference with possessory rights, maintainability of—Declaration, prayer for—Government not impleaded as party, effect of.*

Ryotwari landholders can only claim a supply of water for irrigation of their lands from a Government channel subject to the right of the Government to regulate the distribution and supply in such manner as they deem fit.

No easement or prescriptive right can be acquired by a person in water in a Government channel when that water has been supplied by Government for the purpose of irrigating lands and in fulfilment of the duty cast on them to supply water to lands which they classify as wet.

No person can claim possessory rights in a channel and ask for an injunction restraining threatened interference with such rights.

There can be no possessory rights in connection with incorporeal hereditaments. Where a right to easement, has not ripened by enjoyment for the prescribed period, the person who is in actual enjoyment would not get any remedy against any person interfering with such user and enjoyment,

Water rights—concld.

Plaintiffs sued for recovery of certain lands from their lessees, the defendants. They also asked for an injunction restraining defendants from obstructing the flow of water into their lands from a Government channel called the Diguva channel and for a declaration of their rights. Plaintiffs did not establish any right of easement to the water in the channel, but they based their right to the injunction on the ground that, as the defendants, their lessees, were enjoying the water in the channel under some arrangement with Government, they must be deemed to have been in possession of the right to take water. The Secretary of State was not made a party to the suit:

Held, (1) that plaintiffs were not entitled to the injunction, as they could not be deemed to have had such possession as to entitle them to the relief;

(2) that as the Government was not a party, the Court could not, behind their back, give the plaintiffs the declaration asked for. **M** MAHANKALI LAKSHMIAH *v.* KARNAM NARAYANAPPA, 34 M. L. J. 425; (19 8) M. W N. 276; 23 M L. T. 3 7 **80**

Will—*Conditional ratification of partition by testator, effect of—Suit by legatees impeaching partition, validity of.*

A testator, by his Will, declared that the share allotted to him in a partition previously effected as between himself and his co-parceners was to be . by his heirs on his death, if he did not question the partition during his lifetime. In a suit by the legatees under the Will to set aside the partition:

Held, that the conditional ratification of the partition by the testator was valid and that the suit was, therefore, not maintainable. **M** KALLIANI AMMAL *v.* NARAYANA MENON, (1915) M. W. N. 38 **753**

———, construction of **749**

——— *— Legatee of specific property—Mesne profits, date of accrual of—Interest, award of, on mesne profits, legality of.*

A legatee under a Will to whom specific property has been devised, is entitled to mesne profits thereon from the date of the testator's death.

The Court will, however, not charge an executor, who has been guilty of delay in accounting, with interest on arrears of income not paid by him. **M** GOUWRI *v.* NARAINA MUCHINTHAYA, 23 M. L T. 353; 7 L. W. 513 **664**

———, *oral, title based on—Burden of proo.*

Where a person bases his title on an oral Will the onus lies heavily on him of proving the precise words on which he relies. **P** NARAIN *v.* GAINDO, 3 P. W. R. 1918 **183**

Workman's Breach of Contract Act (XIII of 1859), s. 1—*Dealer in stones, whether artificer, workman or labourer.*

Accused who dealt in stones took an advance from the complainant under an agreement to supply the latter with stones from time to time according to the terms of an agreement entered into between the parties. Accused failed to supply the stones and complainant made an application under the Workman's Breach of Contract Act:

Held, that the contract was not a contract by an artificer, workman or labourer nor was the money advanced on account of work to be performed by an artificer, workman or labourer and that, therefore, the provisions of the Workman's Breach of Contract Act had no application to the case **A** BHAGWAN DIN *v.* MAHMUD ALI, 16 A L. J. 407; 19 C. L J 598 **502**

——— **s. 1**—*Magistrate of Police, meaning of—Jurisdiction.*

The term "a Magistrate of Police" in section 1 of the Workman's Breach of Contract Act must be limited to a Magistrate in the territorial limits of whose jurisdiction the employer resides or carries on business.

There is nothing in section 1 of the Workman's Breach of Contract Act which gives special jurisdiction to a Magistrate, within whose jurisdiction the contract was made or the advance received, to try an offence under the Act committed beyond his jurisdiction.

Both under the Common Law of England and under the Criminal Procedure Code no Court, unless expressly authorised by Statute, can try any offences other than those committed within the area of its jurisdiction. **S** SOBHRAJ DWARKADAS *v.* EMPEROR, 11 S. L. R. 128; 19 CR. L. J. 591 **399**